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April 2, 2014

**SENT BY U.S. MAIL AND EMAIL (Oscar.Biondi@Waterboards.ca.gov)**

Mr. Oscar Biondi  
Water Quality Certification Program  
Division of Water Rights  
State Water Resources Control Board  
P.O. Box 2000  
Sacramento, CA 95812-2000

**RE: DWR Drought Barriers – Preliminary Comments on Proposed  
401 Water Quality Certification**

Dear Mr. Biondi:

This firm represents the Delta Watershed Landowners Coalition (“DWLC”), which includes concerned landowners along and downstream of Steamboat and Sutter Sloughs, which the Department of Water Resources (“DWR”) intends to block off with its Drought Barriers project. We have not yet completed our review of the permit application materials, but have several preliminary concerns about the proposed 401 Certification that we would like to bring to your attention. These issues would need to be resolved prior to any action by the State Water Resources Control Board (“SWRCB”) on the proposed water quality certification.

Our preliminary concerns include:

1. The water quality need and water quality impacts associated with the barriers in these locations has not been adequately described or justified, and the environmental costs and benefits of the barriers are unclear.
2. The barriers will intentionally interfere with the exercise of riparian and senior water rights along Sutter and Steamboat Sloughs as well as farther downstream.
3. Compliance with the California Endangered Species Act (Pub. Resources Code, §§ 21000 et seq. (“CEQA”)) is inadequate, and the intended design, operations and mitigation approach of the barriers are not fully disclosed.
4. Fish passage is inadequate and the barriers will impair migration and movement of special status fish species.

## 1. Inadequate Justification for Barriers

It is unclear from the application materials what the goal of the project is with respect to maintaining water quality. The DWR's 2009 Drought Barriers Report discussed potential locations and provided recommendations regarding the potential placement of several different barriers in the Delta to provide water quality benefits. (See <http://www.water.ca.gov/waterconditions/docs/DWR-EmergencyBarriersDraftReport-Apr2009.pdf>.) While the Sutter and Steamboat Slough barriers are shown to improve water quality at the State Water Project and Central Valley Project South Delta Pumps, worsened water quality is shown for the Sacramento River at Emmaton. (2009 Drought Barriers Report, p. 16.) The application materials submitted for the 401 Certification include *no information* regarding water quality expected within Sutter and Steamboat Sloughs downstream of the barriers or at other water quality compliance points. DWR staff has discussed the issue of water quality with some affected landowners and indicated that water quality may not be appreciably worsened by the barriers, while at the same time stating that their modeling does not match data being collected in the field. A complete and quantitative analysis of expected water quality impacts, however, has yet to be provided.

DWR claims that placement of the barriers will allow retention of water upstream for later use, yet no quantification of the amount of water expected to be retained in storage as a result of the placement of the barriers has been provided. According to the 401 Certification notice the project will "prevent tide-driven saltwater from pushing too deeply into the Delta and allow water managers to retain some water in upstream reservoirs for release later in the year." The State Water Project and Central Valley Project ("the Projects"), via Temporary Urgency Change petitions, have repeatedly requested higher levels of exports from the South Delta than required for health and safety purposes. For instance, the TUCP granted on March 18, 2014, allows more than 1,500 cubic feet per second to be diverted under specified conditions. (March 18, 2014 TUC Order, p. 7.) Just yesterday, higher levels of pumping were announced by the Projects. Should the barriers be placed, it would be entirely inappropriate for the Projects to divert water in the South Delta in excess of health and safety levels while at the same time directly impairing the exercise of senior water rights on the subject sloughs.

Notably, the application materials for the 401 Certification do not propose any specific operational parameters to ensure that the water rights of users along the closed off sloughs would not be affected. Maintaining salinity levels below 1000 EC has been mentioned by DWR; however, normal salinity levels in the Sutter and Steamboat Slough rarely exceed 250 EC. While DWR apparently intends to include four culverts in the bottom of each barrier, no water quality or water level modeling has been provided in the application, nor has a proposed operations plan been prepared. Additionally, though the

provision of replacement pumps and other accommodations to assist diverters along the affected sloughs has been discussed by DWR, there is no written description of plans to ensure irrigation and other uses can continue once the barriers are placed. The Initial Study completed by DWR in 1977, after placement of the Sutter Slough Barrier in September 1976, concluded that full environmental review should be prepared. This has never occurred.

## **2. Inconsistency with Water Rights System**

As mentioned above, the barriers will directly interfere with the exercise of riparian and senior appropriative water rights. They will also directly interfere with DWR's delivery of water pursuant to the North Delta Water Agency's 1981 contract with DWR. DWR has alluded to the operation of the culverts as a means to lessen interference with downstream water diversions, as well as potential modifications to intakes and provision of temporary pumps to ensure that irrigation of crops can occur while the barriers are in place. This information is not contained within the 401 Certification application.

In acting upon a request for water quality certification, the State Water Board considers whether the proposed project complies with "applicable water quality standards and other appropriate requirements," (23 Cal. Code Regs., § 3859, subd. (a)), which is defined as "the applicable provisions of Sections 301, 302, 303, 306 and 307 of the Clean Water Act (33 U.S.C., §§ 1311, 1312, 1313, 1316, 1317) and any other appropriate requirements of state law. (23 Cal. Code Regs., § 3831, subd. (v).) The State Water Board has plainly stated, "Water quality certification is a determination that a proposed project complies with the applicable provisions of sections 301, 302, 303, 306 and 307 of the Clean Water Act and any other appropriate requirements of state law." (*In the Matter of the Petition of Double Wood Investment, Inc.*, State Water Resources Control Board Order No. WQ2000-09 (2000).) Water rights are a relevant consideration in a 401 Certification proceeding. (*In the Matter of the Request for Stay of Merced Irrigation District*, Water Resources Control Board Order No. WQ 2011-0007 (2011).) DWR does not possess the requisite water right necessary to construct the proposed project that will have the result of directly interfering with senior water rights.

Under California water law, riparian rights and senior appropriators have a right to the natural and ordinary flow of water in the stream without injury or impairment by junior rights. (*Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp.* (2002) 202 Cal. 56, 65; *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal. 2d 489, 546.) Here, the proposed barriers project will literally cut off superior water rights holders from the ordinary and natural flows to which they are entitled. According to SWRCB records, more than 150 such diversions, of which most if not all are riparian

and pre-1914 appropriative rights, will be directly impaired in this manner. (See Exhibit A, from the SWRCB's E-WRIMS system.)

After installation of the barriers, rather than taking the ordinary and natural flow of water of the Sacramento River into Sutter Slough, Steamboat Slough and Miner Slough, these 150+ water rights holders will be forced to rely on water largely derived from the western Delta. Indeed, the express purpose of the proposed project is to sever these sloughs from the natural flow of the Sacramento River. This proposed flow pattern is certainly anything but ordinary and natural, as demonstrated by the fact that the surface levels of these sloughs are predicted to be as much as eighteen inches below present levels at low tide. This dramatic alteration of natural flows will result in many of these 150+ diversion works (both pumps and siphons) becoming inoperative.

In short, it is beyond any reasonable debate that the proposed barriers will directly impair senior water rights for the benefit of a junior appropriator in violation of California law. DWR has made no attempt whatsoever to demonstrate how the proposed project is consistent with the California's longstanding rules of priority. In light of this, no entitlements should be issued by the SWRCB that would facilitate this clear violation of law.

### **3. Compliance with CEQA has Not Occurred**

The 401 Certification application indicates reliance on a statutory or categorical exemption from CEQA "T.B.D. by DWR." (Application, p. 3.) It is impossible to assess the applicability of an exemption, however, without an indication of what exemptions DWR believes will apply. Notably, emergency projects authorized under CEQA Guidelines section 15269, subdivision (c) for actions to prevent or mitigate an emergency do not apply to "long term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short term." There is no information in the application indicating that an emergency condition is occurring or is about to occur in the short term. Moreover, categorical exemptions are subject to exceptions (see CEQA Guidelines, § 15300.2). A cursory list of potentially significant impacts from the barriers include: worsening water quality and lowering of water levels that interferes with irrigation of agricultural lands, interference with navigation and recreational boating, interference with movement and migration of special status fish species as well as state listed nesting birds and birds protected under the Migratory Bird Treaty Act, silt buildup around the barriers impacting water quality and interfering with navigation, release of toxic sediments, and air quality and traffic impacts from construction and deconstruction.

Full CEQA review of the barriers prior to installation is necessary, as was determined in 1977. Moreover, the contents of a complete 401 Certification requires both (1) valid CEQA documentation (23 Cal. Code Regs., § 3856, subd. (h)(4)); and (2) a description of steps taken “to avoid, minimize, or compensate for loss of or significant adverse impacts to waters of the state” (23 Cal. Code Regs., § 3856, subd. (h)(6)). The application materials do not include any description of how adverse environmental and other impacts will be mitigated.

**4. Effects on Special Status Fish Species**

Sutter and Steamboat Sloughs are important corridors for several listed fish species, including sturgeon and salmonids, which will be disrupted by the barriers. Specifically, it is unclear whether such species would or could use the culverts for passage, especially since it appears that only one culvert is slated to be kept open at most times. Water quality impairment may also adversely affect fish species. The issue of predation associated with these structures is also unanalyzed. We anticipate additional review of the Biological Assessments included in Attachment C to further detail these concerns.

\* \* \*

Thank you for considering the information in this letter detailing our preliminary concerns. We would like to meet with SWRCB staff as soon as possible to discuss them further. Should additional information be brought forward, it may be possible that local landowner and other concerns could be addressed. Unless that is done, however, *we respectfully request that the present application for 401 Certification not be acted upon.* Moreover, as there are so many questions regarding the need for the project, as well as the manner in which the project is proposed to be carried out, we request that the Board hold a public hearing regarding the proposed 401 Certification. For the reasons discussed in this letter, it would be appropriate for the full Board to consider and act upon the proposed 401 Certification.

Very truly yours,

**SOLURI MESERVE**  
A Law Corporation

By:   
Osha R. Meserve

Mr. Biondi  
April 2, 2014  
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*401 Certification for DWR*  
*Drought Barriers*

Attachment: Exhibit A

cc: Felicia Marcus, Chair, State Water Resources Control Board  
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# EXHIBIT A



Water Diversions on SWRCB EWRIMS database, accessed March 25, 2014