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BEFORE THE
STATE WATER RESOURCES CONTROL BOARD
STATE OF CALIFORNIA

In re Petition of Imperial Irrigation District)
and San Diego County Water Authority for) **PETITIONER SAN DIEGO COUNTY**
Approval of Long-Term Transfer of) **WATER AUTHORITY'S**
Conserved Water) **COMMENTS ON DRAFT ORDER**
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Petitioner San Diego County Water Authority (SDCWA) submits the following comments on the State Water Resources Control Board's (SWRCB) draft decision and order in the above-referenced matter (Draft Order) and requests that these comments be considered by the SWRCB before adopting its final order in this matter. The SDCWA also requests the opportunity to address the SWRCB with respect to the Draft Order at the SWRCB's October 16, 2002 Workshop. Counsel for SDCWA will appear for that purpose.

1 **I. INTRODUCTION**

2 SDCWA supports the SWRCB’s Draft Order approving the Amended Joint Petition of Imperial
3 Irrigation District (IID) and SDCWA for a Long-Term Transfer of Conserved Water (Petition). The
4 SWRCB’s approval provides a basis whereby the IID can conserve water for transfer while protecting its
5 water rights against loss or diminution. The approval also helps clear one of the last remaining hurdles to
6 California’s compliance with the Interim Surplus Guidelines (ISG) in the short-term and the California
7 Colorado River Water Use Plan (California Plan) in the long-term, thereby assuring the continued delivery
8 of Colorado River water to California.

9 While SDCWA is supportive of the Draft Order, we urge the SWRCB to provide additional
10 flexibility to the state and federal resource trustee agencies charged with implementing SB 482 and the
11 California and federal Endangered Species Acts (CESA and ESA). We read the Draft Order to express
12 the view that the transferring parties should be obliged to mitigate for environmental harms to the Salton Sea
13 that are attributable to the Water Conservation and Transfer Project as provided in SB 482. However,
14 to the extent that the Draft Order can be construed as establishing a separate salinity standard from that
15 set forth in SB 482, it may unnecessarily limit or constrain the Water Conservation and Transfer Project
16 and may even conflict with SB 482. For example, if mitigation or replacement water is provided to the
17 Salton Sea in sufficient quantities to offset any material impacts on the Salton Sea resulting from the Water
18 Conservation and Transfer Project, to the satisfaction of the California Department of Fish and Game
19 (DFG) in accordance with its authority under SB 482, then that measure should also be sufficient for the
20 SWRCB.¹

21 Accordingly, SDCWA respectfully requests that the Draft Order be amended such that the
22 resource trustee agencies’ respective approvals under SB 482, CESA and the ESA are sufficient for the
23 SWRCB’s purposes.

27 ¹ Of course, in the event that different mitigation approaches require new or additional
28 environmental review, the SWRCB has retained jurisdiction pursuant to section 10.14 of the Draft Order
to review those approaches.

1 **II. SWRCB APPROVAL REFLECTS THE IMPORTANCE OF THIS HISTORIC WATER**
2 **CONSERVATION AND TRANSFER PROJECT**

3 As SDCWA detailed in its Closing Brief, the importance of the Water Conservation and Transfer
4 Project proposed by the Petition cannot be overstated. The proposed project will: (1) help to ensure
5 California's compliance with the ISG and is the linchpin of the California Plan, thereby allowing for the
6 continuation of Colorado River water deliveries in excess of California's basic entitlement while at the same
7 time demonstrating California's commitment to reducing its Colorado River water use over the long term;
8 (2) eliminate existing uncertainties among California's Colorado River water users as to their respective
9 entitlements thereby providing for the coordinated administration and efficient use of Colorado River water;
10 (3) resolve long-standing disputes and competing claims among Colorado River water users on terms that
11 are acceptable to all parties; and (4) improve water use efficiency in California by providing billions of
12 dollars to fund farm efficiency improvements in the Imperial Valley and ensuring a more reliable water
13 supply for San Diego County. These benefits weigh overwhelmingly in favor of approval. Moreover,
14 importantly, the SWRCB's approval of the Water Conservation and Transfer Project effectuates state law
15 and policy encouraging voluntary water transfers in general and this transfer in particular.

16 **III. THE SWRCB PROPERLY CONCLUDES THAT THE PROPOSED WATER**
17 **CONSERVATION AND TRANSFER PROJECT WILL NOT RESULT IN SUB-**
18 **STANTIAL INJURY TO ANY LEGAL USER AND WILL NOT UNREASONABLY**
19 **AFFECT FISH, WILDLIFE OR OTHER INSTREAM USES OF WATER**

20 As recognized by the Final EIR and the Draft Order, the SWRCB's approval of the Petition could
21 result in some unavoidable impacts on fish, wildlife or other instream uses. For example, the SWRCB's
22 concerns regarding water quality impacts from increasing concentrations of selenium in IID's drains are
23 justified. However, the SWRCB has correctly concluded that any such impacts are not "unreasonable."

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25 First, both IID and the SWRCB have taken the necessary measures to mitigate for identified
26 potentially significant impacts. In fact, through its Draft Order, the SWRCB has provided for significant
27 additional mitigation and monitoring above and beyond that already proposed by IID in the Final EIR.

28 Second, in approving the Petition, the SWRCB's Draft Order demonstrates that the SWRCB has

1 properly exercised its responsibility to balance the interests of Petitioners and the state with fish, wildlife
2 and other instream uses that may be impacted by the proposed Water Conservation and Transfer Project.
3 (WR Ord. 95-4, Dec. 1638; Draft Order, p. 47.) A potential injury to fish, wildlife or other instream uses
4 is not an “unreasonable” injury *unless* the balance tips in favor of those environmental interests. In this case,
5 not only are the potential environmental impacts greatly minimized, and in most cases are fully mitigated for,
6 but the state’s strong interest in promoting and facilitating water transfers in general, and this transfer in
7 particular (*see, e.g.*, SB 482), far outweigh the identified potential impacts. As discussed above, this
8 proposed project, like no other, has the potential of affecting water supply availability for the entire state.
9 The benefits that will flow from successful implementation of the proposed Water Conservation and
10 Transfer Project are numerous and of great importance. Thus, the potential impacts are not “unreasonable”
11 within the meaning of Water Code section 1736 and cannot be the basis for SWRCB denial of the Petition.

12 Lastly, while there are concerns that the proposed project could foreclose restoration of the Salton
13 Sea, the transfer should not be held hostage to a hoped-for, but speculative, restoration project. Proposals
14 for possible restoration of the Sea change daily, and none is without controversy and its own share of
15 potentially significant environmental impacts. Moreover, as the SWRCB correctly notes in its Draft Order,
16 there is no guarantee that restoration will ever occur. Substantial evidence supports, and no party disputed,
17 the fact that the Salton Sea will die of its own accord, irrespective of the SWRCB’s approval of the
18 Petition. Thus, Petitioners should be held responsible for mitigating the impacts of the Water Conservation
19 and Transfer project alone, *not* ensuring the continued existence of the Salton Sea, much less the success
20 of the restoration project.

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1 **IV. SB 482'S "NO MATERIAL INCREASE IN SALINITY" STANDARD PROVIDES THE**
2 **PROTECTION AND FLEXIBILITY NECESSARY TO ACCOMMODATE BOTH THE**
3 **CONSERVATION AND TRANSFER PROJECT AND FUTURE RESTORATION**

4 The Final EIR provides a Habitat Conservation Strategy approach to mitigate for the biological
5 impacts associated with reduced inflows to the Salton Sea resulting from the proposed Water Conservation
6 and Transfer Project (SSHCS). That strategy is set forth in an Habitat Conservation Plan (HCP) prepared
7 pursuant to CESA and the ESA. Through this HCP, IID proposed to commit to certain management and
8 other actions to mitigate for any potential "take" of threatened or endangered species covered by either the
9 CESA or ESA. The HCP would allow for the issuance of an incidental take permit pursuant to Section
10 10 of the ESA. Generally, but with a few exceptions, the proposed SSHCS would require IID to
11 discharge water to the Salton Sea for the purpose of mitigating the impacts of the proposed project on
12 salinity on the Sea for a period of time projected to approximate the baseline life expectancy of the tilapia
13 fishery – i.e., maintaining salinity levels at or below 60 ppt until 2023.

14 However, having correctly recognized that if the cost of mitigation is too high, IID may be unwilling
15 to implement the proposed project, thereby resulting in a loss of the benefits of the transfer and potentially
16 severe water supply implications for the entire State, the SWRCB Draft Order imposes an alternative
17 mitigation measure for the Salton Sea – maintaining baseline salinity levels, as outlined in the SSHCS, for
18 15 years. (Draft Order, p. 49, § 10.5.)

19 In imposing this mitigation measure for the Salton Sea, the SWRCB is, expressly, guided by SB
20 482. (Draft Order, p. 48.) SB 482 reflects an accommodation of both the State's interest in facilitating
21 this transfer and thereby allowing for implementation of the QSA and ultimately ensuring a soft landing
22 through implementation of the ISG during the interim period during which the state satisfies its commitment
23 to reduce its water use from the Colorado River to 4.4 mafy, and restoration of the Salton Sea. (See SB
24 482, ch. 617, § 1(c), (g).) The Draft Order articulates the SWRCB's intention to implement, through
25 imposition of this mitigation measure, a mechanism that both mitigates for the proposed project's potential
26 impacts on the Salton Sea, thereby preserving the feasibility of restoration for a reasonable time, and
27 ensures that the transfer will go forward.

28 However, while SDCWA agrees that the reasoning and justification behind the required mitigation

1 measure is right on point, SDCWA believes that the measure itself does not perfectly capture the
2 legislature’s intent to facilitate this transfer in particular and may even conflict with the specific mitigation
3 standard set forth in SB 482. Further, in practicality, the SWRCB’s mitigation measure, like the SSHCS
4 set forth in the Final EIR, may be sufficiently restrictive such that the cost of mitigation becomes too great,
5 thereby defeating the SWRCB’s, and the legislature’s, stated intent.

6 SB 482 contains an express standard for ensuring that impacts resulting from implementation of the
7 Quantification Settlement Agreement (QSA), which includes the Water Conservation and Transfer Project,
8 specifically the take of species designated as fully protected under state law, are mitigated in a manner that
9 is consistent with the state and federal interest in restoration of the Salton Sea. Specifically, SB 482
10 authorizes DFG, after consultation with the Department of Water Resources, to permit the take of species
11 resulting from implementation of the QSA, so long as DFG determines, among other things, “based on the
12 best available science, that the implementation of the Quantification Settlement Agreement during the first
13 15 years that the agreement is in effect (1) will not result in a material increase in projected salinity levels
14 at the Salton Sea, and (2) the agreement will not foreclose alternatives for reclamation of the Salton Sea
15” (SB 482, ch. 617, § 2(a), (c) (emphasis added).)

16 Primarily, the SB 482 standard is preferable over the SWRCB’s mitigation measure because it
17 provides IID with sufficient flexibility to allow for minor, i.e., not “unreasonable,” deviations from baseline
18 salinity projections, thereby potentially reducing the overall cost of mitigation and helping to ensure the
19 transfer will go forward. In fact, the SB 482 standard is entirely consistent with SWRCB’s responsibility
20 pursuant to Water Code section 1736 – it expressly balances Petitioners’, southern California’s and the
21 entire state’s interest in implementation of the Water Conservation and Transfer Project with the interests
22 of fish, wildlife and other instream beneficial uses at the Sea, specifically by ensuring the continued feasibility
23 of any restoration of the Sea, at least for a reasonable period of time.

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25 Second, the SWRCB’s alternative mitigation measure for the Sea unnecessarily binds IID to the
26 SSHCS, as described in the Final EIR. The SB 482 salinity standard requires a determination by DFG
27 of no material increase in projected salinity levels based on the “best available science.” Therefore, the
28 SWRCB and all interested parties can be assured that the salinity projections used to assess any impacts

1 are adequately grounded in the best science available, irrespective of whether that science is entirely
2 consistent with the baseline salinity projections contained in the Final EIR. While SDCWA knows of no
3 evidence that calls into question the projected salinity levels set forth in the Final EIR, SDCWA believes
4 that SB 482 standard is sufficiently protective of fish, wildlife and other instream uses and need not be tied
5 to the Final EIR.

6 Third, by linking the projected salinity level to the SSHCS, that is articulated through an HCP
7 prepared pursuant to Section 10 of the ESA, the SWRCB assumes that IID itself will be responsible for
8 implementing the measures required to mitigate for the proposed project's impacts on the Salton Sea. This
9 may not be the case. Petitioners' recent consultations with the state and federal resource protection
10 agencies suggest that mitigation of impacts on the Salton Sea pursuant to Section 2080.1 of the Fish and
11 Game Code (i.e., CESA) and Section 7 of the ESA could be a feasible alternative to the HCP approach.
12 In order to allow maximum flexibility, while ensuring no unreasonable injury to fish, wildlife and other
13 instream uses, the Salton Sea mitigation measure adopted by the SWRCB should not foreclose this
14 possibility.²

15 Lastly, while SDCWA recognizes that the SB 482 standard relates specifically to DFG's issuance
16 of a take authorization pursuant to relevant provisions of the Fish and Game Code, and therefore does not
17 constrain the SWRCB's authority pursuant to Water Code section 1736, the SWRCB's alternative
18 standard does create an opportunity for conflict between the two mitigation measures required. The
19 California Environmental Quality Act Guidelines recognize that when two public agencies approve a
20 project, deference to one agency with respect to one or more of the identified impacts may be appropriate
21 under certain circumstances. (14 C.C.R. § 15091(a)(2); KOSTKA & ZISCHKE, PRACTICE UNDER THE
22 CALIFORNIA ENVIRONMENTAL QUALITY ACT § 17.19 (2002 ed.) (describing measures for avoiding
23 conflicting mitigation measures between two public agencies with concurrent jurisdiction over a matter).)
24 In fact, consistent with this approach, the SWRCB routinely requires, as a condition of its approval,

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26 ² In fact, a Section 2080.1 and Section 7 approach may be preferred for all elements of the
27 HCP, not just the SSHCS. If the resource protection agencies permit mitigation for the proposed project
28 pursuant to these provisions, in lieu of an HCP pursuant to Section 10 of the ESA, such mitigation should
be sufficient for the SWRCB's purposes as well. Accordingly, SDCWA requests that the SWRCB amend
its Draft Order, specifically Section 10.10 and 10.11, and related discussions throughout the Draft Order,
to allow sufficient flexibility for this alternative approach.

1 acquisition of necessary approvals from a sister agency. (*See, e.g.*, Draft Order, § 10.16 (requiring IID
2 to obtain any necessary approvals under the Fish and Game Code and federal ESA prior to carrying out
3 the transfer).)

4 In sum, SDCWA requests that the SWRCB amend its Draft Order to require IID to mitigate for
5 impacts resulting from the SWRCB’s approval of the Petition by utilizing a salinity standard for mitigation
6 of potentially significant impacts to the Salton Sea that is substantially similar to that provided in Section 2(a)
7 and (c) of SB 482, in lieu of the mitigation measure currently included in the Draft Order.

8 Accordingly, SDCWA respectfully requests amendment of Sections 10.5, 10.6 and 10.7, and
9 related discussions throughout the Draft Order, to reflect the SB 482 standard. For example, Section 10.5
10 of the Draft Order, which contains the SWRCB’s mitigation measure relating to the Salton Sea, might be
11 redrafted as follows:

12 *Permittee shall obtain the Department of Fish and Game’s*
13 *determination, pursuant to Fish and Game Code section 2081.7,*
14 *based on the best available science, that the implementation of the*
15 *Quantification Settlement Agreement, of which the transfer is a part,*
16 *during the first 15 years that the agreement is in effect (1) will not*
17 *result in a material increase in projected salinity levels at the Salton*
18 *Sea, and (2) the agreement will not foreclose alternatives for*
19 *reclamation of the Salton Sea as summarized in Section 101(b)(1)(A)*
20 *of the Salton Sea Reclamation Act of 1998 (P.L. 105-372).*

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1 **V. THE SWRCB'S DESIGNATION OF THE ORDER IN THIS MATTER AS NON-**
2 **PRECEDENTIAL ENSURES THE CONTINUED SUPPORT OF ALL COLORADO**
3 **RIVER WATER USERS**

4 In light of the importance of the Water Conservation and Transfer Project to the success of the
5 QSA, the California Plan, the ISG, and thus to all of California, the Metropolitan Water District of Southern
6 California and the Coachella Valley Water District have agreed to withdraw their protest to the Petition on
7 the condition that the Order adopted in this matter, and all findings of fact and conclusions of law made
8 therein, be designated as non-precedential. The SWRCB's agreement to this condition ensures the
9 continued support of all Colorado River water rights holders, thereby facilitating implementation of the
10 Water Conservation and Transfer Project.³

11 Moreover, given the non-precedential nature of the Order proposed to be adopted in this matter,
12 together with the greater importance of this Water Conservation and Transfer Project to all of California,
13 SDCWA withholds further comment on those minor factual and legal findings contained in the Draft Order
14 with which it disagrees. These findings, when viewed in context of the urgency and greater importance of
15 the SWRCB's approval of the Petition are inconsequential and SDCWA does not wish to burden the
16 SWRCB or the other parties to these proceedings with these issues. Of course, SDCWA retains the right
17 to dispute any and all findings of fact and law made in the final Order to the extent such Draft Order, when
18 adopted, is made precedential or the Order adopted is substantially different than the Draft Order.

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25 ³ Despite the SWRCB's reference to SWRCB Order WQ 2001-05 (*see* Draft Order, p.
26 82, n.19), which decision appears to distinguish between the precedential effect of legal analyses made
27 within a SWRCB order, and the ultimate decision or outcome, SDCWA understands the SWRCB's Draft
28 Order to indicate that both the Order adopted in this matter, and all findings of fact and conclusions of law
made therein, whether of a policy nature or otherwise, shall be designated as non-precedential. To
eliminate any ambiguity in this respect, SDCWA requests that footnote 19 of the Draft Order be deleted
entirely.

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VI. CONCLUSION

The SWRCB has concluded that substantial evidence supports a finding that approval of the Petition will not result in substantial injury to any legal user of water and will not unreasonably affect fish, wildlife or other instream uses. On that basis, Petitioner SDCWA requests that the SWRCB adopt the Draft Order approving the Petition with those modifications described in parts IV and V herein.

DATED: October 11, 2002

Respectfully Submitted,

By [original signed]
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