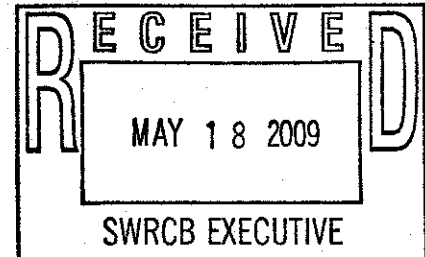


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May 18, 2009

Via Electronic Mail and Surface Mail

Jeanine Townsend, Clerk
Chair and Members
State Water Resources Control Board
1001 I Street, 24th Floor
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Re: DWR/USBR Petition to Consolidate Places of Use;
May 19, 2009 Agenda

Ms. Townsend and Honorable Members of the Board:

The Planning and Conservation League (PCL), in whose behalf this letter is written, attaches and resubmits its May 12, 2009 letter to the State Board addressing the above-referenced application, timely submitted then in response to the Board's notice accompanying its May 19 agenda. Since submitting that letter, PCL has received, and wishes to additionally comment on, the Board's draft order approving the application for change in place of use of licenses and permits of the Department of Water Resources (DWR) and United States Bureau of Reclamation (USBOR).

Review of the Board's draft order makes clear that it has not yet analyzed PCL's substantial criticisms of the project and the abject inadequacy of DWR's environmental documentation to support an exemption from CEQA. For reasons explained in PCL's letter, the asserted emergency exemption should be rejected because DWR's documentation fails to support its own premises, and fails to address the potential of the project to compromise duties owed to the public under article X, section 2 of the California Constitution, the public trust doctrine, and CEQA. Moreover, PCL proposed that even if DWR had adequately supported an assessment short of full environmental review, additional conditions far beyond those DWR proposed would be needed to mitigate harm. Unfortunately, the conditions in the State Board's draft order fall far short of those PCL recommended, and would unless revised fail to uphold the law and protect the environment.

As the Board is aware, DWR did not announce its reliance in a purported CEQA exemption for this project until *after* public comment closed at its last hearing. As the draft order acknowledges (page 11), DWR did not submit its CEQA documents to the Board until after "the deadline to submit written exhibits had passed and the hearing had been adjourned." Accordingly, the Board's careful review of comments on the application and proposed order, including those of PCL, will be crucial to ensure that the Board's action on this project will not abrogate its fundamental duties to follow the law, protect the environment, and accurately analyze the consequences of project implementation.

Several illustrations from the Board's draft order underscore the need for the Board to reassert its own authority over the application, rather than accepting DWR's tenuous premises at face value. First, seeking to allay concerns expressed in comments, the draft order asserts that the approval will not "result in an increase" in project exports from the Delta, relying on *DWR's and USBOR's* assurances that without project approval, "the same quantity of water" would be transferred to the Drought Water bank under the state and federal projects' respective water rights (pages 1, 7).

These assertions are flawed on multiple levels. DWR's speculative assurances assume in advance the State Board's disposition of applications for temporary change approval for transfers under the Drought Water Bank. The draft order also asserts that the "majority" of transfers and exchanges will occur between south of Delta contractors (page 2). While those transfers may involve adverse consequences as well, the phrasing of the draft order leaves open the very real possibility that further Delta exports will be covered.

Moreover, as detailed in PCL's letter, DWR and the Board have thus far sidestepped the root causes, manmade rather than natural, that have turned a substantial but non-record water shortage into a crisis, both for the Delta and the state. Those include the overuse of groundwater, which DWR concedes it has not thoroughly studied in decades; the building of residential developments grounded in "paper water" rather than reliable water supplies, a problem DWR compounded with the removal of shortage conditions in the still-pending Monterey Amendments; and the shift from seasonal to permanent crops, which neither DWR nor the Board has sufficiently studied and taken steps to contain.

Rather than addressing these core problems, the proposed conditions of approval would merely limit deliveries to SWP and CVP contractors to the "historic average deliveries" (page 13, condition 7). The draft order never defines "historic average deliveries," leaving unexplained, for example, whether it refers to a particular type of hydrologic year or to a specific range of historic years. That omission is pivotal. Pumping under "average" deliveries helped precipitate the Delta crisis and bring Delta fish to the brink of elimination. It is highly questionable whether DWR and USBOR can allow pumping under average deliveries without compromising the condition requiring project operation in accordance with the 2008 smelt biological opinion (page 13, condition 5). In a classic case of the foxes guarding the henhouse, the draft order would allow a CEQA exemption to facilitate deliveries to some of the same contractors whose excessive requests for Delta exports helped cause the present crisis.

A second major problem with the draft order is that it fails to take adequate steps to ensure

that deliveries allowed under this project will not be used to serve drainage-impaired lands. Again, the order relies merely on DWR's and USBOR's assertions that drainage will not increase above "historic averages" (page 8)—the same "averages" that have allowed harmful drainage to spread over hundreds of thousands of acres in the Central Valley. PCL observes again that the principal advocate and principal beneficiary of the project appears to be Westlands Water District, the source of California's most longstanding and notorious problem with drainage-impaired lands.

Rather than independently analyzing the project's potential contribution to that problem, the proposed order summarily dismisses the possibility that increases in agricultural drainage will produce "unreasonable" impacts to fish, wildlife, or other beneficial uses (page 9). The order conspicuously does not find those impacts insignificant; instead, it rationalizes them based upon the "significant economic and other impacts of the drought" (*Id.*) As PCL's attached letter explains, this argument rests on a misunderstanding of the Central Valley's economic crisis. Moreover, the Board's protection of fish, wildlife and other beneficial uses cannot be compromised based upon this tenuous economic calculus.

A third major problem with the draft order is that, like DWR's application, it points to no documentation, and contains no reasoning, that would support the extension of interim use for two years. Instead, the draft order relies on the circular reasoning that the changes in use should be "effective for two years in order for exchanges to take place over a two-year period" (page 4). By contrast, PCL has proposed that if the project is to proceed, interim use must be limited to one year, and not be allowed to ripen into established uses that could become "no project" or "baseline" conditions for future environmental assessment.

Lastly, PCL is aware that the draft order seeks to hold in reserve the Board's authority to protect the public trust, protect against unreasonable uses of water, and protect against endangered species. But the time to assert the Board's multiple sources of legal authority is now, before the order becomes final based upon an unwarranted use of a CEQA exemption, and based upon conditions that are insufficiently rigorous to ensure that the public and the environment are adequately protected.

Respectfully submitted,



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Counsel to Planning and Conservation League

attachment

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12 May 2009

Via Electronic Mail and Surface Mail

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Re: DWR/USBR Petition to Consolidate Places of Use;
19 May 2009 Agenda

Honorable Members of the Board:

The Planning and Conservation League (PCL), in whose behalf this letter is written, requests that the State Board deny the above-referenced petition based upon the legally-inadequate environmental documentation presented by petitioner Department of Water Resources (DWR). In PCL's view, the asserted emergency exemption is not qualified under the provisions of article X, section 2 of the California Constitution; under the public trust doctrine; and under the California Environmental Quality Act (CEQA). Moreover, even if an assessment short of an environmental impact report (EIR) were legally available—a conclusion not supported on the present record—DWR and the Bureau of Reclamation (USBOR) have failed to propose and adopt sufficient conditions to ensure that adverse effects are reduced to an acceptable level.

Statement of Interest

PCL is the statewide league organized to advocate for California legislative and judicial action that promotes the long-term sustainable use of natural resources. PCL served and continues to serve as the principal advocate for enactment and implementation of CEQA, having sponsored the original bill in the 1970 session of the Legislature. In recent years, PCL has also advocated in the courts for the law's effective enforcement. By virtue of its successful enforcement of CEQA in *Planning and Conservation League v. Department of Water Resources (PCL v. DWR)* (2000) 83

Cal.App.4th 892, PCL has shown its interest in administration of the State Water Project that is based in ecological reality and public participation, fulfilling CEQA's "meticulous process designed to ensure that the environment is protected." (*Id.* at p. 911.) By virtue of its successful enforcement of the National Environmental Policy Act (NEPA) in *Planning and Conservation League v. United States Bureau of Reclamation (Westlands Water Dist.) (PCL v. USBOR)* (N.D. Cal. No C 05-3527, 2006), PCL has shown its interest in securing adequate environmental review to precede connections between the State Water Project and Central Valley Project.

PCL submits these comments after the April public hearing on this petition only because neither it nor the participants at the public hearing were advised by DWR *until after the hearing closed* that DWR purported to rely on an asserted CEQA emergency exemption. Because the Board has not yet acted on the petition, including acting in reliance on the asserted exemption, PCL believes these comments can timely afford relief to PCL and other interested parties.

Grounds for Denial of Exemption

The CEQA exemption is claimed pursuant to section 21080(b)(3) of the Public Resources Code, and more particularly because the Secretaries of the Environmental Protection Agency and Natural Resources Agency determined that this project addresses "one or more" conditions identified in the Governor's declaration of a drought emergency.

Preliminarily, the asserted exemption from CEQA must be conditioned upon DWR's, USBOR's, and the Board's need to comply with superseding non-statutory authority. That is, the Legislature cannot authorize a CEQA exemption that fails to comply with the duties embraced in article X, section 2 of the California Constitution, and the public trust doctrine. An exemption from CEQA's specific procedural requirements cannot stand if it is read to exonerate DWR's, USBOR's, and this Board's duty to conduct a sufficiently detailed assessment to ensure that it will not produce an unreasonable use of water or means of diversion, and will not fail to protect public trust resources whenever feasible. DWR's asserted exemption fails to demonstrate recognition of and compliance with either of these mandates; the asserted exemption is not constitutionally authorized.

To resolve the petition as modestly as possible and avoid constitutional conflict, the State Board is requested to deny the petition and remand it to DWR to give that department an opportunity to establish compliance with article X, section 2 and the public trust doctrine. Related to the remand, the Secretaries must themselves determine, with specific factual findings connecting evidence to statutory criteria, which if any specific lawful exemptions (not just "one or more") invoked by the Governor justify the requested action.

As a separate ground, the petition must be denied because no substantial evidence supports the asserted claim that there is a "natural disaster created by the critical drought conditions currently existing in the State" (emphasis added). PCL does not deny that current water demands exceed the immediately available natural supply. But no evidence has been presented that this circumstance results from a natural disaster, as opposed to one created by human mismanagement; without a natural disaster in fact, as opposed to on paper, the asserted CEQA exemption fails. (*Western Municipal Water Dist. v. Superior Court* (1986) 187 Cal.App.3d 1104, 1110-1111.)

The precipitation index appearing at page 7 of the Report to the Governor dated March 30, 2009 (Report to the Governor) shows that in respect of *natural* conditions, Northern Sierra precipitation as of late March (even without consideration of subsequent post-April 1 precipitation) closely tracks the long-term 1922-1998 average, hardly exceptional. The preceding year showed precipitation less than average, but two years prior to that near-record precipitation. Most significantly, none of the recent years comes close to the record drought year of 1976-1977, in which CEQA exemptions for connecting the federal and state places of use were *not* claimed. (Moreover, the map on page 8 following suggests that the Northern Sierra actually represents the *least-favorable* conditions of the entire Sierra range.)

And while this description of natural phenomena fails to establish extraordinary *natural* conditions, the DWR statement seeking to justify the exemption forthrightly explains the *man-made* conditions producing the immediate shortfall between supply and demand. To list just several examples:

(1) Groundwater cannot be pumped because of human abuse of that resource in years past. DWR's public review draft of its *California Water Plan Update 2009* (at 4-10) estimates the state's groundwater overdraft at between 1 and 2 million acre-feet annually, while recognizing that DWR has not completed a comprehensive assessment of overdraft in 29 years.

(2) Millions live in residential developments added since 1990 because of human evasion, based upon the faulty premise that future populations could be supported on unrealistic assumptions of future water availability and demonstrated unreliability of then-existing allotments. Even after the *PCL v. DWR* decision and its progeny and subsequent enactment of SB 221 and SB 601 sought to counteract that unrealistic assumption, analysts continue to find that "many utilities are banking on 'paper water' already used by someone else within the state water system." (E. HANAK, *WATER FOR GROWTH: CALIFORNIA'S NEW FRONTIER* (Public Policy Institute, 2005) p. vi.)

(3) California agriculture has shifted from seasonal to permanent crops, again premised on demonstrably unrealistic expectations that "water will follow the plow," coupled with an exacerbation of those risks with the secretly-negotiated Monterey Amendments' elevation of agricultural allotments to the same priority as urban ones.¹ Earlier this year, the *Sacramento Bee* reported that since the last major drought in the early 1990s, farmers have converted more than

¹ Nor does substantial evidence support a conclusion that Central Valley unemployment is water-supply related. One cannot deny that overall unemployment is now greater than a year or two ago, as the Fresno County Supervisors' resolution recites; but no evidence pinpoints water shortages as the cause. To the contrary, discerning economic analysis shows that worldwide market conditions, rather than the last three years' water supply, define farm worker employment income; and overall employment is affected primarily by housing market, not farming, conditions. (J. Michael, *Water Won't Wash Away Valley's Recession*, *Sacramento Bee* (May 1, 2009).)

Moreover, interim implementation the Monterey Amendments, enabling DWR to pump, contractors to extract, and economies to build on so-called article 21 water, was instrumental in creating the extraordinary Delta impacts that have led to judicial restraint on this excessive pumping. Again, it is at best the height of irony to cite legal restraints needed to protect species as a form of natural disaster to justify *exemption* from the very law that prevents the real natural disaster (species extinction) from becoming worse.

500,000 acres to permanent crops. <http://www.sacbee.com/378/story/1641720.html>. Indeed, the Report to the Governor (page 17) acknowledges that this conversion has "eliminated the flexibility of changing crop patterns or fallowing land in response to dry conditions."

In sum, California faces a disaster now, but not a natural one. The current disaster reaps the fruit of years of human mismanagement, thus calling for more, not less, scrutiny of proposals to reallocate water to uses that perpetuate this mismanagement. Whatever action the State takes in response to the disaster of its own making, exemption from formal environmental assessment, vital to assuring compliance with constitutional standards, is the least defensible.

Conditions of Approval

Given the long history of mismanagement precipitating the present crisis, approving the proposed project without conditions would amount to the water policy equivalent of approving bank bailouts without constraining executives' conduct or lending practices. In remanding the petition and its asserted claim of exemption to DWR, the State Board can instruct DWR and USBOR to propose meaningful conditions that might support a proposed mitigated negative declaration, if supported by a stronger record that demonstrates what the present documentation has not. For example, the interim use of a joint point of diversion should be conditioned to meet the following project conditions:

(1) The interim use must be limited to one year, and not allowed to ripen into an established one in law or fact. Accordingly, any permit, however temporary, will not become either the "no project" or "baseline" condition for future environmental assessment. That condition would contrast sharply with the presently proposed condition that deliveries to SWP or CVP contractors "will not exceed historic average deliveries," which would be humorous were it not so insulting to the Delta's present distress.

(2) The proposed joint place of use for the two projects must serve only reasonable statewide uses, and must not be allowed to serve unreasonable uses. By contrast, the present proposal is documented predominantly to serve the Westlands Water District, whose water use is widely viewed as producing among the most unreasonable impacts experienced in the State.

(3) DWR and USBOR have long been aware of the environmental dangers surrounding the provision of water to drainage-impaired State Water Project and Central Valley Project lands. To avoid risking further environmental harm, the projects must not be used to deliver water to districts serving lands that the United States Geologic Survey, or the State Board, characterizes as drainage-impaired.

(4) DWR and USBOR, and districts receiving water under the projects, must meet conditions to ensure effective and environmentally responsible drought response.

a. Urban water districts receiving water from the federal or state projects must implement a drought response program that includes the institution of mandatory water rationing.

b. Agricultural water districts must implement a drought response program that ensures that water from the federal or state projects will not be used to facilitate the planting of permanent crops in water-short areas during this drought year.

c. DWR and USBOR must develop a statewide drought response plan,

following consultation with stakeholders (including environmental stakeholders), that fully protects endangered species and avoids adverse impacts to groundwater and freshwater, as well as fish and wildlife. The statewide plan would set clear procedures for state response, including rationing requirements and mitigation measures to address all environmental impacts, taking into account the duration and severity of the water shortage.

d. DWR and USBOR must implement a long-term giant garter snake monitoring plan in consultation with the Department of Fish and Game and US Fish and Wildlife Service. The purpose of the plan will be to determine project impacts on giant garter snake survival under the operations of the State Water Project and the Central Valley Project.

(5) For reasons similar to those identified in the State Board's recent Order 2009-0027, responding to the Sonoma County Water Agency's petition for temporary urgency change, additional conditions must also be imposed here.

a. Recipients of water from the projects must comply with minimum flow and cold water pool requirements set by the order to avoid unreasonable impacts to aquatic species. The recipients shall submit plans to implement those requirements.

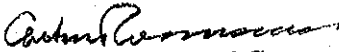
b. If the applicable federal or state agencies (National Marine Fisheries Service and Department of Fish and Game) determine the levels of Chinook salmon to be too low during operations under the order, water recipients must consult immediately with those agencies to implement measures to increase movement of salmon upstream.

c. Any recipient of federal or state project water shall submit a plan to the State Board to reach a water conservation target of 25 percent during the first year of this petition or until the expiration of this order, including steps they will take to reduce unreasonable use of water. That recipient shall submit monthly reports to the State Board of the progress made in reaching this target.

Conclusion

This Board's refusal to accept the DWR-USBOR-Westlands grasp at the brass ring on the cheap is needed to restore the public's trust in management of California water resources. At a moment when State leadership is sorely needed to extract ourselves from stalemate, it ill-becomes the state and federal authorities to seek once again, as was attempted with the Intertie project that was enjoined by *PCL v. USBOR*, to attain their Holy Grail of a unified Federal and State Water Project without adequate environmental review and public participation. This Board's courageous denial of the petition will help convince a skeptical public that the State of California remains lawfully in charge of the water resources to which it is entrusted.

Respectfully submitted,


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