

**PROTEST, OBJECTION, AND IN THE ALTERNATIVE,
PETITION FOR RECONSIDERATION OF
TEMPORARY URGENCY CHANGE ORDER**

TO THE STATE WATER RESOURCES CONTROL BOARD:

1. The San Joaquin River Exchange Contractors Water Authority, Central California Irrigation District, San Luis Canal Company, Columbia Canal Company and Firebaugh Canal Water District hereby Protest and Object, and in the alternative, Petition for Reconsideration of the Temporary Urgency Change Order to the Petition of the United States Bureau of Reclamation for the Central Valley Project and Department of Water Resources entered January 29, 2014 as modified on February 7, 2014, on the following bases:

A. The conditions of the order will operate to the injury of the Petitioners as lawful users of water;

B. The conditions of the order will operate to the injury of and have an unreasonable effect upon wildlife;

C. The conditions of the order are not in the public interest;

D. The order and the proceedings in execution and issuance of the order are not in accordance with law and the order is void and of no force or effect; and,

E. Such further grounds and evidence as shall be presented hereafter, and, including the attached Protest Brief.

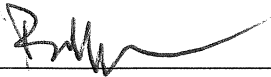
The objecting and protesting parties and parties seeking reconsideration request that the Urgency Order as amended be immediately rescinded. If such rescission is not

ordered a hearing is requested to consider the objections and protests of this Party and all other parties. Notice of this Protest and Objection, and in the alternative, the Petition for Reconsideration, has been served by mail upon Reclamation and the Department of Water Resources for the SWP.

Dated: February 28, 2014

MINASIAN, MEITH,
SOARES, SEXTON & COOPER LLP

By: _____



PAUL R. MINASIAN

**PROTEST BRIEF TO
STATE WATER RESOURCES CONTROL BOARD
TEMPORARY URGENCY CHANGE ORDER, AS AMENDED**

The San Joaquin River Exchange Contractors Water Authority, Central California Irrigation District, San Luis Canal Company, Columbia Canal Company and Firebaugh Canal Water District hereby Protest and Object, and in the alternative, Petition for Reconsideration of the Temporary Urgency Change Order to the Petition of the United States Bureau of Reclamation for the Central Valley Project and Department of Water Resources entered January 29, 2014 as modified on February 7, 2014, as follows:

- I. **An Urgency Change Petition under Water Code Section 1435 is limited to a Petition “to change the point of diversion, place of use or purpose of use from that specified in the permit or license”. The Petition filed did not request or place at issue changes in the water rights of the SWP and CVP. The Board itself may initiate and give notice of a hearing to modify the water rights to create a new priority for storage for fishery uses and prohibition of irrigation, refuge and municipal and industrial use in excess of 50 gallons per person, but notice and a hearing must be provided and it has not so been noticed. The conditions purported to be applied to the SWP and CVP water use exceed the jurisdiction of the Board through temporary change procedures and require a petition, noticed hearing and due process compliance, none of which has occurred.**

The Petition of the SWP and the CVP could not be clearer that the only request of the Projects was that the Delta outflow requirements and Delta gate closure requirement of the Water Quality Control Plan which are a condition of making export diversions and must be complied with in order to export water be relaxed for the month of February 2014.

The petition states:

...Reclamation and DWR request modification of D-1641 outflow requirement, commonly known as X2 criteria, to allow management of reservoir releases on a pattern that will conserve storage for later fishery protection and minimum health and safety needs. In addition, the request includes modifying the February closure requirement of the DCC gates as water quality and fishery conditions warrant and as restricted by specific monitoring of fish.

The Board could grant the Petition or deny it. However, the Board may not grant the waiver of water quality conditions on the condition that the Projects waive or give up water rights or change their purpose of use, including barring delivery of water to contractors of each Project except for water useful for the undefined “health and safety” needs.

As we point out hereafter, the SWRCB itself can notice proposed changes in the water rights of the State and Federal Projects (here, that no water be released and used from storage except apparently for fishery flows and regulation of water temperature for fish), but this urgency petition does not open all CVP and SWP water rights to new conditions and requirements or to wholesale orders transferring judgment of the operations of the Projects to the SWRCB staff. If that is the desire of the Board, the basic requirements of due process under the Federal and State Constitutions require that a Petition be filed by the SWRCB staff, who apparently have new priorities and plans for both stored and diverted water currently subject to water rights granted to those Projects and their legal users providing notice and an opportunity to protest. *Morgan v. United States* (1936) 298 US 468; 565 S.Ct. 906, 908; 80 L.Ed. 1288; *Morgan v. United States*

(1938) 304 US 1; 585 S.Ct. 373; 82 L.Ed. 1129. To further reinforce the failure to comply with due process requirements, 23 CCR 780(a) allows continuing authority over water rights but states that "...no action will be taken pursuant to this paragraph unless the Board determines, after notice to affected parties...". After providing for those due process procedures, and if the Board revokes the Projects' current authority to store water or use water both North and South of the Delta, the Board may elevate and implement its conception of the highest and best use of water or reasonable water use...after compensating for the use of facilities and the damages caused thereby, if any.

The SWRCB was asked by Reclamation and the State to relax requirements for maintaining water quality related to Delta outflow and Delta gate closure for a period of 28 days in February. A discussion of what uses water made available by those adjustments would be applied to by the Projects is not authority for a water project governance coup. After notice and hearing, the Board can approve or deny that petition or condition it, and the Projects can determine whether to accept the conditions or to refuse the conditions attached to the adjustments and continue to waste water to the ocean in attempting to meet the Board's own unrealistic salinity requirements. However, the Board may not unilaterally alter existing water rights on the Project, harming the Protestants who are legal users of water, without notice and a hearing. A new notice and full hearing procedure is required to restrict use of stored water already authorized for beneficial use purposes and not yet released into the Delta or to alter and restrict the purposes of use of water pumped at the Export pumps by the Projects to some narrow interpretation of the phrase "health and safety."

II. The Board’s attempt to create additional water right operating conditions upon the use of stored or diverted water through an Urgency change in Water Quality Plan standards is void. Section 1435 provides no such authority. Judge Robie in the State Water Resources Control Board cases (136 Cal.App.4th (2006)) prescribed the means for making temporary changes in a Water Quality Control Plan. Reasonable conservation and operations of the CVP and SWP should continue while the Board considers meritorious changes in a Water Quality Control Plan that has proven by repeated events not to be sufficiently flexible.

The Decision in the *SWRCB Consolidated cases*, 136 Cal.App.4th 674 (2006) included a challenge to the SWRCB Order to change through water rights Decision 1641 the terms of the 1995 Bay Delta Water Quality Control Objectives in order to “accommodate” the Vernalis Adaptive Management Plan. The Court’s Decision rejected a water right order as a means of modifying a Water Quality Control Plan. This Urgency Order is unlawful for this very reason. Whether labeled as an “experiment” or a “delayed implementation” of a Water Quality Control Plan, the Board has no authority to change the Water Quality Control Plan requirements except in accordance with the Court’s ruling in that case found at page 233-4, which states:

...such an alteration could be accomplished only through a properly noticed and conducted regulatory proceeding. (See §13244.) ...The trial court’s decision rests on the conclusion (with which we agree) that when a water quality control plan calls for a particular flow objective to be achieved by allocating responsibility to meet that objective in a water rights proceeding, and the plan does *not* provide for any alternate, experimental flow objective to be met on an interim basis, the decision in that water rights proceeding must fully implement the flow objective provided for in the plan. The

guiding principle is that the Board's power to act in a water rights proceeding commenced to implement a water quality control plan is constrained by the terms of the plan it is implementing.

The State Water Resources Control Board argued on pages 31 through 32 of the SWRCB Consolidated Case decision that it had the power under its broad water right authority and could implement changes affecting water quality by conditioning or altering water right terms and conditions. The Court of Appeal rejected the SWRCB contention and the procedure the SWRCB was attempting to implement and is again attempting to use in this instance:

In conclusion, we agree with the trial court that by adopting the San Joaquin River Agreement flow regime in lieu of the Vernalis pulse flow objective in Decision 1641, even on a temporary basis, the Board failed to fully implement the 1995 Bay-Delta Plan and instead accomplished a de facto amendment of that plan without complying with the procedural requirements for amending a Water Quality Control Plan. In so acting, the Board failed to proceed in the manner required by law and thus abused its discretion.

It may seem anomalous that a protest and complaint is being made by legal users of water who could benefit from the reduction in Delta outflow. The Urgency Action is an unlawful alteration to a Water Quality Control Plan which conserves water in this serious dry period and corrects a serious and wasteful error and myth that fish species benefit from throwing more water at them. In fact, under the circumstances, the reduction in Delta outflow and the alteration of Delta Gate operations is all required, reasonable and in accordance with public interest, but the error and fault is in the SWRCB attempting to condition the saving upon storing both the savings and all other stored water for a higher

imagined purpose without revoking the water rights of the State and Federal Projects. However, it is never “anomalous” to require government officials to comply with due process requirements and to consider the effects of those potential actions carefully.

The same result can be reached by the Board under the Governor’s emergency declaration with notice, altering the Water Quality Control Plan to provide greater flexibility to the Project operations without the improper attempt to take over operations of the SWP and CVP systems and alter water rights. The assumption upon which the current Water Quality Control Plan is based that even in severe drought conditions, more water released for salinity control and fish but no Delta gate opening is the “better option” is simply wrong and is an error which can now be seen clearly by facts and events.

Logic and benefits in saving Delta outflow water do not, however, expand the jurisdiction of the Board to limit diversions at the Export Pumps to 1,500 cfs, or to specify what the 1,500 cfs may be utilized for by the Project operators who already hold water rights for that use. Nor may the Board add restrictions to use of the water already made subject to water rights and in storage without a full noticed proceeding and hearing. Most importantly, an emergency does not grant the Board authority to provide for restrictions upon deliveries of stored water or direct diversion of water rights granted to the Projects until and unless the water rights are taken from the Projects or modified prospectively. The Governor can order the acquisition of control of the SWP and perhaps even the Federal CVP if he is convinced the SWRCB staff can do a better job, but he has not done so. (See Section VII hereafter for a discussion of Governor authority and lack of

delegation of taking power to the Board). Advice regarding operations can be provided by the SWRCB staff and Board Members, but this order goes far beyond advice.

The origin of the problem demonstrates the solution. After the SWRCB case Decision in 2006, the SWRCB amended the Water Quality Control Plan. It gave the Executive Director authority to vary the 7,100 cfs but constrained the Staff judgment to certain runoff indexes and amounts which are simply not present in the current low flow conditions after two years of draining storage for perceived fishery benefits. As to the Delta Gate closure terms, no authority was given in the Water Quality Control Plan to vary from closure in the period December through May. Many parties commented and recommended more flexibility, but the atmosphere and erroneous presumption that the Endangered Species Acts and the edicts under biological opinions in some way preempt California water prevailed in the SWRCB adoption of the Plan.

The authority to provide flexibility in the Water Quality Control Plan can be gained by the Board if they wish to hold an evidentiary hearing to include variability in that Plan, but there is nothing in the Temporary Urgency Petition relating to water rights permits which allows that proceeding to be utilized to short cut the process or use the process as the SWRCB staff has done here to attempt to take over operation of the Federal and State water supply projects and storage.

In fact, the Urgency Order terms relating to water rights exceed all jurisdiction and authority of the Board. There is no Urgency process for consideration of changes in the Water Quality Control Plan (Water Code Section 13240, 13245), and the Urgency

changes requested pursuant to Section 1435 of the Water Code by the State and Federal Project requested none of the changes in water rights purportedly ordered except for the 1,500 cfs pumping limit when the relaxation of Delta outflow and gate closure was in effect.

23 CCR 791(e) may be cited for authority for the Urgency Order to include terms relating to water rights of the Projects. However, the section does not excuse due process notice to legal users of water rights (required by 23 USC 780 and 782), the right to a hearing, and the identification of the party requesting the change in the water rights. Here, if the SWRCB staff wishes to petition for changes in the water rights or the NMFS or USFWS under the ESA wishes to petition to include some concept of “health and safety” use of water, a petition can be filed, a hearing held, and a clear and explicit identification of the government agency that decimated water use by industry, commercial users, refuges and agriculture in 2014 will be identified.

III. Does the Federal or State Endangered Species Act Biological Opinion’s adoption of the concept of “health and safety” use of water in any manner authorize the Board’s Urgency Order?

“Health and safety” may be defined in Biological Opinions by USFWS and NMFS as limited to domestic use at 50 gallons/day/person (no landscaping or industrial or commercial use) for sanitation and fire flow, but there is no federal regulation, Court case or statutory authority for such a limitation under California or Federal law.

Those Biological Opinions are obviously under Court-ordered revision processes and therefore hold little authority.

Further, there is no provision of the Federal Endangered Species Act which states that the Federal ESA preempts California water law. The Supreme Court requires harmonizing the ESA requirements with Congress' other legislative directives, including the direction that the CVP create agricultural production for the nation. *National Assn. of Homebuilders v. Defenders of Wildlife*, 551 US 644; 127 S.Ct. 2518; 1168 L.Ed.2d. 467 (2007). Nor is the principle of the primacy of State water rights in the operation of water projects "preempted" by the Federal ESA. CVPIA Sec. 3406(b) requires that Reclamation operate the CVP to the requirements of state water law and the ESA but does not appoint the SWRCB as determiner of ESA requirements or provide that NMFS and USFWS can operate the CVP through its interpretation given to the SWRCB. We are all aware of the "interrorem" threats under the ESA to file felony charges and to seek fines by NMFS and USFWS staff and environmental groups, but Congress and the President have not to this date adopted any law specifying that California should allow bureaucrats in NMFS or USFWS to determine water use and allocations in California.

Further, upon what authority or record available before adoption of this Urgency Order was it determined that "health and safety" does not include a coherent and orderly society? Is a lack of food at affordable prices not important or critical in "providing" health and safety? Is widespread unemployment an element in social disorder and in turn to be evidenced as to be avoided as a part of preserving "health and safety?" Neither the

State Board or the Projects or the public have been allowed to participate in any public hearings in regard to what it takes to have a “healthy and safe” community in terms of water supplies in a drought. We would look forward to such hearings but until they are noticed and occur, this Board and its staff should not provide for those determinations.

As Judge Oliver Wanger stated in the *Consolidated Delta Smelt* cases, 717 F.Supp. 2d 1021, 1071 (2010), for which the EIS and Biological Opinion has still not been revised or unveiled:

No party has suggested that humans and their environment are less deserving of protection than the species.

The Court further concluded on page 1071 of that Decision:

6. Congress created public expectations in the Amended Reclamation Act by instructing Reclamation to contract for water service to hundreds of public entity water service providers that supply water to millions of people and thousands of acres of productive agricultural land....Federal agencies have acted arbitrarily and capriciously in formulating Component 2, an RPA (reducing pumping). Federal defendants have failed to comprehensively and competently evaluate whether RPA alternatives can be prescribed that will be mutually protective of all statutory purposes of the Projects.

IV. **The SWRCB is impermissibly placing itself in the position of ordering reductions in water use under existing water rights and becoming a surrogate for the payment of damages which will be owed for taking of water under the ESA for imagined higher purposes. The NMFS and USFWS should be given the opportunity to determine whether they wish to expose their agencies and pay the damages and costs to provide for more water in storage or for different operations to advance the interests of the ESA. The SWRCB has no authority to incur that liability for the State of California. The Governor's order does not make that election for the tax payers of the State of California. This Board should not allow the historic vagueness of the Federal and State Endangered Species Acts to project it into hundreds of millions of dollars of monetary liability when the Project operators are fully capable of protecting the species as well as the beneficial use of water, and are doing so.**

Here, the SWRCB in a void order has adopted language from the biological opinions of NMFS and USFWS regarding “health and safety” and now seeks to approve NMFS and USFWS’ interpretation and require curtailment of use of stored water, massive operational changes in the SWP and CVP with what small amounts of water are available. This policy of “saying whatever NMFS and USFWS tell us is health and safety use” is dangerous and wasteful. Let the party who is responsible for the costs of their order decide what is cost effective and important so the taxpayers pay directly for the costs determined to be appropriate by the Federal and State Constitutions.

The Court of Claims in *Tulare Lake Water Storage Basin v. United States* case arising from similar events in the Delta utilizing the authority of the Federal Endangered Species Act, 59 Fed Cl. 246 (2003) to take or restrict water use stated at page 254:

This fact, we believe, confers liability for the April 1992 pumping reductions squarely on defendant. While we are unable to charge the federal government with actions the state has taken of its own accord, we are equally unwilling to allow it to avoid responsibility for measures that, though initially implemented by the state, are nonetheless subsequently

incorporated into the federal government's ecological and hydrological regime. In relying on the status quo to achieve its objectives, in other words, NMFS essentially ratified these procedures and, in doing so, incurred liability for them. The issuance of the February 14, 1992, biological opinion, bolstered by the more explicit April 27, 1992, amendment, put the state on notice that its actions were directly subject to restrictions under the ESA. We thus conclude that water losses from April 3-27, 1991, are properly identifiable with federal action and are therefore compensable under the *Fifth Amendment*.

Allowing the USFWS and NMFS, rather than the SWRCB, to act directly and to accept responsibility for compensation to pay the damages to make the decision of whether orders should be issued under the ESA to require a prohibition of water use, reservation of water in storage for 2015 for fish temperature and water releases, and drying up hundreds of square miles and wildlife refuges in order to protect cold water reserves for 2015 salmon runs or to reserve water for other species, is the appropriate action. The Governor's Emergency Proclamation issued January 17, 2014 did not state that the SWRCB was authorized to take or acquire rights or rights to water without due process for the purposes of protecting species. (See discussion in Section VII hereafter.)

Section 8 of that Proclamation stated:

The Water Board will consider modifying requirements for reservoir release or diversion limitations where existing requirements were established to implement a water quality control plan. These changes would enable water to be conserved upstream later in the year to protect cold water pools for salmon and steelhead, maintain water supply and improve water quality.

“Modification” of release or diversion limits which were established as part of a Water Quality Control Plan is not restricting the use of the 1,500 cfs or 3 million acre feet of stored water and does not mean establishing new rights to water or taking away existing rights. The Governor is quite capable of issuing supplementary proclamations if he wishes the Board to incur the financial liability and economic losses for the State of California of terminating the core agricultural and industrial use of water which will form the basis for revival when this drought is over.

V. **This Urgency Order is void and should be rescinded because it was not adopted by a Board Member or by the Deputy Director of Water Rights. The Executive Director is not a person delegated to exercise this power under the Board Rules.**

Resolution 2012-0029 delegates to the Deputy Director of Water Rights the authority to act on petitions for temporary urgency changes (Res. 2012-0029 at ¶ 4.4.1) or to a Member of the State Board may so act. Mr. Howard had no authority to act, and therefore the order is void. The delegation of Res. 2012-0029 further states: “If the State Water Board receives any objections to a petition for a temporary urgency change, the Deputy Director shall refer the matter to the Executive Director for action under section 2.2.” (*Id.*)

“[A]ction under section 2.2” appears to mean action *by an individual member of the Board*. Section 2.2 delegates to individual Board members the authority to:

Act on a petition or request for renewal of a conditional temporary urgency change pursuant to chapter 6.6

(commencing with section 1435) of part 2 of division 2 of the Water Code. This delegation includes the authority to:

2.2.1. Hold a hearing on any petition or request for renewal made pursuant to chapter 6.6.

2.2.2. Make the findings required by chapter 6.6 as conditions precedent to the issuance or renewal of a temporary change order.

2.2.3. Make any findings required by CEQA as conditions precedent to the issuance or renewal of a temporary change order. (Res. 2012-0029 at ¶ 2.2.)

It appears that a referral by the Deputy Director to the Executive Director is meant to put the contested petition before a member of the Board, since nowhere does the delegation allow the Executive Director to act in the place of an individual Board Member. The Resolution does not include a delegation to the Executive Director to take the actions described in Section 2.2.

The Executive Director specifically cited ¶ 4.4.1 as the authority for issuing the Urgency Order. (*See Revised Urgency order at 7 & n.4 (attached).*) He stated that “Resolution 2012-0029 delegates to the Board Members individually *and to the Executive Director* the authority to hold a hearing, if necessary, and act on a temporary urgency change petition.” (Revised Urgency Order at 7. Emphasis added.)

The Executive Director apparently believes that the directive to the Deputy Director to “refer” a contested petition for a temporary urgency change “to the Executive Director for action under section 2.2” was an implied delegation of authority to the Executive Director to act on the contested petition in the place of a Board member.

However, ¶ 2.2 is a delegation of authority to *individual Board members*. It is unlikely that a Court will conclude the resolution contained an implied delegation to the Executive Director of such an important duty: The resolution is titled “Delegation of Authority to State Water Resources Control Board Members Individually and to the Deputy Director for Water Rights.” (Emphasis added.) Nowhere does the resolution purport to delegate any authority to the Executive Director.

This Urgency Order should be immediately rescinded and a more solid “springboard” for the SWRCB taking over operations of the State and Federal Water Projects which are paid for by those water users should be found...if one exists. There is no basis for validation of this order.

VI. The Urgency Order is subject to challenge. The San Joaquin River Exchange Contractors have standing as legal users of water and are entitled to the procedural and substantive protections of the “no-injury” rule of the California Water Code as legal users of water as well as members of the public protected by the public interest.

If the SWRCB questions whether Protestant San Joaquin River Exchange Contractors Water Authority, who are entitled under the Second Amended Exchange Contract to receive water from the CVP or in certain circumstances from their water rights on the San Joaquin River, are legal users of water, the decision in the *Bay Delta Consolidated Cases* 136 Cal.App.4th 674 (2006) conclusively establishes their standing. Justice Robie declared:

If the permit holder seeks the Board’s permission to change the purpose of use that provided the basis for the acquisition

of its permit in the first place, there is no reason the persons who, through contracts with the permit holder, actually put the water to the beneficial use sought to be changed should be precluded from asserting to the Board that the change will operate to the injury of their rights, simply because those rights derive from a contract. (Page 70.)

VII. The Governor's Proclamation did not delegate the authority to take property or water rights.


The provisions of the Government Code providing for the Governors' actions permitted to be taken in a state of emergency (Government Code Sec. 8655-8625, *et seq.*) declared by the Governor do not automatically give the State Board power to rescind or amend issued water rights or take property. Section 8657 requires that the Governor direct through rules and regulations which rights, permits and authorities are to be taken, and which property he wishes to commandeer, take and pay compensation for. Clearly, the Proclamation of January 17, 2014 included no such authority being delegated to the SWRCB regarding the CVP facilities or its water rights. The Governor should be given the privilege of deciding this question.

Respectfully submitted,

MINASIAN, MEITH,
SOARES, SEXTON & COOPER, LLP

By: 

PAUL R. MINASIAN

By: 

PETER C. HARMAN
For the San Joaquin River Exchange Contractors
Water Authority, Central California Irrigation District,
San Luis Canal Company, Columbia Canal Company
and Firebaugh Canal Water District

PROOF OF SERVICE

I, Denise Dehart, declare,

I am employed by the law firm of MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP. My business address is 1681 Bird Street, Post Office Box 1679, Oroville, California 95965-1679. I am over the age of 18 years and not a party to this action.

On February 28, 2014, I served the following document(s) set forth below in the manner indicated:

(X) **Service by Mail (Deposit)**: By enclosing a copy in an envelope addressed as shown below and depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.

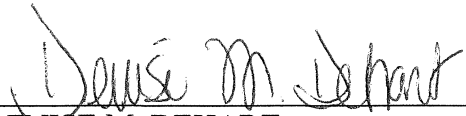
Document Served: **PROTEST, OBJECTION, AND IN THE ALTERNATIVE,
PETITION FOR RECONSIDERATION OF TEMPORARY
URGENCY CHANGE ORDER
PROTEST BRIEF TO STATE WATER RESOURCES
CONTROL BOARD TEMPORARY URGENCY CHANGE
ORDER, AS AMENDED**

Persons Served:

For the United States Department of the Interior, Bureau of Reclamation:
David Murillo, Regional Director
United States Department of Interior, Bureau of Reclamation
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For the State of California, Department of Water Resources:
State of California, Department of Water Resources
Mark Cowin, Director
1416 Ninth Street, Room 1115-1
Sacramento, California 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on February 28, 2014, at Oroville, California.



DENISE M. DEHART