

SOUTH DELTA WATER AGENCY

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Via fax: commentletters@waterboards.ca.gov
Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Implementation and Enforcement of Water Rights During Drought Conditions

Dear SWRCB Board Members:

The following comments are submitted by the South Delta Water Agency in response to the Board's Notice on the above matter.

PROCESS.

SDWA suggests the Board not address drought issues under emergency and/or urgency authorizations or processes. The current drought began nearly two years ago, with the previous two year drought occurring within the last five years. The notion that droughts are unanticipated events which need to be addressed via truncated processes with limited public input is unrealistic. Although the current drought began in late 2012/early 2013, the SWRCB has yet to hold any sort of public hearing on the water rights involved. Instead, the SWRCB has issued a string of "urgency" orders without any real public participation. Such orders were clearly the result of closed door discussions between the water right holders and SWRCB staff, which suggests or at least gives the appearance of impropriety. The water right holders who are responsible for meeting various water quality/fishery flows standards should not be able to negotiate changes to such obligations outside of the public process. The assertion that SWRCB staff were not involved in discussions about the Temporary Urgency Change Petition and yet adopted it the day after it was filed is preposterous.

It is clear from the 2014 Urgency Orders that DWR and USBR claims and assertions were not always accurate, yet were adopted by the Board as the bases for the Urgency Orders. A public process wherein DWR, USBR and other personnel and experts can be cross-examined would give the

Board a much better understanding of the facts associated with the drought, and the reasons why any particular water quality standard should or could be changed on a temporary basis.

Similarly, the emergency regulations adopted by the Board short circuit the public process. Although the public was allowed to comment on the draft orders, the Board has now had two years to hold an evidentiary hearing or hearings on any number of drought-related issues. As recently acknowledged by the Board, the emergency regulations implemented unreasonable powers whereby the Board could demand responses within 5 working days rather than have a deliberate, public process whereby evidence could be produced and examined. We should not be making decisions based upon very short responses with little deliberation or testing of facts. Similarly, the handling of changes to fishery standards cannot be seriously contemplated on some sort of real time basis whereby a select group decides whether or not to protect the fish. Clearly the projects are not being required to plan ahead on a multi-year basis. In the past two years minimum fishery flows had to be relaxed and yet exports were in the millions of acre feet. The urgency and emergency processes are simply a method by which the mandates of the current water right decision D-1641 are ignored and violated.

SDWA suggests the SWRCB rescind the Urgency Orders and the emergency regulations and notice evidentiary hearings on the relevant issues. Drought issues are too important to treat in an expedited manner.

ISSUE FOCUS.

The current drought has been a lesson in what not to do. The SWRCB staff spent countless hours examining hypothetical "natural" flows, estimating current and projected water uses based on incomplete and faulty data and seeking to address problems that did not exist. The entire San Joaquin River system informed the Board that it would deal with any local disputes and would not challenge water rights in general, yet the curtailment process would not allow such cooperative actions.

In addition, SWRCB staff inspected diversions and informed diverters claiming riparian water rights that their diversions "are illegal and should cease" without there ever being a hearing on such diversions or any complaint filed against the diverter.

Further, the SWRCB, after adopting emergency regulations, all but begged the exporter to file complaints against in-Delta diverters and the end result was that no such complaints were filed.

Without a doubt, the SWRCB needs to re-think how it deals with droughts. Rather than seek out problems which do not exist, the SWRCB should limit its activities to attempting to resolve conflicts during a drought. If an entire watershed has agreed to work together to avoid conflicts over shortages, the SWRCB should allow such efforts and not frustrate them by conditioning that cooperation on agreement from third parties.

When claimants of riparian and/or pre-1914 rights continue to divert, the SWRCB and its staff should not make public statements about the legality of such diversions or availability of water unless a complaint is filed charging such. It is painfully clear that aspects of SWRCB staff as well as Board Members took it upon themselves to criticize Delta water users without investigating the facts and certainly without conducting hearings. Perhaps the SWRCB should adjust its ex parte communications so that exporters allegations are not its only source of information. Given that after months of specific allegations against in-Delta diverters there were no complaints being filed, one would assume that exporter grievances were somewhat overstated and SWRCB beliefs in water availability were incorrect.

Unless and until an actual dispute arises between water right users as evidenced by the filing of a complaint, the SWRCB should be acting as mediator to resolve such disputes. In the water rights priority world in which we operate, there will be interests who do not get water during drought times. Those interests not getting water and who believe they should, bear the burden of showing who is preventing them from getting the water or showing who is taking their water. Absent a complaint on either of these, the SWRCB has no basis for deciding a non-issue, or one that is at least not ripe. Thus it should be trying to work with stakeholders to avoid conflicts, not encouraging conflicts.

A clear example of how the SWRCB mishandled this past year's problems is evidenced by Delta issues. After having conducted nearly five years of water rights investigations in the Delta, the SWRCB abruptly identified and publically expressed its concerns about in-Delta water rights and adopted emergency regulations which would allow it to demand "proof" of in-Delta water rights on a five day turn-around! At the same time, the SWRCB suddenly believed that Delta channels were without water to support water rights, but refused to conduct a hearing wherein the basic facts and physics could be set forth. Tellingly, neither the SWRCB nor its staff provided any response to in-Delta assertions about water availability and presented no legal support for Borad stated positions. Those positions were that Delta water rights were dependent on water quality and that when project water constituted the majority of Delta inflow there was no water available for other users. Again, neither SWRCB position was supported by legal argument or citation, and no counter to was given to in-Delta responses. This is no way to run a business.

As stated above, the SWRCB should re-examine not only how it handles drought issues, but also what its goals are. Those goals are not to seek out problems and prevent diversions about which there are no official complaints. It should attempt to resolve conflicts among water users so as to avoid the bigger fights which may or may not occur. The SWRCB must stop doing exporter bidding at the very last minute via urgency and emergency processes. We know we have droughts, we know they occur regularly and we know what the impacts of water shortage are. The SWRCB should identify the relevant issues and conduct full evidentiary hearings to determine how to handle these re-occurring events.

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Even now, we all fear another year of little or no rainfall, yet the SWRCB is not requiring the projects to seek permit changes under the normal, publically involved process. It is time to learn from our mistakes and not wait until the last minute to guess at what can or should be done.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Herrick". The signature is written in a cursive style with a large initial "J" and a stylized "H".

JOHN HERRICK