

SOUTH DELTA WATER AGENCY

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April 25, 2014

Via E-Mail michael.buckman@waterboards.ca.gov

Mr. Michael Buckman
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Re: Urgency Change Order

Dear Mr. Buckman:

On behalf of the South Delta Water Agency, I am submitting the following comments to the April 18 changes to the above-referenced Urgency Change Order of the same date, as well as other terms and conditions of that Order and its five subsequent changes before the April 18 changes.

As per my prior comments, nowhere in the Order or any of its permutations does the SWRCB make the necessary findings under Water Code Section 1435(c). That subsection requires that the SWRCB find that the "urgency need" asserted by the Petitioner is in fact an urgent need. The subsection precludes the SWRCB from finding an urgency need if the Petitioner failed to exercise "due diligence" in seeking the changes under the regular Water Code provisions dealing with short term and long term changes. The purpose of this subsection is to make sure that any petitioner does not wait until the last minute to seek a permit change rather than go through the more detailed process under the other sections of the Code. This is important in that the regular provisions for seeking permit changes include public notice and participation, whereas the urgency provisions include no such public notice or process. As you know, I and others specifically requested that DWR, USBR and SWRCB provide the public with such change petitions before any order was issued. None of those parties provided any documents until after the Urgency Order was issued or changes thereto made.

In this instance, there can be no doubt that DWR and USBR have indeed waited until beyond the last minute to seek permit changes. The current drought began well over a year ago, but the projects failed to take any action to address its continuance. Even as the fall of 2013 progressed and no precipitation occurred, the projects simply waited and waited and waited, exporting as much water as they could while making no plans for the drought. Importantly here, the projects did not file any petition for permit changes ahead of time, in the event the lack of rain continued and they would be unable (as they assert) to meet current permit terms and

conditions under D-1641 and ESA mandates. It was not until January 29, 2014, three days before the projects' obligations for Delta outflow kicked in that the projects first sought relief from those permit obligations. At what point between last spring and January 29, 2014 would a reasonable person (or agency) conclude that compliance with permit obligations for outflow and other water quality objectives might not be met, and that changes to existing permits would be necessary? Clearly that point was months before January 29, 2014. In fact, I recall that the presentations of the projects at the Drought Workshop included references to prior months of modeling and estimations of how the drought shortages might preclude compliance with permit terms and conditions. A complete lack of planning and total inaction cannot constitute due diligence.

Hence, the January 31, 2014 Order, silent on the required finding of Section 1435(c), is contrary to the statutory requirements underlying an urgency order. Since that January 31, 2014 Order, the SWRCB, DWR and USBR have constantly discussed, negotiated and agreed to six further changes, including the April 18 change. Although a few precipitation events occurred after the January 31 Order, there is no conceivable excuse for DWR and USBR's failure to address the other topics contained in the six subsequent Urgency Changes. Issues such as fishery flows, insufficient storage, export levels, and water quality objectives were at the core of the projects' concerns when they petitioned for the initial Urgency Change. By not including the requests for subsequent changes at the time of the January 29 Urgency Petition, the projects, in collusion with the SWRCB piece-mealed not only the entirety of the changes sought, but also any examination of the effects of the changes.

As an example, at the time of the January 29 Petition, the USBR knew full well that it was not going to meet the Vernalis fishery base flow or pulse flow this year. Rather than include its desired changes to these water quality objectives/permit conditions in the January 29 Petition, it waited a further 72 days (January 30-April 11) to request relief from these San Joaquin River fishery flow obligations. It strains credulity to describe this as the projects exercising "due diligence" in seeking these changes as required by Section 1435 (c). To the contrary, the projects did the opposite of exercising due diligence, they assumed that once the SWRCB had ignored this requirement for an urgency permit change, that they could simply make permit changes on a near real-time basis as their whims and preferences dictated. Amazingly, the SWRCB agreed to this process and now consults on a weekly basis with the permittees to decide on how to alter permit terms and conditions to best help increase exports.

The Urgency Change Order and its numerous changes/amendments appear to be based upon the notion that in a severe drought crisis, permit terms and conditions adopted after an 82 day hearing are unfair as limitations on export operations and are biased in favor of fishery and other water right interests. For some unexpressed (in the Order) reason minimum fishery protections are now not needed and will not be enforced. This position is based upon a premise that even if there is no surplus water available for exports and no project storage or yield in excess of that which is needed to comply with permit terms and conditions, actions must be taken to find and allow exports anyway. Such a position presents serious legal, factual and hydrological conundrums. If the current drought does not result in all available "project" water being used exclusively for compliance with existing permit terms and conditions, under what scenario would it? Will the SWRCB seek to find ways to allow exports if it doesn't rain for another year? It would make sense perhaps to ease current conditions in order that some amount of carryover storage be available for future obligations, but there is no rational scenario under

which permit changes should be granted to increase exports when the system is millions of acre-feet short of water.

Bizarrely, the projects and the SWRCB have concluded that any outflow that exceeds a minimum fishery standard is somehow "lost" to beneficial use or not being put to its fullest use, while at the same time agreeing to lower the minimum flows on (seemingly) alternate weeks. Why is not any flow in excess of a minimum fishery flow seen as a benefit, partially "making up" for the shortages from which the fisheries were denied? Why is not the additional flow a short term benefit to the estuary and beneficial uses as a whole by pushing ocean salts farther west? Why is the desire of contractors (without any water supply in this drought) a need against which other beneficial needs and permit requirements is balanced? When did the priority of water rights, area of origin statutes and existing mandates in permits and Water Quality Control Plans become on par with the junior-most water right holders? It is perplexing to say the least that the SWRCB believes one class of contractors (not even water right holders) must "get something" at the expense of all other interests and water right holders.

Worse still, the latest change to the Urgency Order allows for the export of fishery pulse flow water instead of that water traveling downstream a few miles to help meet another fishery requirement. Apparently, the USBR negotiated with the SWRCB that in exchange for it *not* meeting the San Joaquin River Water Quality Objectives for the protection of fish and wildlife beneficial uses, it could take water needed for USBR and DWR outflow requirements. One can only wonder at how this discussion progressed and what the SWRCB was trying to protect when it conditioned non-compliance on other non-compliance. One is supposed to bargain to get something in exchange; not bargain against oneself.

At this point one must ask a few questions of the SWRCB. If the projects, which are without a water supply, which refuse to meet minimum permit obligations during a drought, and which demand as much export water as possible can get agreement from the Board, can other permittees and licensees similarly negotiate with the Board? Can a licensee who is subject to a curtailment notice file an urgency petition seeking the ability to divert anyway? Divert some? Take some fishery water? Cannot he/she ask the Board to balance the needs of all those license holders against the "unfair" water rights priority system and fishery needs? Can he/she argue that any export water (being used by contractors under the junior most water rights) be shared with others, just as the minimum fishery flows have been "balanced" against export needs? What does a licensee have to show in order to get the SWRCB to "re-balance" the current water allocations during this drought, as the projects have done. Of course, no such urgency petition would be entertained, which bares the current Urgency Order as the ill-advised and illegal document it is.

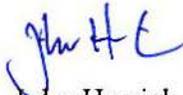
If the SWRCB were interested in trying to protect those beneficial uses designated in the current Water Quality Control Plan and D-1641, it would condition any exports above those alleged to be for "health and safety" be used to meet existing permit conditions. How much water has been exported since the January 31 Order? Why could that water not be re-introduced into the San Joaquin River to fully meet base and pulse flow fishery obligations? To meet outflow obligations? To meet Western Delta agriculture standards? To meet Vernalis or Brandt Bridge salinity standards? Instead, the exported water goes to somehow protect an unwritten "Export Contractor Beneficial Use Water Quality Objective." The explicit requirements contained in D-1641 become illusory or merely suggested permit terms and conditions. They are

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not subject to change via a noticed hearing with cross-examination, but subject to change in non-public discussions whereby the needs of those without water supersede adopted water quality objectives, while the fishery agencies try to look the other way.

The most recent changes to the Urgency Order were supported by virtually no analysis, modeling or storage and release estimates. There appears to be no record supporting the SWRCB's relaxation of the San Joaquin River fishery flow requirements, and no rational support for allowing exports to take water needed to meet outflow or other water quality objectives. SDWA objects to and opposes each permutation of the Urgency Order and recommends the projects be ordered to meet their obligations before being allowed to reap any benefit from their permits.

Very truly yours,

A handwritten signature in blue ink, appearing to read "John H. C.", written in a cursive style.

John Herrick, Esq.