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DRAFT MEMORANDUM RE CEQA ISSUES
SUBMITTED BY ORANGE COUNTY WATER DISTRICT
SACRAMENTO

I. INTRODUCTION.

In 1992, at the recommendation of the Division of Water Rights ("DWR"), OCWD filed an application for all water it put to beneficial use at that time, as well as the water it expected to put to beneficial use in the foreseeable future. For the past fifteen years OCWD has diverted and put to beneficial use an average of about 200,000 acre/feet per annum ("AFA") of water and a wet year high of 271,000 acre/feet. It anticipates putting 505,000 AFA of water to beneficial use in wet years when its planned diversion projects are completed, and this amount is reflected in its application.

While some of its projects preceded the enactment of CEQA, OCWD has completed 11 separate CEQA documents for projects to date, the Army Corps of Engineers ("COE") has prepared an Environmental Impact Statement ("EIS") for storage behind Prado, and OCWD has participated with the Corps of Engineers in an Environmental Impact Statement/Environmental Impact Report ("EIS/EIR") for storage behind Prado Dam. Further, in 2006, OCWD certified its final Programmatic Environmental Impact Report ("PEIR") on its water rights application.

This PEIR provided project level review of two additional components of OCWD's plan: Anaheim Lake Expanded Recharge and Santiago Creek Expanded Recharge. With the pre-CEQA projects, these documents provide full project level review for 362,000 of the 505,000 AFA OCWD seeks. In her written testimony at page 2 (OCWD Ex. 4-1) Ms. Leslie Moulton, the primary author of this PEIR, explained that the PEIR also provided project level review of the impacts to the Santa Ana River for the entire 505,000 AFA of diversions. In other words, OCWD has completed project level analysis of the impacts of all of its future diversions, finding no significant impact on hydrology, and no significant impact to biological resources. Because some of OCWD's projects are planned for five to twenty years in the future, the PEIR also provided a program level analysis of the impacts of physical construction of the future diversion

project components above 362,000 AFA, that will add 143,000 of capacity to get to the 505,000 AFA total.

The State Board has suggested that it would be helpful to explore how it may grant a permit for the last 143,000 AFA of water for which OCWD has applied. At the invitation of the State Board, this memorandum is submitted as a draft discussion piece on this issue. This memorandum will be replaced and superseded by more complete briefing on this issue as part of OCWD's closing brief.

As discussed below, the State Board has both authority and precedent for issuing a permit for the full amount of water OCWD seeks, for the following reasons: (1) the State Board has the authority to issue permits with long-term construction completion dates for water intended for future use, and has done so, post-CEQA enactment, for projects that require future impacts analysis; (2) a permit to appropriate is inherently conditional and subject to revocation if not diligently pursued, and this diligence requirement may be applied to remaining CEQA analysis; and, (3) CEQA expressly anticipates use of a program Environmental Impact Report ("EIR") to evaluate long term project elements, and OCWD has sufficiently evaluated the impacts to the SAR at a project level so that the State Board can discharge its public trust responsibilities. At this point, the State Board should issue the permit for the full 505,000 AFA, with the last 143,000 AFA conditioned on timely completion of project level review of construction impacts, and proper consideration of and response to comments in the course of that review as separately required by CEQA.

II. THE STATE BOARD HAS AUTHORITY TO ISSUE A PERMIT FOR THE FULL QUANTITY OF WATER REQUESTED IN OCWD'S APPLICATION, INCLUDING LONG-TERM PROJECT COMPONENTS.

Long-term water diversion projects would never be undertaken without some guarantee that the water could be used when the project was finished. As a result, California law allows the State Board to issue appropriation permits for long-term projects, thereby recognizing water rights even when the permittee lacks specific project plans at the time a permit is issued. In fact,

California's appropriation process specifically anticipates this scenario. In some of these cases, final CEQA analysis at the time of the application is not possible, yet the State Board has proceeded to grant a permit.

A. The State Board May Issue a Permit for the Full Amount of Water OCWD Anticipates Utilizing in the Future.

When the State Board issues an appropriation permit, the terms of the permit must be tailored to the size and difficulty of the project. This tailoring is especially important for long-term projects because many of the details of such projects are unknown at the outset. Once a permit is issued, the appropriator obtains a conditional right to use the water. *Madera Irr. Dist. v. All Persons*, 47 Cal. 2d 681, 690 (1957). Because the permit right is conditional, the State Board retains the power to reconsider, modify or revoke a permit if the conditions are not met or rights it conveys are not diligently pursued and put to beneficial use. Cal. Code Water §§1394, 1410; *California Trout, Inc. v. State Wtr. Res. Ctl. Bd.*, 207 Cal. App. 3d 585, 610 (1989) (citing Cal. Code Water §§1395-97 (the permittee "must diligently commence and complete construction of the project and apply the water to beneficial use in accordance with the law and the terms of the permit")); *Madera*, 47 Cal. 2d at 690-91. Upon completion of the required construction works and application of the water to beneficial use, the appropriator will be issued a license, perfecting its appropriative rights. Cal. Code Water §1610.

Because many projects involving water appropriation require construction of diversion works prior to being able to utilize the water, California has long recognized appropriative rights to water that cannot be used when the right is acquired:

[B]efore any actual diversion or use of the water, a claimant may acquire an incipient, incomplete and conditional right to the future use of the water, by beginning the construction of the works necessary for such diversion and use, and, in good faith, diligently prosecuting the same toward completion.

Haight v. Costanich (1920) 184 Cal. 426, 431 (emphasis added).

Haight involved a dispute between landowners over the amount of water each was entitled to divert. Defendant was riparian to the stream at issue. Plaintiff utilized water from the

stream by way of a ditch running across Defendant's land, which was built and utilized by Plaintiff's predecessor prior to Defendant's entry on the land. Both parties utilized the water for several years before Defendant blocked the stream and prevented Plaintiff from accessing it. At issue was the amount of water Plaintiff was entitled to divert. The *Haight* court reasoned that an appropriator is entitled to use all of the water which it intends to use at the time of its initial appropriation, so long as it is put to beneficial use within a reasonable time after the initial appropriation, by the use of reasonable diligence. *Id.* at 432. Thus, the right to take a reasonable time to prepare to use the water is inherent in a right of appropriation:

It follows that the quantity of water to which [an appropriator] is entitled by right of diversion is the quantity actually used for beneficial purposes at the time of the original diversion, and which was reasonably necessary for such purposes, plus any additional quantity intended to be applied to future needs at the time of the original diversion, which has been actually put to use within a reasonable time, measured by all the circumstances of the case, after the original diversion, and which was reasonably necessary therefor.

Id. at 433 (emphasis added).

While the rule set forth in *Haight* evolved under common law prior to the current California Water Code, the concepts have endured and become part of modern water law. This history is summarized by the Court in *Madera Irrigation District, supra*.

In *Madera*, the Court considered a dispute between an irrigation district and the United States over a contract by which the United States agreed to provide water from the Central Valley Project to the irrigation district and to expend funds to construct a distribution system within the district. One issue was the validity of the water right at issue because there had been an application to appropriate but the right was never perfected. The *Madera* court summarized the history of appropriative water rights in California as follows:

Prior to legislation upon the subject, no priority of right to the use of water could be acquired in advance of the taking of the first definite step to divert water to beneficial use. When work was finally completed and the water applied to beneficial use, a right vested in and to the use of the water which "related back" for priority to the time when the claim was made, the location was selected, and work was commenced looking toward the conveyance of a definite amount of water from a definite source to the place of its intended use. [Citation Omitted.] From the time of the commencement of the work to the time of beneficial use the

right was considered as incipient and conditional. The provisions of the Civil Code enacted in 1872 were substantially declaratory of the rules laid down in the early decisions. (Civ. Code, §§ 1414-1421.) (2) In *Inyo Consol. Water Co. v. Jess*, 161 Cal. 516, the court declared at page 520 [119 P. 934] that the purpose of the code sections was "to afford a more perfect protection for such rights and to facilitate the subsequent acquisition of the title to the use. Previously, the incomplete right could be acquired only by some open, visible work to that end, upon the ground, accompanied by a declaration of the intent. ...

The Water Commission Act of 1913 and the existing provisions of the Water Code changed the mechanics of the procedure for initiating and completing an appropriation of water, but they do not change the attributes of the water rights acquired thereunder. The filing of an application under the present law is comparable and of like effect to the posting and recording of notice or commencement of actual construction work under the rules which had previously prevailed. ... The Water Code provides that the effect of filing an application confers, for all practical purposes, a priority only. Section 1450 states: 'Any application properly made gives to the applicant a priority of right as of the date of the application until such application is approved or rejected. Such priority continues only so long as the provisions of law and the rules and regulations of the department are followed by the applicant.'

The issuance of a permit following application still does not confer upon the permittee a fully perfected right. Section 1455 of the Water Code states: 'The issuance of a permit continues in effect the priority of right as of the date of the application and gives the right to take and use the amount of water specified in the permit until the issuance or the refusal of issuance of a license for the use of water.'

Madera at 689-91.

Here, like the Plaintiff in *Haight*, OCWD seeks a permit which includes water that will be captured by future diversion projects. The evidence has shown that OCWD has diligently pursued the current and near term elements of its diversion projects, and will continue to diligently pursue the long term elements. OCWD's Assistant General Manager, Mr. Craig Miller, testified that OCWD is already underway on studies of some of its "long term" projects, and that others will be undertaken in a 20 to 25 year timeframe. As shown below, this timeframe is reasonable and consistent with State Board precedent.

B. The State Board May Grant Permits With an Extended Construction Completion Condition.

The State Board is empowered to impose timing conditions on the construction of diversion works built to facilitate appropriation. Cal. Code Water §§1391, 1395. Those

conditions should be imposed on a case by case basis and should reflect the specific project and its likely obstacles. Here, OCWD's long term diversion works timeframe is appropriate, and within the State Board's power to approve.

The California Water Code provides that diversion projects to utilize appropriative water rights are proper if (1) they are undertaken within the timeframe specified in the appropriation permit, (2) they are undertaken with "due diligence," and (3) they comport with the rules and regulations of the State Board. Cal. Code Water §§1395-98. The State Board's governing regulations apply these requirements to the application process:

"[a]n application will be denied when it appears . . . that (a) the applicant does not intend to initiate construction of the works required for the contemplated use of water within a *reasonable time* and thereafter diligently prosecute the construction and use of water to completion, or (b) the applicant will not be able to proceed within a *reasonable time*, either because of absence of a feasible plan, lack of the required financial resources, or other cause."

23 Cal. Code Regs. §840 (emphasis added). The State Board and the courts have rejected a fixed rule as to what constitutes a "reasonable time" for an appropriator to complete a water diversion project, instead determining reasonableness on a case-by-case basis. *See Haight v. Costanich*, 184 Cal. at 432 (rejecting the application of the Civil Code's 5-year non-use rule for obtaining a prescriptive right to the "due diligence" requirement for appropriation). "In determining the period of time to be allowed to build diversion works and apply the water to full beneficial use, the particular conditions surrounding each case will govern. In every case the matter must be pressed with due diligence considering the size of the project and the obstacles to be overcome." 23 Cal. Code Regs. § 841; *See also, In the Matter of Applications 13694, 13744 and 17687 to Appropriate Water from East Branch of North Fork Feather River and Tributaries in Plumas County*, 1960 WL 66319, *6 (Cal. St. Wat. Res. Bd., Decision No. D 984) (rejecting application where applicant had no reasonable assurances of obtaining financing for the project, no access to the property necessary for the project, and had made no showing that it could proceed with due diligence).

Accordingly, because the size and difficulty of projects can vary considerably, construction completion timeframes in permits also vary dramatically and are often quite lengthy. See *Order WRO 2004-0029*, 2004 WL 3252407 (Cal. St. Wat. Res. Bd.) (construction completion deadlines of 9 years and 6 years); *WR 97-05*, 1997 WL 33797713 *8 (Cal. St. Wat. Res. Bd.) (construction completion deadlines 18 years and 27 years); *In the Matter of applications 23838 and 23690 and Permit 15140*, 1976 WL 20798 (Cal. St. Wat. Res. Bd.) (construction completion deadline of 3 years); *In the Matter of Permits 3010, 6565, and 14704*, 1974 WL 19810 (Cal. St. Wat. Res. Bd.) (construction completion deadlines of 22 years and 42 years).¹

Given the length of development and construction of these projects, it is apparent that some impacts of construction could not be identified and studied at the time the permits were granted, yet that was not a bar to issuing the permits.

III. CEQA ANTICIPATES A SCENARIO WHERE ALL LONG-TERM PROJECT ELEMENTS ARE NOT FULLY DEFINED AT THE OUTSET.

In parallel with the provisions of the Water Code applicable to appropriations, CEQA applies to projects authorized by public agencies that could have adverse results on the environment, and requires an approving agency to study the potential environmental impacts of a project in an effort to minimize them. The lead agency, in this case OCWD, has the authority and responsibility to guide the EIR process and make the decisions regarding the EIR and its adequacy, including approving the EIR. Cal. Pub. Res. Code § 21067; 14 Cal. Code Regs. §15050. It is the lead agency's job to determine whether the final EIR is adequate and complete under CEQA and to approve a project after the EIR is certified. 14 Cal. Code Regs. §§5088(a), 15132, 15090(a)(1). OCWD has done this.

¹ Because these Orders were issued with respect to applications for extensions, it is not clear whether all of the cited completion deadlines were those issued initially, or whether they were extended beyond the initial deadline, but regardless of whether an extension was granted, the cited orders illustrate the State Board's precedent for granting permits with lengthy construction completion deadlines.

A. OCWD's Program EIR Is the Appropriate CEQA Document for the Long Term Elements of this Project.

CEQA recognizes that in many instances, a single environmental review of several related actions is more useful and informative than piecemeal review. This is especially true when certain long-term elements of a project are not fully defined at its outset. In those circumstances, CEQA provides for the preparation of a "program" EIR which treats those separate but related actions as a single project. A "program" EIR is proper when a project is composed of a series of actions that are related geographically, as logical parts in a chain of contemplated actions, or as individual activities carried out under the same authority and having similar environmental impacts. 14 Cal. Code Regs. §15168(a). CEQA Guidelines *require* that a lead agency prepare a program EIR when a project is to be implemented in phases. 14 Cal. Code Regs. §15165. Thus, a program EIR often will be used when an agency must consider a broad set of environmental issues during the early stages of the planning process for a long-term project. 14 Cal. Code Regs. §15168(b)(4), (d). As later-stage project activities are defined, the lead agency must evaluate each activity to determine whether a supplemental EIR should be prepared for that activity. If a program EIR is sufficiently comprehensive, no further environmental review will be necessary. 14 Cal. Code Regs. §15168(c). Whether additional environmental review is required is a decision for the lead agency. Cal. Code Pub. Res. §21166; Cal. Code Regs. §15162.

OCWD has completed project level review for its post-CEQA current and near term projects. This accounts for 362,000 AFA of diversions². In addition, in the PEIR OCWD has carefully evaluated at a project level the impacts on the Santa Ana River of its remaining planned diversions up to 505,000 AFA in wet years. This specific review includes hydrology and biological impacts. Only the construction activities associated with OCWD's future diversion

² This includes those diversions which preceded the enactment of CEQA.

components are covered at a program level. Once the future projects are more fully defined, OCWD will be required to evaluate what supplemental environmental review is necessary and to complete that review. Presently, however, OCWD's program EIR is the proper method of environmental review for this project.

There is precedent in the Board's decisions for granting a permit in such circumstances. In the Board's decision *In the Matter of Application 28158*, the Board granted an appropriation permit – with a 10 year project completion deadline - despite incomplete impacts analysis at the time of hearing:

To the extent that the project may result in diversion of water in excess of the average District diversions in past years, the potential adverse effects on the fishery and aquatic resources cannot be fully evaluated until completion of the instream flow study and monitoring program discussed in Section 6.3. Following completion of the study, the Board's reservation of jurisdiction would allow for imposition of additional mitigation measures if appropriate. The Board finds that, in the interim period, the need for water for municipal purposes overrides the potential adverse environmental effects which could result from the diversion of water as authorized in this decision.

In the Matter of Application 28158 (1989 WL 92547)(Cal. St. Wat. Res. Bd.)(1989)(Decision Approving Issuance of Permit Subject to Specified Conditions).

The impacts not yet studied in Application 28158 were impacts central to the decision to grant a permit, yet the permit was issued. In contrast, OCWD has carefully evaluated the central impacts of primary concern to the State Board – hydrology and public trust resources, reserving only construction related impacts for later study.

It is important to note that by granting OCWD a permit for the full 505,000 AFA wet year maximum for which it has applied, the Board will not be sanctioning potential construction impacts for which project-level CEQA has not been completed. OCWD is still required to undertake the proper CEQA review, and that review can be memorialized as a permit term. Moreover, pursuant to the administrative review process envisioned by CEQA, the State Board as a responsible party, and the public, will have the opportunity to comment on, and/or challenge, future CEQA review.

IV. THE STATE BOARD CAN MODIFY OR REVOKE THE PERMIT FOR NON-COMPLIANCE AND THEREFORE SHOULD NOT DENY OCWD'S APPLICATION.

A permit to appropriate is, by its very nature, conditional. The State Board maintains the power to revoke or modify a permit if the appropriative rights are not diligently pursued. For example, the State Board does not feel it has sufficient information to determine the terms or conditions which will protect vested rights without resulting in a waste of water, it may reserve jurisdiction to amend, revise or supplement a permit that has been issued. Cal. Code Water § 1394(a). "There shall be cause for revocation of a permit if the work [of diversion, or otherwise] is not commenced, prosecuted with due diligence, and completed or the water applied to beneficial use as contemplated in the permit and in accordance with this division and the rules and regulations of this board." *California Trout*, 207 Cal. App. 3d at 611; Cal. Code Water §1410. See also, *In the Matter of applications 23838 and 23690 and Permit 15140*, 1976 WL 20798, 6 (Cal. St. Wat. Res. Bd.) (modifying permit to meet water quality objectives).

In the case of *California Trout*, environmental groups sought the rescission of two licenses issued to the City of Los Angeles and the Department of Water and Power. Although the primary legal issue in that case involved the Fish and Game Code and is not pertinent here, the facts are instructive. The Department of Water and Power was issued permits numbers 5555 and 5556 on June 1, 1940. One permit, for the appropriation of the tributaries of Mono Lake, was conditioned on the completion before December 1, 1945 of the construction work for such diversions. It likewise required that the Department of Water and Power complete application of the water to the proposed use by December 1, 1948. By the 1962-63 water year, the Department of Water and Power had not put to beneficial use the full extent of its appropriation. "This situation led representatives for the Water Board and the Department of Water Resources to warn L.A. Water and Power to 'take steps to develop its full entitlement to the waters of the Mono Basin or risk the potential that other appropriations might be granted rights by the Water Board.'" *California Trout*, 207 Cal.App.3d at 597. The Department of Water and Power heeded this warning, completed the second Los Angeles aqueduct to enable the additional diversions,

and was able to put to beneficial use the full amount of water allowed by the diversion and storage permits 5555 and 5556 by the early 1970s. In 1974, the Water Board issued licenses to perfect the rights acquired under permits 5555 and 5556, thereby affirming the procedure whereby a permit was granted some 30 years before the necessary diversion works were completed.³

The State Board has granted permits for long-term projects where the details of the long-term aspects of those projects were not well defined, and has even declined to revoke such permits when, years after the permits were issued, the long term projects anticipated in those permits had not been undertaken. For example, in 1962 the Calaveras County Water District ("Calaveras") obtained eleven permits to appropriate water from the North Fork of the Stanislaus River. Water Rights Order 80-7 ("WR 80-7"). Calaveras's application proposed the development of a hydroelectric power plant and various water supply projects, but when the permits were issued, the water supply projects were described only in general terms. WR 80-7 at 3. Approximately eighteen years later, Calaveras petitioned for changes to the permit terms, including extensions on its project completion deadlines. At that time, Calaveras's long-term water supply projects were still not fully defined. The State Board nevertheless found that the delay and repeated extensions in construction completion dates were warranted given obstacles beyond Calaveras's control, such as failure to obtain electoral bond approval, and difficulties in obtaining a purchaser for the power, and therefore rejected challenges to the permits. *Id.*

Because the State Board is not powerless once it issues a permit, but has wide latitude to reevaluate and modify permit conditions, it should not deny OCWD's permit because of uncertainties about the future construction aspects of diversion projects anticipated by OCWD. Some uncertainties are inherent in long-term projects, and the failure of the Board to grant permits for those projects would stifle complicated or expensive projects, and runs contrary to the State Board's permitting authority and its prior orders.

³ Ultimately, the Court required conditions be attached to the licenses granted to accommodate the provisions of the Fish and Game Code.

V. CONCLUSION.

OCWD's program level review of the construction impacts of its long-term project components does not prevent the State Board from issuing OCWD the full requested permit. The State Board's prior orders show that the State Board is authorized to issue the permit with long term, study and completion deadlines. Additionally, OCWD has in fact studied the impacts to the SAR of its full requested diversion amount, and the remaining review of construction impacts is not grounds to issue a permit for less than the requested amount. Furthermore, because issuance of a permit conveys a conditional right to appropriate, the State Board may amend, revise or supplement the permit if OCWD does not diligently pursue its diversion projects and properly evaluate construction impacts.