

San Luis & Delta-Mendota Water Authority



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March 3, 2014

VIA E-MAIL

State Water Resources Control Board,
c/o Michael Buckman
Michael.Buckman@waterboards.ca.gov

Department of Water Resources,
c/o James Mizell
James.Mizell@water.ca.gov

Regional Solicitor's Office,
c/o Amy Aufdemberge
Amy.Aufdemberge@sol.doi.gov

U.S. Bureau of Reclamation,
Paul Fujitani
pfujitani@usbr.gov

Re: Comments and Objections Regarding Order Approving a Temporary Urgency Change in License and Permit Terms and Conditions Requiring Compliance With Delta Water Quality Objectives in Response to Drought Conditions (In the Matter of Specified License and Permits of the Department of Water Resources and U.S. Bureau of Reclamation for the State Water Project and Central Valley Project)

Dear State Water Resources Control Board Members and Agency Staff:

The San Luis & Delta-Mendota Water Authority ("Authority"), on its own behalf and on behalf of its member agencies, submits the following comments and objections in response to the Order Approving a Temporary Urgency Change in License and Permit Terms and Conditions Requiring Compliance With Delta Water Quality Objectives in Response to Drought Conditions, as modified on February 7, 2014 and again on February 28, 2014 (hereafter, "Order"). We have attached a protest based on the State Water Resources Control Board ("Water Board") petition

protest form, as requested in the January 31, 2014 notice of the change petition. In further support, we have separately submitted a petition for reconsideration of the Order.

The Order is a response to the extreme and unprecedented hydrological conditions now confronting California, and it recognizes that the existing water quality objectives in the Bay-Delta Plan do not account for the current extremely dry conditions and the impact of these conditions on beneficial uses. When it adopted the Bay-Delta objectives, the Water Board considered “the beneficial uses of water (municipal and industrial, agricultural, and fish and wildlife) based on a set of assumptions about the State’s water supply, including the expected variability of this water supply.” (Order, p. 4.) The Order acknowledges the “[f]low and salinity objectives in the Bay-Delta Plan and D-1641 were developed based on historic hydrologic conditions” and the “magnitude of the current drought was not considered in the establishment of the Bay-Delta objectives or in the terms and conditions contained in D-1641.” (Order, pp. 2, 4.)

This water year’s extreme conditions necessitate adjustments to water right terms and conditions, to ensure reasonable and maximum beneficial use of the dwindling water supply. In the Order, the Water Board recognizes that requiring full compliance with the Bay-Delta objectives under the extreme drought conditions prevailing in 2014 is not in the public interest. The Order provides necessary adjustments to water right conditions for the State Water Project (“SWP”) and Central Valley Project (“CVP”), to help ensure that the State’s scarce water supply is managed to maximize and protect beneficial use. The Authority appreciates the swift actions the Department of Water Resources (“DWR”), the Bureau of Reclamation (“Reclamation”), and the Water Board have taken so far to mitigate the drought’s impacts and to conserve limited water supplies.

Respectfully, however, still more is required, and the Authority objects to aspects of the Order. In particular, the Order should be modified to further enhance opportunities to improve water supply south-of-the-Delta. The existing D-1641 objectives should not be the benchmark for allocating water among beneficial uses in this extraordinary year. To best serve the public interest, the CVP should be allowed to take maximum advantage of every reasonable opportunity to capture water available in the Delta for export pumping. The Order limits allowable export pumping and deliveries to pumping for “health and safety” purposes and needs but does not define that term. The Water Board should do so, to clarify both the application and legal and factual basis for the Order. Further, we request that the Water Board remove the 1,500 cfs limitation on export pumping in Condition 1.b. of the Order. And, we request that the Water Board remove Condition 2 of the Order, which reinstates Delta Outflow and DCC gate closure requirements when precipitation events temporarily allow compliance. In the current unprecedented circumstances, the conditions and terms for export pumping should be flexible and based as much as possible on real-time conditions. This flexibility is necessary, for example, to allow export pumping to take best advantage of the temporary, increased flows expected in the Delta from the current storm, while still appropriately protecting other interests. This need for flexibility and a tailoring of applicable conditions on export pumping will likely continue throughout the year. We acknowledge that such management imposes added burdens on all

concerned, but the current extraordinary conditions facing California compel this approach.

Additional actions by the Water Board and other agencies will likely be necessary as we go through the year, as the impacts of the drought become more widespread and more severe, and impacts that may not even be anticipated today are realized. It will require flexibility and adaptation, as conditions change and opportunities arise, to fulfill the fundamental state policy established in Water Code section 100 that the water resources of the State shall be put to beneficial use to the fullest extent of which they are capable, in the interest of the people, and for the public welfare.¹ The Authority acknowledges the difficult challenges the drought creates, and urges the Water Board to continue to take all necessary actions to mitigate the drought's impacts on beneficial uses.

The notice accompanying the February 28, 2014 amendment to the Order indicates the Executive Director intends to make additional revisions to the Order by no later than March 7, 2014. The potential revisions identified in the notice heighten the Authority's concern about potential limitations on CVP operations and resulting impacts to water supply. The Authority offers these comments and objections in an effort to assist the Water Board in its decision making in this difficult time.

1. There Are Severe Shortages Within The CVP Export Service Areas

The members of the Authority face dire water supply conditions in their service areas, and there is no relief in sight for the foreseeable future. These local public agencies hold contracts to receive water from the CVP, but for the 2014 water year, CVP south-of-Delta agriculture water service contractors have received an initial allocation of zero percent.² Some of these same contractors have suffered low contract allocations for many years preceding this drought. For example, south-of-Delta CVP agriculture contractors have received less than a 50 percent allocation in 6 out of the last 7 years.³ Likewise, SWP contractors have received a 65 percent or less allocation in the 6 out of the last 7 years.⁴ The Exchange Contractors have

¹ In balancing the competing beneficial uses of water, the Water Board should "be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water." (Cal. Water Code § 1254.)

² On January 31st, 2014, DWR announced that all SWP contractors will receive a zero percent allocation of their contractual entitlements. (<http://www.water.ca.gov/swpao/docs/notices/14-02.pdf>) On February 21st, 2014, Reclamation announced that north-of-Delta and south-of-Delta agriculture water service contractors will receive a zero percent allocation, and municipal & industrial ("M&I") water service contractors will receive 50 percent of their historic use. (<http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=46045>.)

³ Reclamation, http://www.usbr.gov/mp/cvo/vungvari/water_allocations_historical.pdf

⁴ See Notices regarding SWP contract allocations, available at <http://www.water.ca.gov/swpao/notices.cfm>.

received an unprecedented forty percent initial allocation, despite contracts requiring deliveries of no less than seventy-five percent of supply. Similarly, wildlife refuges have been allocated forty percent of level 2 supplies, despite provisions of federal reclamation law requiring deliveries of no less than seventy-five percent.

The lack of water significantly impacts the families, farms, and communities that rely on the CVP and SWP as a source of water supply. Lands will be fallowed⁵ and abandoned fields will generate dust and air quality issues, including respiratory health problems and increased incidence of Valley Fever. Permanent crops will perish, jobs will be lost, farming families and communities will face increasing economic hardship. Groundwater basins, which are already declining in many areas, will be overtaxed as farms and communities increase groundwater pumping to meet the water demands of people and crops. The Water Board must consider these conditions when it is deciding how to best protect beneficial use of water and serve the public interest.

2. The Water Board Must Define “Health and Safety Purposes And Needs” And Must Justify Any Limitations On CVP Export Operations Arising From That Definition

Condition 1.b limits allowable export pumping to “the minimum pumping levels required for health and safety purposes” and limits deliveries to SWP and CVP export contractors to “health and safety needs.” (Order at pp. 13-14.) Hence, the scope of these terms in application is critical to the effect of the Order. Yet, what is encompassed within “health and safety” is not defined in the Order. Defining the scope of “health and safety” purposes and needs is essential not only to understanding application of the Order, but also to evaluating the factual and legal basis for the restrictions imposed by the Order.

The notice accompanying the February 28, 2014 amendments to the Order states that the Executive Director intends to revise the Order to provide “clarification on the allowable uses of water pumped under the health and safety export provisions of the Order.” This could greatly affect allowable exports. Depending upon what definition is adopted, it may bring the Order into conflict with federal law, which specifies a range of purposes for the CVP including agricultural, environmental and municipal purposes. It may also raise conflicts with contractual obligations, conflicts that will fundamentally interfere with the CVP’s ability to operate. The definition may also lead to conflict with the Governor’s Emergency Declaration and Executive Order. The Emergency Declaration recognized a broad range of impacts from drought as forming the basis for an emergency, including impacts to agriculture. Paragraph 8 of the Executive Order directed

⁵ For example, the general manager of Westlands Water District (a member agency of the Authority) recently stated that “[w]ithout an adequate water supply, an estimated 200,000 acres of prime agriculture land (which equates to 300 square miles of barren dirt) will remain unplanted on the Westside of Fresno County.” (Westlands Water District, <http://www.westlandswater.org/wwd/pr/ca-farms-and-consumers-in-jeopardy.pdf?title=California%20Farms%20and%20Consumers%20in%20Jeopardy>).

that water be conserved upstream “to protect cold water pools for salmon and steelhead, maintain water supply, and improve water quality.” The CVP’s water supply is for all project purposes.

3. The 1,500 CFS Cap In Condition 1.b Should Be Removed So That Available Water Can Be Moved South-of-the-Delta

It is critical that the Water Board allow and the CVP take every opportunity to mitigate the impacts of the drought, particularly the impacts to south-of-Delta beneficial uses. To protect south-of-Delta beneficial uses, it is imperative that the Water Board consider and look to optimize opportunities to allow for export pumping. For example, when rain events occur and boost surface flows, increased export pumping should be allowed, to capture what limited water is available. At this point, every available acre-foot of water has value and can help to mitigate the impacts to the farms, families, and communities that depend on the CVP for their water supply.

The Order does not allow the Projects to take full advantage of the opportunities that may be presented, for example, by storm events. In Condition 1.b, the Order sets the maximum exports at 1,500 cfs. (Order, pp. 13-14.) The Authority does not agree that there should be an automatic 1,500 cfs cap on export pumping. The 1,500 cfs cap does not reflect an assessment of water needs in the current extreme drought conditions. Nor is it essential to protect listed fish species; the biological opinions applicable to export pumping allow pumping in excess of 1,500 cfs, depending for example upon the distribution of protected fish within the Delta. Instead of using 1,500 cfs as a hard limit on allowable exports, the Water Board should rely upon the existing biological opinions and prevailing water quality conditions at the export pumps in the South Delta to act as the limit on export pumping. Any limitations on pumping should remain flexible and be based on real-time conditions as much as possible, to respond to changing conditions as they evolve over the year.

4. Condition 2 Of The Order Should Be Removed So That More Available Water Can Be Moved South-of-the-Delta

The Authority requests that the Water Board remove Condition 2 of the Order. Condition 2 requires the Projects to comply with the Delta Outflow and DCC Gate Closure requirements of D-1641 when precipitation events occur that enable the Projects to meet those requirements. (Order, p. 14.) It does allow the project pumping to exceed 1,500 cfs to pump natural and abandoned flow available after meeting those requirements, but having to meet those requirements reduces the volume of water below what otherwise can be pumped. Requiring compliance with the objectives this year is not in the public interest, given the very limited water supplies available to support beneficial uses.

In essence, Condition 2 is trading a highly uncertain benefit for fish and wildlife from what will be very temporary compliance with the Delta Outflow and DCC Gate Closure requirements for the certain and easily quantifiable loss of water supply for beneficial uses, or

additional storage of water, south-of-the-Delta. In the circumstances in 2014, that is a trade the Water Board should not make.

5. Additional Actions Will Likely Be Needed To Mitigate Drought Impacts

The Water Board should issue Water Diversion Curtailment Notices to prevent diversions that are unsupported by water rights under the current hydrological conditions. The Order states that “[f]ollowing persistent dry hydrologic conditions, the Board plans to issue Water Diversion Curtailment Notices to water right holders in water short areas in the near future.” (Order, p. 4.) The Authority urges the Water Board to issue such Curtailment Notices as soon as possible. In these extreme hydrological conditions, there is very little, if any, “natural flow” to support appropriative and riparian water rights and it is likely that many diversions are relying on the Projects’ release of stored water. (See Order, p. 8 [describing how unprecedented “depletions” on the Sacramento River and Feather River systems are resulting in further reductions in the Projects’ storage to meet water quality objectives].) In addition to Curtailment Notices, the Water Board will likely need to increase enforcement actions to ensure water is available for its intended and authorized uses.

In sum, the Authority appreciates the swift actions of the Water Board, DWR and Reclamation to mitigate the drought’s impacts and conserve scarce water supplies. The Authority has concerns regarding and objections to the Order, as explained above. The extreme hydrological conditions present challenges for the entire State and the Water Board has the critical task of determining what is reasonable and in the public interest when so little water is available to support beneficial uses. We respectfully ask that when striking that balance, the Water Board give greater weight to the needs of the farms, families, and communities that depend upon CVP water supply.

Sincerely,



Daniel G. Nelson
Executive Director
San Luis & Delta-Mendota Water
Authority

(Objections of the San Luis & Delta-Mendota Water Authority)

State of California
State Water Resources Control Board
DIVISION OF WATER RIGHTS
P.O. Box 2000, Sacramento, CA 95812-2000
Info: (916) 341-5300, FAX: (916) 341-5400, Web: <http://www.waterboards.ca.gov/waterrights>

PROTEST- PETITION

OBJECTIONS TO:

ORDER APPROVING A TEMPORARY URGENCY CHANGE IN LICENSE AND PERMIT TERMS AND CONDITIONS REQUIRING COMPLIANCE WITH DELTA WATER QUALITY OBJECTIVES IN RESPONSE TO DROUGHT CONDITIONS (WITH MODIFICATIONS DATED FEBRUARY 7, 2014) In the Matter of Specified License and Permits of the Department of Water Resources and U.S. Bureau of Reclamation for the State Water Project and Central Valley Project

Specified License and Permits:

Permits 16478, 16479, 16481, 16482 and 16483 (Applications 5630, 14443, 14445A, 17512 and 17514A, respectively) of the Department of Water Resources for the State Water Project and License 1986 and Permits 11315, 11316, 11885, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 20245, and 16600 (Applications 23, 234, 1465, 5638, 13370, 13371, 5628, 15374, 15375, 15376, 16767, 16768, 17374, 17376, 5626, 9363, 9364, 9366, 9367, 9368, 15764, 22316, 14858A, 14858B, and 19304, respectively) of the United States Bureau of Reclamation for the Central Valley Project.

I (We) have carefully read the notice (state name):

Daniel O'Hanlon (authorized agent of the objector/protestant - San Luis & Delta-Mendota Water Authority)

Address, email address and phone number of protestant or authorized agent:

Kronick, Moskovitz, Tiedemann & Girard, 400 Capitol Mall, 27th Floor, Sacramento CA 95814;
dohanlon@kmtg.com; 916-321-4500

Protest based on ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS:

the proposed action will

- not best serve the public interest
- be contrary to law
- have an adverse environmental impact

Facts which support the foregoing allegations:

The San Luis & Delta-Mendota Authority objects to Condition 1.b and Condition 2 of the Order because those Conditions will not best serve the public interest, are contrary to law, and will have adverse environmental impacts. Condition 1.b limits State Water Project and Central Valley Project (collectively, the "Projects") pumping levels, and deliveries to the Projects' export contractors, to "health and safety purposes" and requires that pumping levels "shall be no greater than 1,500 cfs." Condition 2 requires the Projects to be operated to comply with D-1641 Delta Outflow and DCC Gate Closure requirements if precipitation events occur that enable the Projects to meet those requirements. These limitations will unduly limit export pumping.

Condition 1.b and Condition 2 will not best serve the public interest:

To serve the public interest, it is necessary that the State Water Resources Control Board ("Water Board") allow the Projects to be operated in a manner that captures available water and to mitigate the impacts of the current extraordinary drought. Condition 1.b prevents the Projects from being operated in such a manner because it restricts export pumping and deliveries to undefined "health and safety purposes" and also limits the rate of export pumping to 1,500 cfs. These restrictions on pumping and deliveries are contrary to the public interest because in the current extreme drought the public interest requires that the Projects be allowed to capture flow and make that water available for a variety of beneficial uses. The public interest requires that the scarce water resources be used to mitigate the drought's impacts on the families, farms and communities that rely on the Projects' water.

Condition 2 will not serve the public interest because it requires the Projects to default back to compliance with the Delta Outflow and DCC Gate Closure requirements following a precipitation event. That will diminish the ability of the Projects to divert water available in the Delta. The justification for relaxing outflow and other requirements will not end with any single precipitation event, or even multiple precipitation events. The depleted storage levels and snow pack will likely remain a critical problem. Condition 2 is contrary to the public interest because it prevents the Projects' from addressing this emergency, by operating to maximize the capture and storage of water.

Condition 1.b and Condition 2 are contrary to law:

Condition 1.b and Condition 2 are contrary to law because they conflict with the statutory and constitutional directive that the water resources of the State be put to beneficial use to the fullest extent of which they are capable and that the conservation of such water be exercised in the interest of the people and for the public welfare. (Water Code § 1256; Cal.Const. Art. 10, § 2.) As explained above, Condition 1.b and Condition 2 fail to ensure that water be put to maximum beneficial use or that water is conserved in the public interest and for the public welfare.

In addition, Condition 1.b and Condition 2 are contrary to law because they preclude the Projects from operating in compliance with federal law. Federal law requires the CVP be used to satisfy multiple purposes to achieve the broadest public benefit for the entire Central Valley. Precluding the Bureau of Reclamation ("Reclamation") from exporting water other than to meet health and safety needs will unlawfully render Reclamation unable to meet statutory requirements (see, e.g., Central Valley Project Improvement Act, § 3406(d)) and contractual obligations.

(Objections of the San Luis & Delta-Mendota Water Authority)

Condition 1.b and Condition 2 will have adverse environmental impacts:

Condition 1.b and Condition 2 will have adverse environmental impacts by preventing the Projects from operating in a manner that mitigates the impacts of the drought to the fullest extent possible. By limiting the amount of and purposes for which water may be pumped and delivered, these Conditions withhold water that could be captured and delivered or stored by the Projects south-of-the-Delta. Elimination of these conditions will ensure that the maximum amount of water is available to mitigate the environmental impacts of the drought. Such environmental impacts include but are not limited to: groundwater overdraft and resulting water quality issues and land subsidence; land fallowing and resulting air quality impacts; loss of permanent crops; and increased pressure on alternative water supplies and resulting environmental impacts. Condition 1.b and Condition 2 will exacerbate the existing environmental impacts of the drought by preventing the Projects from maximizing the capture and delivery of water.

Under what conditions may this protest be disregarded and dismissed?

These objections to the referenced Order may be disregarded and dismissed if the following occur: Condition 1.b and Condition 2 and related portions of the Order are modified so as to allow reasonable levels of pumping of water available in the Delta.

All protests must be signed by the protestant or authorized representative:

Signed:  Date: 3/3/2014
**(Daniel O'Hanlon, Authorized representative of
the San Luis & Delta-Mendota Water Authority)**

All protests must be served on the petitioner. Provide the date served and method of service used:

These objections were served by e-mail on March 3, 2014, to the following:

- 1) State Water Resources Control Board, c/o Michael Buckman, at Michael.Buckman@waterboards.ca.gov;
- 2) Department of Water Resources, c/o James Mizell, at James.Mizell@water.ca.gov;
- 3) Regional Solicitor's Office, c/o Amy Aufdemberge, at Amy.Aufdemberge@sol.doi.gov; and
- 4) U.S. Bureau of Reclamation, Paul Fujitani, at pfujitani@usbr.gov.