



December 14, 2015

Via email: commentletters@waterboards.ca.gov

Jeanine Townsend
Clerk of the Board
State Water Resources Control Board
and Honorable Members of the Board

Subject: 12/15-17/2015 BOARD MEETING ITEM 7: Consideration of an proposed Order granting In Part and Denying In Part the Petitions for Reconsideration of the Executive Director's February 3, 2015 Order that approved Temporary Urgency Changes in License And Permit Terms and Conditions for the State Water Project and Central Valley Project and Subsequent Modifications to that Order.

Dear Ms. Townsend:

Restore the Delta's mission is to save the San Francisco Bay-Delta Estuary for our children and future generations. We work in the areas of public education and outreach so that all Californians recognize the Sacramento-San Joaquin Bay Delta as part of California's natural heritage, deserving of restoration. Restore the Delta is a grassroots campaign of residents and organizations committed to restoring the Sacramento-San Joaquin Delta so that fisheries and farming can thrive there together again. We fight for a Delta with waters that are fishable, swimmable, drinkable, and farmable, able to support the health of the estuary, San Francisco Bay, and the ocean beyond. As a coalition of Delta residents, business leaders, civic organizations, community groups, faith-based communities, union locals, farmers, fishermen, and environmentalists, we envision the Bay-Delta Estuary as a place where a vibrant local economy, tourism, recreation, farming, wildlife, and fisheries thrive as a result of resident efforts to protect our waterway commons.

We write to provide members and staff of the State Water Resources Control Board with our response to the proposed Order described above. Mainly, we regard the proposed Order as justifying a failed approach to regulating and managing the state and federal water projects¹ during four years of drought. The proposed Order largely fails to address our legal, factual and

¹ "State and federal water projects" refers specifically here to the State Water Project owned and operated by the California Department of Water Resources, and the Central Valley Project owned and operated by the United States Bureau of Reclamation.

environmental concerns. We also find that the order positions the State Water Board and the state and federal water projects to fail at providing future drought water supplies, and protecting listed migratory fish upstream and in-Delta Estuary resident fishes by continuing status quo management of the water projects, and of timid application of its authorities to its jurisdiction over the projects. The root of these likely failures is the Board's persistent unwillingness to reduce reliance on the Delta for future water supplies of importing regions of the San Joaquin Valley and urban California, mandated by the Legislature and signed into law by Governor Arnold Schwarzenegger in 2009.

That future is here and now.

The proposed Order indicates how Board legal interpretation provides institutional incentive to state and federal water project operators to lean on the temporary urgency change process to bail them out of management errors and mishaps. It is the same brand of moral hazard that occurred during the bail-outs of large banks and financial institutions deemed "too big to fail" in the 2008 economic crisis. Except that here in California, we can choose to prevent such water supply and ecological failures by complying with existing law.

The proposed Order also helps illustrate how the Board's chronic and persistent foot-dragging on analyzing and balancing the public trust resources of the Bay-Delta Estuary has made it complicit in poor management of the state and federal water projects, contributing to the mishaps that occurred, and could occur again in 2016 (should wet conditions fail to materialize as hoped for state and federal Central Valley reservoirs).

The failures documented, and the provisions planned for in the proposed Order were set in motion a few years ago, as our protest petitions of February 13, May 5, June 17, and July 22, contended.² The Board must incorporate into its work program an immediate update of the Bay-Delta Water Quality Control Plan, and that plan must incorporate into its implementation program actions that will reduce reliance on the Delta for California's future water supply needs, as mandated by California Water Code 85021. The Board faces such difficult balancing actions currently in the Delta precisely because it has failed to play a role in fostering reduced reliance on imported water supplies from the Delta, despite the law's enactment now over six years ago.

Three lingering legal interpretation issues are addressed somewhat by the proposed Order. These are:

- The Governor's emergency drought authorities under the California Government Code extend to suspending water quality rules.

² Restore the Delta's protests are online at: (February 13) http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/comments_tucp2015/docs/rtd_stroshane021315.pdf; (May 5) http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/comments_tucp2015/docs/rtd_stroshane05052015.pdf; (June 17) http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/comments_tucp2015/docs/rtd_timstroshane061615.pdf; and (July 22) http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/comments_tucp2015/docs/rtd_timstroshane072215.pdf.

- Due diligence principles of appropriative water rights permits do not apply to temporary urgency change petitions.
- Delta Reform Act policies apply not just to long-term governance of the Delta but must also govern in the near-term.

The Governor's emergency powers do not extend to relaxing federally-approved water quality objectives and beneficial uses without legal due process.

The Board contends in its proposed Order that the Governor has the authority to override federally-approved water quality objectives protecting sensitive beneficial uses in the Bay-Delta Estuary. Restore the Delta protested back on February 13, 2015, that the federal Clean Water Act allows no emergency exceptions to the administration of water quality standards adopted by states. We argued at that time that the Governor had no legal authority to suspend an EPA-approved water quality objective on the grounds that he had declared an emergency water shortage.³

In the proposed Order, the State Water Board disagrees with our interpretation of the Governor's authority.⁴ Yet, absent their interpretation of the Governor's authority to suspend Water Code Section 13247, the Board also stated in the TUCP Order of February 3 (and again in the proposed Order), that "absent suspension" of that section, the Board could not approve the change petition and its associated modifications to the permits and licenses.⁵

While the Governor has emergency powers under the Government Code⁶ to address drought conditions, we maintain that these powers do not extend to relaxing or suspending federally-approved water quality objectives that protect designated beneficial uses under the federal Clean Water Act. These and related issues are now in litigation.

³ RTD's protests February 13, p. 6; and May 5, p. 11.

⁴ State Water Resources Control Board [SWRCB], *Order Denying in Part and Granting in Part Petitions for Reconsideration and Addressing Objections*, December 7th draft, p. 45. Accessible at http://www.waterboards.ca.gov/board_info/agendas/2015/dec/121515_7_with_coverltr.pdf. Hereafter cited as "proposed Order."

⁵ SWRCB, TUCP Order, February 3, 2015, p. 13; accessible at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/2015/tucp_order020315.pdf, hereafter cited as "TUCP Order"; proposed Order, p. 46.

⁶ According to the TUCP Order, the Governor's drought emergency proclamation relied on California Government Code Section 8571, which states, "During a state of war emergency or a state of emergency the Governor may suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency, including subdivision (d) of Section 1253 of the Unemployment Insurance Code, where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency." The legal question is whether the Governor's powers extend to the Clean Water Act, and its implementing rules, delegations of authority, and regulations, whose authority is federal, not state-based.

Emergency drought powers aside, it is also poor public policy, even in drought conditions, to relax or suspend water quality regulations developed originally through due process, since public trust resources and local drinking water supplies can be directly harmed by such precipitous actions. The water quality control plan has the legal status of being a quasi-legislative action, hence having force of law. The implementing water rights decision of D-1641 is a quasi-judicial action. Waiving either is contrary to law, and an abuse of agency discretion.

Due diligence of appropriative water rights permits applies to temporary urgency change petitions, even during drought emergencies.

Due diligence (the principle of “use it or lose it”) is required for the lawful exercise of all appropriative water right permits in California. Water right holders enjoy their rights to water supplies only to the extent that their use is reasonable and not wasteful.⁷

Water Code Section 1435 invokes the concept of due diligence when it states in pertinent part that the board shall not find a petitioner’s need to be urgent if the board in its judgement concludes, if applicable, that the petitioner has not exercised due diligence either in petitioning for a change under Division 2, “Water”, of the California Water Code (which contains the part of the Code addressing appropriation of water), or in “pursuing” the petition for change. We protested that the Board had and failed to use *its* authority to evaluate the TUCP and the petitioners’ exercise of due diligence with respect to whether the Department of Water Resources and the Bureau of Reclamation had been duly diligent in reasonably using and diverting water supplies they control, as well as protecting public trust resources in the period leading up to petition for a temporary urgency change.

While RTD was deemed correct in the proposed Order that the Board’s finding of urgency is not limited to circumstances due to natural conditions, the Board is “not required to investigate the extent to which Project operations contributed to critically low water supplies that necessitated approval of the TUCP.”⁸ The Board’s position is analogous to a detective coming upon a corpse and deciding that the detective could only identify the physical cause of its death without investigating the fuller picture of why the death occurred at all. The Board prefers to undertake only what the law may (arguably) minimally require of it. This is disappointing, because diligence in the service of reasonable use and methods of use of water involves *motive*, provided by incentives to use water as efficiently as possible in service of all beneficial uses, including those protected by the public trust. The Board’s duties to protect public health, fisheries, and ecosystems on the brink of collapse in the Bay-Delta Estuary—never mind its obligations to protect the public trust and ensure reasonable use of water under California’s constitution—go unheeded because Water Code Section 1435(c) did not explicitly require it to do so, though there are other legal authorities in and beyond the Water Code that are obligatory. We find the Board’s

⁷ California Constitution, Article X, Section 2, and California Water Code Section 100.

⁸ Proposed Order, p. 30.

narrow reading of its obligations under California's water policy and law framework to be an abuse of discretion.

The proposed Order makes explicit legal reasoning used by the Board that gives the Department of Water Resources and the Bureau of Reclamation incentive to continue relying on TUCPs for "bail-outs" rather than take greater care with the water they store and the legal obligations placed on those supplies needed for public trust resource and Delta water quality protection, and for efficient water use by all of their contractual customers.

Delta Reform Act policies apply not just to long-term governance of the Delta but must also govern in the near-term.

In concluding, we focus on two policy principles of the Delta Reform Act of 2009: public trust resource protection in the context of reasonable use, and the legislative mandate to reduce reliance on the Delta for future water supplies.⁹

First, public trust resources are not luxury items. Subsistence fishing impacts of a TUCP Order on environmental justice communities should be taken into account in water allocation decisions since their members rely on common fishery resources as a low-cost source of protein in their diets.¹⁰ Changes to water quality objectives and the resulting degradation of water quality may harm fish and ecological beneficial uses that could affect public health. Protecting public trust resources "whenever feasible" means not that they are a residual of water allocation decisions, but that, as part of the people's common heritage, they must be protected when state agencies

⁹ California Water Code Section 85054. The coequal goals are a succinct policy statement requiring balance of Delta public trust resource protection and recovery with improved water supply reliability. The objectives inhering in the coequal goals are defined in the Delta Reform Act to include restored ecosystems, improved water quality, improved water conservation and efficiency measures, and improved conveyance and storage, and the Delta's cultural, recreational, and agricultural uniqueness as a place, and reducing risks to Delta people, property and state interests through emergency preparedness and other actions. See Water Code Section 85020 and 85023.

¹⁰ F. Shilling, A. White, L. Lippert, and M. Lupell. 2010. *Contaminated fish consumption in California's Central Valley Delta*. Environmental Research. doi:10.1016/j.envres.2010.02.002. F. Shilling, S. Sommer, L. Leonelli, and D. Shimoum. 2008. *Community-Based Strategies to Reduce Mercury Exposure in Delta Fishing Communities*, for California Department of Public Health and Central Valley Regional Water Quality Control Board, June, 39 pages. J.A. Davis, B.K. Greenfield, G. Ichikawa, and M. Stephenson. 2008. *Mercury in sport fish from the Sacramento-San Joaquin Delta region, California, USA*, Science of the Total Environment 391: 66-75.

make water allocation decisions. “Whenever” means that “feasibility” must be evaluated at each allocation decision point.¹¹

Public trust resources are not to be dispensed with should they inconveniently reduce water allocations to some interests. The City of Los Angeles’s licenses to Mono Lake tributaries were not sacrosanct and neither are the Department’s and the Bureau’s water right *permits* in the Central Valley.

Listed species are part of that common ecological heritage, and population abundance indicators signal the health of the ecosystem, along with water quality indicators. Extinction is forever for these species. Their struggles to survive are indicative of the Delta ecosystem collapsing.¹²

In contrast, growers affected by reduced surface water allocations may be faced with the need to adjust, but loss of water supplies is not a permanent loss of access to life and livelihood as it is with listed fish species. Hardships to farmers can be addressed by society facilitating their economic and social adjustment through adoption of more efficient water use methods, crop choices, or by each individual’s own foresight and initiative to adapt to changing water allocation conditions and, in a worst case perhaps other economic opportunities. They are already adapting

¹¹ *National Audubon Society et al v. Superior Court* (1983) 33 Cal. 3d 419, 441 (“Thus, the public trust is...an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.” And, 446 (“The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”) The latter passage points back to Water Code sections passed in the 1950s and 1960s that codify in part the duty of the Water Board to consider public trust uses of stream water, and *National Audubon* adds in footnote 27 accompanying the “whenever feasible” quote that “the noncodified public trust doctrine remains important both to confirm the state’s sovereign supervision and to require consideration of public trust uses in cases filed directly in the courts without prior proceedings before the board.”

¹² EPA’s August 2012 Action Plan for the Bay-Delta Estuary (p. 2) put forward several activities aiming to contribute to Estuary restoration, including strengthening estuarine habitat water quality standards and selenium water quality criteria, improved regional water quality monitoring and assessment, preventing pesticide pollution, and restoring aquatic habitats while managing methyl mercury. “Collectively,” EPA wrote, “these activities will contribute to the restoration of the Bay-Delta Estuary. Even if they are all successfully implemented, however, they are not sufficient to resolve the complex problems that have stressed the ecosystem to the point of collapse.” EPA at the time also expresses hope that the State Water Board will successfully and soon update the estuarine habitat standards in the Bay-Delta Water Quality Control Plan. Accessible at <http://www.epa.gov/sites/production/files/documents/actionplan.pdf>.

to a likely future of drier conditions and reduced surface and groundwater supplies, even in the San Joaquin Valley.¹³

The proposed Order fails to grapple with this ethical reality—balancing the risk of extinction of endangered public trust resources with the potentials for individual and societal adaptation during persistent drought conditions. One set of beings has options in life, while others do not. The proposed Order implies the Board’s public trust balancing duties are free of such facts; we disagree. Instead of balancing fish needs with water supply needs as a fact-free matter of reasonableness as has been done in the 2015 TUCP Order and its subsequent modifications, the Board may have boxed itself into an extinction watch during 2016, if insufficient supplies to break the drought or sustain Delta ecosystems are not forthcoming this winter.

Future controversy can be prevented. Planning for and implementing compliance with Water Code Section 85021 through the next water quality control plan can help prevent extinction of public trust resources in the Delta in future drought periods, while also placing Delta-import-dependent communities and water contractors on a path toward local and regional water self-sufficiency, essentially doing more to drought-proof their populations and economies.

The water rights of state and federal water projects of the Central Valley are unique. Their appropriative water rights permits carry conditions obligating the projects to shoulder compliance with water quality objectives and beneficial uses in the Delta. Those objectives and uses ought to be protective, but they are not. Relaxing them only worsens the Delta’s problems, given the lack of compliance by state agencies and state and federal water contractors with Water Code Section 85021 to date.

The Board should update the Bay-Delta Water Quality Control Plan first because it has long been evident that both the 1995 Water Quality Control Plan and its implementing water right decision D-1641 have failed to protect Delta public trust resources, drought conditions or no. Such an assessment comes not only from the State Water Board’s 2010 Delta Flow Criteria Report but also from the US Environmental Protection Agency’s 2012 Action Plan for the Bay-Delta Estuary.¹⁴

¹³ The UC Davis study of drought economic impacts to agriculture we cited in our July 22 protest identified several ways that growers adapt to shortages in the near term. See https://watershed.ucdavis.edu/files/biblio/2015Drought_PrelimAnalysis.pdf. See also Robert Rodriguez, “California farmers now see drought as rule, not exception,” *Miami Herald* December 4, 2015, for description of how San Joaquin Valley farmers consider how they will adapt to smaller water supplies under climate change. See <http://www.miamiherald.com/news/nation-world/national/article47926390.html>.

¹⁴ SWRCB, *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem*, August 3, 2010, prepared pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009, p. 2: “The best available science suggests that current flows are insufficient to protect public trust resources.” And the 2012 EPA Action Plan states (p. 2): “Any solution to the ecological problems of the Bay Delta Estuary must be multi-faceted, including *providing sufficient flows*, physical habitat which is sufficiently large, connected, diverse, and self-sustaining, as well as a reduction of many types of stressors, such as contaminants, invasive species, and predation.” Emphasis added.

December 14, 2015

Page 8

The preferable policy outcome going forward should be: No more TUCPs that relax Delta water quality objectives. This can come about with better water quality control planning and reduced reliance on the Delta for California's future water supplies. While, as EPA suggests they may not be sufficient to recover Delta ecosystems, *they are necessary, and needed soon.*

The next WQCP and water right decision must take into account implementation of Water Code Section 85021's mandate to reduce reliance on the Delta for California's future water supplies.¹⁵ This section was enacted in 2009, over six years ago. The future of California's water supplies is here and now.

We thank you for the opportunity to comment on the proposed Order. If you have questions or concerns for us please contact Barbara Barrigan-Parrilla (209/475-9550, email barbra@restorethedelta.org) or Tim Stroshane (510/847-7556, email tim@restorethedelta.org).

Sincerely,



Barbara Barrigan-Parrilla
Executive Director



Tim Stroshane
Policy Analyst

cc: Felicia Marcus, Chair
Frances Spivy-Weber, Vice-Chair
Tam Doduc
Doreen D'Adamo
Steven Moore
Tom Howard
Les Grober

¹⁵ Water Code Section 85021 states: "The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts."