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Via email to commentletters@waterboards.ca.gov

Felicia Marcus, Chair
State Water Resources Control Board
Sacramento, California

Re: **2/17-18/15 BOARD MEETING** -- Recommended Improvements to the Implementation and Enforcement of Water Rights during Drought Conditions (Item 4)

Dear Chair Marcus:

This office provided one of the 36 comment letters in response to the State Water Resources Control Board's (Board) September 10, 2014 public solicitation. Many of the suggestions and observations of that comment letter – many of which are in common with certain other comment letters – can be found in the current draft January 2015 Dry Year Program Report.¹ We are encouraged with the efforts and progress the Board has made towards a more comprehensive water management system for the State. We encourage it to continue on its path and offer the below as further signposts on that path.

POLICY ISSUES BEYOND THE DRY YEAR REPORT

The crux of the water management system in California to the contemporary era has been based on entitlements to water recognized by law, all of which are subject to the overriding Constitutional limitation on beneficial and reasonable use, including the priority system. As described in brief below, the Board should do everything in its power to encourage innovation rather than a reliance on the status quo that brought California to its present drought crisis.

¹ The comment letter observations and suggestions tie in with the following parts in the January 2015 Dry Year Program Report: As to data collection -- 1.1 (all diverters to report details); 2 at "Demand Analysis"; 2.5 (enforcement of the collection of detailed data); 3.1 (detailed reporting on transfer data); 3.3 (annual — not triennial — reporting of water diversions); 3.5 (all reports should meet measurement standards of best practices and not rely on estimates); as to using modern technology -- 1.2 (satellite and telemetry); 3.0 (real-time basis as the standard); 3.3 ("best professional practices" and "best available technology" for all water reporting by all parties); 5.0 (modernize like other states have done); as to the statements of water diversion in particular -- Sections 3.1 – 3.4.

Classic legal distinctions are of lessened relevance. Over the last 165 years generations have spent inordinate time dealing with assorted legal niceties relating to different types of legal definitions of water entitlements and uses. Some of these very legal distinctions on which this traditional jurisprudence has relied are questioned in (1) From the Family Farm to Agribusiness: The Irrigation Crusade in California and the West 1850-1931 by Donald J. Pisani (1984) and (2) the current academic work at California State University, Monterey Bay on *THE DISEÑOS PROJECT: A Geospatial Visualization of the Environmental History of California, 1769-1892*.

The engineering basis for these different water entitlement are discussed in detail in the classic tome The California Law of Water Rights by Wells A. Hutchins (1956). A better understanding of water because of new technology has clouded these classic definitions. It's much harder to argue now that there is difference between underflow and groundwater than it was 75 years ago. But more importantly, the Legislature and Congress has confused the issues even more with their various clean water acts, making it much harder to harmonize the classic water entitlement system developed over the last 165 years with contemporary water management and the need to protect and optimize the water resources of the State.

Past successes at the Optimization of Water. In response to the need for optimization of water, there have been a number of successes and attempts by the SWRCB, DWR and water agencies across the State:

- A. Groundwater Basin Programs,
- B. Napa Frost Protection Program,
- C. 1978 Dry Water Report,
- D. Sax Report and Comments,
- E. Mono Lake Preservation, and
- F. LADWP settlement of the Inyo County Issues.

Not all of these attempts have been successful but the SWRCB is revisiting earlier attempts because of the Drought. Many of the issues the State is currently facing would be much easier to resolve if the earlier recommendations had been followed in 1978 and 2002. Hopefully the SWRCB will carefully consider the current policy recommendations and adopt them during this Drought.

Failures at attempts at Optimizing Water. There have been two major failures of which we have specific knowledge, to wit, Monterey County and the Salton Sea.

Monterey County has salt-water intrusion and water supply problems. The problems were diagnosed 75 years ago. Much government action and expense has been spent trying to solve the problems ever since, yet the problems still exist. Currently several Monterey County agencies and an investor-owned water company are waiting to find out from a Court who bears what proportion of the substantial fiscal downside of yet another failed project, caused by an admitted Government Code section 1090 violation. The People of Monterey County and the State have paid for the failure to deal with the seawater and supply problems for the past 75 years.

Much further south, the Salton Sea is an environmental problem. A close examination of the facts suggests that the Sea came into existence at its current level because in decades past the State of California wanted to increase its entitlement to Colorado River water. California and other western states need some portion of the one million acre feet water currently evaporating from the surface of the Sea each year. The State spent over 25 million dollars to develop a Salton Sea solution over the last ten years. Millions have been spent in Court by various public agencies arguing about responsibility for the Salton Sea and now the SWRCB is going to hold a workshop on March 18, 2015. The People of the region as well as the State of California have paid for all of this effort yet there is no solution in sight. See pages 6-9 of the October 14, 2014 comment letter submitted by this office.

Dynamics that foster failure. In a recent publication by the Hamilton Project under the auspices of the Stanford Woods Institute of the Environment (Discussion Paper 2014-06), there is an extensive discussion about the lack of innovation in the water industry. One key finding of the report is the following:

Second, we call for regulatory reforms at the subnational level to create a more innovation-friendly environment. As part of this recommendation we suggest that some states could benefit from the creation of new water innovation offices to coordinate and support pro-innovation policies. We argue that many current regulations frequently hinder the adoption of cost-effective technologies.

Ajami, Newsha K., Barton H. Thompson, Jr., and David G. Victor, *The Path to Water Innovation* (October 2014), page 6.

This office has advocated for years that innovation has to be considered in order to deal with State and National water issues. At times this office on behalf of Clients have offered innovation for free to water agencies across the State. There has been a negative reaction to these offers:

1. *Restructuring America's Water Industry: Comparing Investor-owned and Government-owned Water Systems* (Reason Report), 1996, Reason Foundation—A Report in which this office participated in because the People of Color in Oakland and Richmond were not getting a fair shake from the San Ramon Valley development which depended on the expansion of Political Boundaries of East Bay MUD.
2. INSTADJUDICATOR — A computer program developed for solving the water entitlement issues in Salinas Valley.
3. Water Optimization Patents (Systems and Methods for Optimized Water Allocation, United States Patent Sep 28 2010 US7805380, United States Patent Dec 25 2012 US8341090) — the Imperial Irrigation District refused to consider the innovation, even when offered for free.

4. Salton Sea Patent (Method of Restoration of Highly Saline Lake, United States Patent November 16, 2010 US 7,832,959 B1)—the most capable engineering in the world was sought to bring an unbiased approach. See page 8, n3 of the October 14, 2014 comment letter from this office.

The Board may wish to consider why the water industry has such resistance to innovation and creative solutions. The likely answer can be found in an article by Professor Kagan about Dredging in the SF Bay:

The argument can be briefly stated. The Oakland case is the product of an American political system that has become highly responsive to political demands, a system that quickly generates knowledge and public policies reflecting new insights and values, such as mankind's interest in protecting complex aquatic life cycles and ecosystems. But the American political system articulates and implements those policy ideas in a way that encourages adversarial, legalistic modes of decision-making. This adversarial legalism results in enormously costly, time-consuming, and erratic policy implementation and dispute resolution, conducted in courts or in the forbidding shadow of judicial review. Good policy ideas are thus transmuted into bad case-level outcomes.

Adversarial Legalism and American Government by Robert A. Kagan, *Journal of Policy Analysis and Management*, Vol. 10, No. 3 (1991), Page 370.

The status quo in water optimization is protected by the system Professor Kagan describes in his article. It is the Board's (and the State's) role to solve problems, not to honor the status quo.

A recent editorial in the Wall Street Journal discussed the impact of change on American Business.

Former Florida Governor Jeb Bush made a useful point in his speech to the Detroit Economic Club last week: Of the companies on the first Fortune 500 list in 1955, 88% "don't even exist today or have fallen away." That reality of American capitalism was clear from the news that RadioShack has filed for bankruptcy.

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RadioShack joins the list of other famous American companies capsized by waves of creative destruction. The lesson is that in a capitalist economy no business triumph lasts forever, and the most dangerous moment can be when you are at the height of success. Andrew Grove, the former Intel CEO, summed it up when he wrote "Only the Paranoid Survive." The same cannot be said for government, where failure is typically rewarded with more money.

The RadioShack Lesson, Feb. 9, 2015, *The Wall Street Journal*. The people of California should not be required to continue subsidizing the failure of California's water agencies to optimize the State's water resources.

CONCLUSION

The People of California can reasonably expect all of its government agencies to follow the mandate of the Constitution and put the water resources of the State to reasonable and beneficial use, rather than allowing the parochial interest of different parts of the State to dominate the discussion, and thwart innovation at the expense of the greater good.

We encourage the Board to continue its pursuit of optimizing the State's water resources. If you, other Board members, or your staff wishes to discuss any of the points raised in this and our prior comment letter, let us know. We exercise caution in approaching the Board and its staff because in the past one of the larger California counties accused this office of exercising undue influence through such contacts.

Thank you for allowing us to comment on this matter of public importance.

Sincerely,

Patrick J. Maloney

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