

1 DOWNEY BRAND LLP
KEVIN M. O'BRIEN (SBN 122713)
2 kobrien@downeybrand.com
MEREDITH E. NIKKEL (SBN 254818)
3 mnikkel@downeybrand.com
NICOLAS CHAPMAN (SBN 340661)
4 nchapman@downeybrand.com
JAKE VOORHEES (SBN 352829)
5 jvoorhees@downeybrand.com
621 Capitol Mall, 18th Floor
6 Sacramento, California 95814
Telephone: 916.444.1000
7 Facsimile: 916.444.2100
8 Attorneys for Petitioners SACRAMENTO
RIVER SETTLEMENT CONTRACTORS, A
9 MUTUAL BENEFIT CORPORATION, et al.

10 SOMACH SIMMONS & DUNN
A Professional Corporation
11 ANDREW M. HITCHINGS (SBN 154554)
ahitchings@somachlaw.com
12 BRITTANY K. JOHNSON (SBN 282001)
bjohnson@somachlaw.com
13 ELLEN M. MOSKAL (SBN 329144)
emoskal@somachlaw.com
14 500 Capitol Mall, Suite 1000
15 Sacramento, CA 95814
16 Telephone: (916) 446-7979
Facsimile: (916) 446-8199

17 Attorneys for Petitioner
18 GLENN-COLUSA IRRIGATION DISTRICT

19

20

BEFORE THE

21

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

22

In the Matter of the Petition of:

SWRCB/OCC File _____

23

Sacramento River Settlement Contractors
Non-Profit Mutual Benefit, A Mutual Benefit
24 Corporation, et al. and Glenn-Colusa Irrigation
District for Reconsideration of the Executive
25 Director's June 14, 2024 "Conditional
Approval" of the U.S. Bureau of
26 Reclamation's Final Sacramento River
Temperature Management Plan.

PETITION FOR RECONSIDERATION OF
THE EXECUTIVE DIRECTOR'S JUNE 14,
2024 "CONDITIONAL APPROVAL" OF
THE U.S. BUREAU OF RECLAMATION'S
FINAL SACRAMENTO RIVER
TEMPERATURE MANAGEMENT PLAN

27
28

1 **I. PETITION FOR RECONSIDERATION**

2 1) Petitioners:

3 Sacramento River Settlement Contractors, A Mutual Benefit Corporation
4 P.O. Box 150
5 Willows, CA 95988

6 Glenn-Colusa Irrigation District
7 P.O. Box 150
8 Willows, CA 95988

9 Natomas Central Mutual Water Company
10 2601 W. Elkhorn Boulevard
11 Rio Linda, CA 95673

12 Reclamation District No. 108
13 975 Wilson Bend Road
14 Grimes, CA 95950

15 Sutter Mutual Water Company
16 15094 Cranmore Road
17 Robbins, CA 95676

18 2) The specific State Water Resources Control Board (State Water Board) actions of which
19 Petitioners request reconsideration:

20 The Executive Director’s June 14, 2024 “Conditional Approval” of the United States
21 Bureau of Reclamation’s (“Reclamation”) Final Sacramento Temperature Management
22 Plan (TMP).

23 3) The dates on which the State Water Board made the orders or decisions:

24 June 14, 2024.

25 4) The reasons the actions were inappropriate or improper:

26 a. The State Water Board erred as a matter of law because it can only amend, revise,
27 or supplement conditions placed on a water right after providing notice to the water
28 rights holder and holding a hearing, and it did neither before the Executive
Director’s “Conditional Approval.”

b. The Executive Director’s Conditional Approval illustrates the State Water Board’s
repeated practice of amending, revising, or supplementing existing terms and
conditions placed on water right permits without providing notice or a hearing,
which results in this practice being an underground regulation. Thus, the Executive
Director’s condition approval is invalid because it did not comply with the
Administrative Procedure Act (“APA”).

- 1 5) The specific action which Petitioners request:
2 Reconsideration of the Executive Director’s Conditional Approval of Reclamation’s TMP.
3 6) A statement that copies of the petition and any accompanying material have been sent to
4 all interested parties:
5 Copies of this Petition and accompanying materials have been sent to the State Water
6 Board, California Department of Water Resources (DWR), Reclamation, California
7 Department of Fish and Wildlife, United States Fish and Wildlife Service, and National
8 Marine Fisheries Service,

9 **II. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION**
10 **FOR RECONSIDERATION**

11 The Executive Director’s conditional approval of Reclamation’s final TMP was an “error
12 in law” because there was no notice or a hearing before the Executive Director added conditions to
13 Reclamation’s water right permits. (Cal. Code Regs., tit. 23 § 768 subd. (d).) For the reasons
14 below, the Executive Director’s Conditional Approval must be set aside.

15 **A. The Executive Director Erred by Adding Conditions to Reclamation’s Water**
16 **Right Permits Without Providing Notice or Conducting a Hearing.**

17 Pursuant to section 1394 of the Water Code, the State Water Board may reserve
18 jurisdiction over a water right permit to “*amend, revise, supplement, or delete terms and*
19 *conditions in a permit....*” (Wat. Code, § 1394, subd. (a) [emphasis added].) The State Water
20 Board must give notice and conduct a hearing before exercising this jurisdiction. (Wat. Code, §
21 1394, subd. (b).) The State Water Board’s regulations require adjudicative hearings on water right
22 matters to comply with the APA. (See Cal. Code Regs., tit. 23, § 760 [“adjudicative hearings
23 on . . . water right matters shall be conducted in accordance with procedures set forth in [Cal. Code
24 Regs., tit. 23, § 648 *et seq.*”]; Cal. Code Regs., tit. 23, § 648, subd. (b) [“all adjudicative
25 proceedings before the State Board . . . shall be governed by chapter 4.5 of the Administrative
26 Procedure Act”].) Chapter 4.5 of the APA defines “adjudicative proceeding” as: “[A]n
27 evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a
28 decision.” (Gov. Code, § 11405.20.) To conduct an adjudicative proceeding, “[t]he agency shall
give the person to which the agency action is directed notice and an opportunity to be heard,
including the opportunity to present and rebut evidence.” (Gov. Code, § 11425.10, subd. (a)(1).)

1 Here, there was no notice or a hearing for Reclamation or other interested parties to contest
2 the Executive Director’s decision to “amend, revise, [or] supplement” the conditions placed on
3 Reclamation’s water right permits. Conditions 1, 2, 3, and 7 in the Executive Director’s
4 Conditional Approval amend, revise, or supplement conditions imposed on Reclamation’s water
5 right permits by Water Right Order 90-5 (WRO 90-5). Condition 1 is an amended, revised, or
6 supplemented condition because it now requires Reclamation to notify the Executive Director if
7 Reclamation will be unable to achieve 56 °F at Balls Ferry within 72 hours. Order 90-5 did not
8 require Reclamation to provide this 72-hour notice. Condition 2 is an amended or revised
9 condition because it requires Reclamation to update the monitoring stations to “increase spatial
10 resolution” beyond the modeling requirements issued in WRO 90-5. Condition 3 is a revised or
11 amended condition because the updated Water Temperature Modeling Platform did not exist 34
12 years ago when the Board adopted WRO 90-5. Finally, Condition 7 revises, amends, and
13 supplements the condition reserving jurisdiction to the State Water Board by expanding the
14 authority the Executive Director has to approve a TMP. WRO 90-5 does not provide any
15 authority to the Executive Director to condition Reclamation’s or DWR’s permits regarding future
16 temperature management plans, to conditionally approve a temperature management plan, or to
17 condition approval of a temperature management plan on meeting a temperature less than 56°F at
18 an upstream compliance location. WRO 90-5 only gives the Executive Director the power to
19 approve or object to the TMP. Thus, by adding conditions 1, 2, 3, and 7, the Executive Director
20 impermissibly amended, revised, and supplemented the conditions imposed by WRO 90-5 without
21 notice or a hearing.

22 These conditions violate Water Code section 1394 and WRO 90-5. WRO 90-5 states:
23 “The State Board reserves jurisdiction and retains continuing authority over this permit to amend
24 any term or condition after notice and opportunity for hearing, for the purpose of maintaining
25 water quality and protecting the fishery in the Sacramento River....” (WRO 90-5, at p. 60.) By
26 not providing notice or a hearing, the Executive Director’s Conditional Approval of Reclamation’s
27 Final Sacramento River TMP violates WRO 90-5 and section 1394 of the Water Code and must be
28 set aside.

1 **B. The Executive Director’s Conditional Approval is an Underground Regulation.**

2 The Executive Director’s policy of adding new terms and conditions to a water right
3 permit without providing the requisite notice required by Water Code section 1394 is an unlawful
4 underground regulation. An agency adopts an unlawful “underground regulation” when it adopts
5 a “regulation” outside of the APA’s “basic minimum procedural requirements that are exacting.”
6 (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333; Gov. Code § 11340.5,
7 subd. (a) [“no state agency shall issue, utilize, enforce, or attempt to enforce any guideline,
8 criterion, bulletin, manual, instruction, order, standard of general application . . . unless the [same]
9 has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter”].)
10 The APA defines regulation as: “every rule, regulation, order, or standard of general application or
11 the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any
12 state agency to implement, interpret, or make specific the law enforced or administered by it, or to
13 govern its procedure.” (Gov. Code, § 11342.600.) When determining if a regulation is subject to
14 the APA, courts will consider two principal characteristics: (1) the agency must intend the rule to
15 apply generally to a certain class, rather than to a specific case; and (2) the rule must implement,
16 interpret, or make specific the law enforced or administered by the agency. (*Morning Star Co.*,
17 *supra*, at pp. 333–334.) If the agency’s action meets both factors and was adopted outside of the
18 APA process, it is an unlawful underground regulation. (*Id.* at p. 333.)

19 The underground regulation here is the State Water Board’s and the Executive Director’s
20 long-standing practice of adding and amending conditions placed on water right permits without
21 providing notice or conducting a hearing. This is similar to *Malaga County Water District v.*
22 *Central Valley Regional Water Quality Control Board* (2020) 58 Cal.App.5th 418, where the court
23 found that a hearing procedure qualified as an underground regulation. There, the court
24 emphasized that even though the hearing procedure was tailored in the case at issue, “its
25 underlying content was consistent with a long-standing practice previously adopted for all similar
26 cases.” (*Id.* at p. 437.)

27 The same is true for the State Water Board and the Executive Director. For example, in
28 Order WR 2006-0007, the State Water Board denied a petition for reconsideration after it

1 approved a water right application and issued a permit. (State Water Resources Control Board,
2 Order WR 2006-0007, at p. 1.) When denying the petition for reconsideration, the State Water
3 Board added conditions to the water right permit without providing notice or a hearing. (*Id.* at pp.
4 15–16; *see also* State Water Resources Control Board, Order WR 94-2 [amending conditions of a
5 water right permit when denying a petition for reconsideration]; State Water Resources Control
6 Board, Order WR 2022-0095.) Similarly, the Executive Director has a policy of conditionally
7 approving temperature management plans as a general class of actions taken in receiving draft
8 temperature management plans, circulating drafts for public review and accepting and reviewing
9 public comments on those drafts. In this way, the policy of conditionally approving temperature
10 management plans applies to the general class of temperature management plans, not a specific
11 case. As exemplified by these orders and the Conditional Approval of the TMP in this case, the
12 State Water Board and the Executive Director have a long-standing practice of adding and
13 amending conditions without providing adequate notice or holding a hearing. Therefore, the first
14 underground regulation factor is met.

15 The State Water Board and Executive Director’s policy of adding and amending conditions
16 to water right permits without a hearing also satisfies the second factor of an underground
17 regulation. When the Executive Director conditionally approves the TMP, they are implementing
18 and interpreting the specific basin plan under the Porter-Cologne Water Quality Act (Wat. Code §
19 13000 *et seq.*), and WRO 90-5. (WRO 90-5, at p. 2.) Thus, the State Water Board interprets and
20 implements these additional conditions under the abovementioned statutes, order, and legal
21 doctrine. Therefore, the second characteristic is also satisfied.

22 Because the Executive Director’s policy of conditionally approving Reclamation’s TMPs
23 qualifies as a regulation, it must abide by the APA. There is no dispute that the State Water Board
24 has not adopted a regulation formally authorizing the Executive Director to conditionally approve
25 Reclamation’s TMPs under Chapter 3.5 of the APA. Therefore, this approval must be set aside.
26 (*Missionary Guadalupanas of Holy Spirit Inc. v. Rouillard* (2019) 38 Cal.App.5th 421, 432
27 [“Failure to comply with the APA procedures nullifies the regulation”].)

28

SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION

DOWNEY BRAND LLP


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. CONCLUSION

For the reasons above, the Petitioners request the State Water Board set aside the Executive Director's Conditional Approval of Reclamation's TMP.


DATED: July 15, 2024

DOWNEY BRAND LLP

By: 
MEREDITH E. NIKKEL
Attorneys for SACRAMENTO RIVER
SETTLEMENT CONTRACTORS, A MUTUAL
BENEFIT CORPORATION, et al.

DATED: July 15, 2024

SOMACH SIMMONS & DUNN

By: 
BRITTANY K. JOHNSON
Attorneys for GLENN-COLUSA IRRIGATION
DISTRICT

SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION

DOWNNEY BRAND LLP

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 500 Capitol Mall, Suite 1000, Sacramento, CA 95814.


On July 15, 2024, I served true copies of the following document(s) described as **PETITION FOR RECONSIDERATION OF THE EXECUTIVE DIRECTOR'S JUNE 14, 2024 "CONDITIONAL APPROVAL" OF THE U.S. BUREAU OF RECLAMATION'S FINAL SACRAMENTO RIVER TEMPERATURE MANAGEMENT PLAN** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address `jestabrook@somachlaw.com` to the persons at the e-mail addresses listed in the attached Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 15, 2024, at Sacramento, California.


Jennifer Estabrook

SERVICE LIST

1		
2	Erik Ekdahl	Howard Brown
3	Diane Riddle	Garwin Yip
4	Matthew Holland	National Marine Fisheries Service
5	State Water Resources Control Board	2800 Cottage Way
6	1001 I Street	Sacramento, CA 95825
7	Sacramento, CA 95814	howard.brown@noaa.gov
8	Erik.Ekdahl@waterboards.ca.gov	Garwin.yip@noaa.gov
9	diane.riddle@waterboards.ca.gov	
10	matthew.holland@waterboards.ca.gov	
11		
12	Kaylee Allen	Brooke Jacobs
13	Matt Brown	Jason Roberts
14	United States Fish and Wildlife Service	Erica Meyers
15	2800 Cottage Way	California Department of Fish and Wildlife
16	Sacramento, CA 95825	715 P Street
17	kaylee_allen@fws.gov	Sacramento, CA 95814
18	matt_brown@fws.gov	brooke.jacobs@wildlife.ca.gov
19		jason.roberts@wildlife.ca.gov
20		erica.meyers@wildlife.ca.gov
21		
22	Levi Johnson	Kristin N. White
23	Central Valley Operations Office	Elizabeth Kiteck
24	U.S. Bureau of Reclamation	Bureau of Reclamation California Great Basin
25	3310 El Camino Avenue, Suite 300	2800 Cottage Way
26	Sacramento, CA 95821	Sacramento, CA 95825-1890
27	lejohnson@usbr.gov	knwhite@usbr.gov
28		ekiteck@usbr.gov
29		
30	Lenny Grimaldo	
31	Molly White	
32	California Department of Water Resources	
33	P.O. Box 942836	
34	Sacramento, CA 94236	
35	lenny.grimaldo@water.ca.gov	
36	molly.white@water.ca.gov	
37		
38		

SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION

DOWNEY BRAND LLP