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July 30, 2015

By email to Tom.Howard@waterboards.ca.gov and by U.S. Mail

Board Members
State Water Resources Control Board
c/o Thomas Howard, Executive Director
P.O. Box 2000
Sacramento, CA 95812-2000

Re: **Objections to July 3, 2015 Order Conditionally Approving a Petition for Temporary Urgency Changes in License and Permit Terms and Conditions Requiring Compliance with Delta Water Quality Objectives in Response to Drought Conditions (“Order”)**

Dear Board Members:

Pursuant to Water Code section 1438(d), Biggs-West Gridley Water District, Butte Water District, Richvale Irrigation District, and Sutter Extension Water District (collectively “Joint Districts”) respectfully object to the Order and certain provisions in the Order.

The Joint Districts are senior water right holders in the Feather River watershed and hold agreements concerning the diversion of water from the Feather River with the State of California, including all its political subdivisions. The Joint Districts recognize the extraordinarily difficult drought conditions currently facing our state and the need to take actions to address and mitigate the impacts and effects of drought. However, these actions should be well thought out and considered in a coordinated, public process designed to avoid unintended consequences and redirected impacts. The Order adopted by the State Water Resources Control Board’s (“SWRCB”) Executive Director fails to adhere to these and other applicable legal standards.

1. The Order has the Potential to Result in a Breach of the Joint Districts’ Diversion Agreement with the State of California, Resulting in Injury to Other Lawful Users of Water in Violation of Water Code § 1435(b)(2).

While the Order relaxes Delta water quality requirements to preserve upstream storage (Order, § 1, pp. 26-27), it also largely fixes Keswick releases at 7,250 cfs in June, July and August¹ (*id.*, § 28, pp. 28-29) and “Upon request of the Executive Director” mandates adjusted operations at Folsom Lake to ensure that critical water supplies are available (*id.*, § 9, p. 30).

¹ Keswick releases are subject to change in accordance with real time monitoring.

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The cumulative effect of rendering CVP operations largely inflexible is that greater responsibility for maintaining Delta water quality, providing supply for inbasin uses, and responding to unforeseen conditions falls on Lake Oroville and the Feather River. This poses potentially catastrophic consequences in 2015 and beyond to water users, such as the Joint Districts, and other beneficial uses that rely on a viable Lake Oroville.

The Order does not define or otherwise establish the parameters under which the Executive Director may demand adjusted operations at Folsom Lake². Nor does the Order specify under what circumstances or to what extent Keswick releases may be adjusted (either more or less) from the 7,250 cfs baseline. Because of these uncertainties, it is impossible to predict and quantify the impact and risk to Lake Oroville storage levels resulting from the Order. What is without dispute, however, is that current and projected Lake Oroville storage levels are perilously low and potentially so low as to put into question the ability of the Joint Districts and its landowners to finish irrigating 2015 crops and to provide water for other beneficial uses in the fall and winter of 2015 and, potentially, 2016. Current forecasted projections of Lake Oroville storage indicate that levels will encroach at or below 900,000 acre-feet by mid- to late-September, at which point DWR begins to lose the ability to divert water from the reservoir. Indeed, at an unknown storage level shortly below 900,000 acre-feet, it is believed that the only way to maintain flows in the Feather River below Lake Oroville is to rely on a partially functioning river valve that is operational only by virtue of a temporary settlement agreement.

The Order states that the proposed changes to project operations will "not affect the Petitioners' obligation to curtail their diversions of natural and abandoned flows to the extent necessary to protect senior water right holders, or to meet any independent contractual obligations that the Petitioners may have." (Order, p. 22, underlining added.) However, the SWRCB's July 7, 2015 letter to the Bureau acknowledges that "changes in Shasta Reservoir operations from what Reclamation proposed in its May 4 Temperature management plan will affect system-wide Central Valley Project and State Water Project operations and water supplies, and that the current plan relies more heavily on the already limited storage available in Folsom and Oroville." (Letter, p. 4.) Water Code section 1435(b)(4) requires findings that, among other things, the urgency change is made without injury to any other lawful user of water. The Order fails to include such findings and assurances that Lake Oroville will be operated to avoid injury to the Joint Districts and other water users that hold agreements with the State of California, particularly given the inflexibility of CVP operations. Additionally, the Order gives the Executive Director discretion to order subsequent modifications to Folsom and Keswick releases

² The SWRCB's letter to Mr. Ron Milligan of the U.S. Bureau of Reclamation dated July 7, 2015 states that "120,000 acre-feet end of September Folsom storage forecasted in the June 25 Plan represents the minimum acceptable storage to meet community water supplies, and that other changes in system-wide operation would be necessary if this minimum storage cannot be achieved." Such specificity is conspicuously absent from the Order.

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outside of a public process and without findings supported by evidence and assurances that legal injury will be avoided.

2. The Order has the Potential to Result in Unreasonable Effects Upon Fish, Wildlife, and Other Instream Beneficial Uses in Violation of Water Code § 1435(b)(3).

The Joint District service area, particularly rice acreage, provides wetland habitat and food resources for the protected Giant Garter Snake, waterfowl, and other protected species that rely on the Pacific Flyway. The Feather River provides habitat to a variety of protected fish species. Increased Lake Oroville releases to account for inflexible CVP operations may result in an unavailability of water this fall and winter for habitat areas within the Joint Districts and greater Sacramento Valley. Lack of available supply in Lake Oroville to release to the Feather River may also result in impacts to fall run Chinook salmon and other protected fish species of the Feather River. These potentially unreasonable effects upon fish and wildlife were not considered in the Order, which is singularly focused on minimizing temperature impacts to winter-run Chinook salmon.

3. The Public Interest is Not Served by Purporting to Delegate Decisionmaking to the Executive Director Rather than the Full Board on such Far-Reaching and Significant Issues Addressed in the Order in Violation of Water Code § 1435(b)(4).

Prior to authorizing a temporary change, the SWRCB must determine that the proposed change is in the public interest. (Water Code § 1435(b)(4).) The public interest is considered and protected in the ultimate terms of the order granting the temporary change and in the process undertaken by the SWRCB prior to adopting the order. (See, e.g., *id.* §§ 1437, 1438.) A process that serves the public interest must include coordinated governmental action by public officials, not employees. Similarly, the process must include adequate pre-decision due process and stakeholder input to avoid or minimize temporary changes that result in unintended consequences or redirected impacts.

In creating the State Water Resources Control Board, the Legislature wished “to provide for the orderly and efficient administration of water resources of the state” (Water Code § 174(a)) by creating a five member appointed board with diverse qualifications and specialties (*id.* § 175(a)). While the Board Members have participated in two informational workshops on issues related to the Order, the Executive Director, not the Board, issued the Order. As a result, the Order was adopted without the benefit of dialog with and amongst diversely educated and specialized Board Members who are accountable for their actions. (Water Code §§ 177, 178.)

At its very essence, the Order involves high-stakes tradeoffs. Winter-run Chinook salmon may be protected, but at the potential expense of significant injury to legal users of water,

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such as the Joint Districts, and injury to other biological resources reliant on other SWP and CVP facilities. Public interest demands that decisions involving such far-reaching and significant issues be heard, debated, and acted upon by the Board Members, not one SWRCB employee.

4. Water Code § 1439 Requires The Board Supervise the Order to Avoid Injury to the Joint Districts and Other Lawful Water Users.

The Order mandates continuing supervision and consultation to address and react to potential unreasonable effects on fish, wildlife and other instream uses of water (Order, p. 19) and to preserve municipal and industrial supply for the cities served by Folsom Lake (*id.*, p. 20). The Order does not expressly require continued consultation to ensure the protection of all other lawful users of water, such as the Joint Districts. Such action is, however, required by Water Code section 1439, which states:

The board shall supervise diversion and use of water under the temporary change order for the protection of all other lawful users of water and instream beneficial uses and for compliance with change order conditions.

(Underlining added.) Board Members, SWRCB staff, and members of the RTDOMT should ensure that the Joint Districts and all other lawful users of water are protected from injury.

5. The Order Improperly Grants the Executive Director Authority to Reallocate Water That Would Otherwise Be Released to Satisfy Prior Rights.

The Order improperly colors the water conserved as a result of the Order for use “in accordance with the Petitioners’ current CVP and SWP operations plan associated with the June 25, 2015 revised Temperature Management Plan for the Sacramento River....” (Order, § 3, p. 27). Similar language was included in the February 3, 2015 TUCP Order (p. 23), but deleted in the March 3, 2015 version of the TUCP Order. The Joint Districts urge the SWRCB and its Executive Director to again strike this reference. The Executive Director is not empowered to reallocate water in a manner inconsistent with the laws and regulations that govern when water is released to satisfy downstream water rights, to maintain adequate water quality, to generate hydroelectric power, to protect the environment, and for other beneficial uses.

6. Conclusion

The Joint Districts appreciate the SWRCB’s consideration of these objections and its efforts in mitigating and responding to the current drought emergency. The Joint Districts urge the SWRCB Board Members, not their Executive Director, to adhere to the requirements of

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Water Code sections 1435 et seq. and provide minimal levels of constitutional due process protections prior to taking possible future actions to address drought impacts.

Respectfully submitted,

JOINT WATER DISTRICTS BOARD



By: _____
DUSTIN C. COOPER, General Counsel

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