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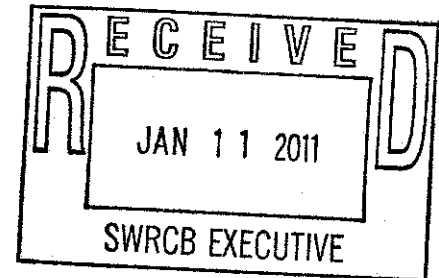
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January 11, 2011



Via electronic and U.S. mail

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Comment Letter – 01/18/11 Board Workshop: Woods CDO

Dear Ms. Townsend:

This letter is submitted in regard to the State Water Resources Control Board's ("SWRCB's") draft Cease and Desist Order ("CDO") issued on December 14, 2010, against Woods Irrigation Company ("Woods") for threatened violation of the prohibition against the unauthorized diversion or use of water ("draft CDO"). The draft CDO was issued pursuant to the SWRCB's authority under Water Code sections 1052 and 1831. Woods contested the proposed order on the grounds that the SWRCB lacks jurisdiction to determine pre-1914 appropriative rights and riparian rights, among other arguments. This firm represents numerous pre-1914 appropriators and riparians around the state and is therefore interested in the SWRCB's authority with respect to these water rights. As detailed below, we believe that the draft CDO goes too far in ordering monitoring and reporting requirements against pre-1914 appropriators or riparians.

The draft CDO concludes that the SWRCB has authority to determine the validity of claimed riparian and pre-1914 rights to the extent necessary to prevent unauthorized diversion or use of water. In addition, without further explanation or citation to any authority, the draft CDO concludes that the SWRCB may also "impose monitoring and reporting requirements to the extent necessary to ensure that Woods complies with the cease and desist order." (draft CDO at p. 18.) The ordering section of the draft CDO requires Woods to provide a Monitoring Plan for approval that includes provisions for monthly record-keeping of the amounts and rates of water diverted and delivered, installation of measuring devices and meters, and an instruction manual or other identification of the process used by Woods's employees to routinely measure diversions and deliveries and to maintain measuring devices. We believe that these monitoring

and reporting requirements go beyond conditions imposed in prior SWRCB CDOs against pre-1914 appropriators and riparians, and are prohibited by Water Code section 1831(e).

Prior SWRCB Orders Issuing CDOs to pre-1914 appropriators and riparians

The draft CDO cites four orders as examples of the SWRCB's consistent exercise of its authority to determine the validity of pre-1914 and riparian rights to the extent necessary to prevent unauthorized diversion or use of water. (draft CDO at pp. 16-17.) Only one of the four orders, Order WR 2001-22, addressed the SWRCB's authority to impose reporting requirements on a pre-1914 appropriator. In Order WR 2001-22, the SWRCB required a report setting forth the legal basis for certain water deliveries, including "proof of the nature of the claimed rights, when they were initiated and perfected and for what amounts and purposes, the chain of title for each right, and proof that the rights had been maintained through continuous diversion and use." (Order WR 2001-22 at p. 25.) The reporting requirement in Order WR 2001-22 was limited to proof of the validity of the water right, not the future exercise of the water right. Indeed, Order WR 2001-22 found that SWRCB jurisdiction to require reporting extends only "to the extent necessary to ascertain whether [the] water use is covered by a valid pre-1914 appropriative water right." (*Id.*)

One of the four orders cited in the draft CDO, Order WR 2004-0004, did not impose any monitoring or reporting requirements. The remaining two orders, Order WR 2006-0001 and Order WR 2009-0060, imposed reporting requirements without citation to authority, and the requirements were not contested in those proceedings. Moreover, in those latter Orders the appropriators were permitted to temporarily continue diverting in excess of the water rights as determined by the SWRCB, and the monitoring and reporting requirements were imposed in conjunction with a schedule to bring the diversions into compliance with the water rights.

Furthermore, at the time these prior orders were issued, pre-1914 appropriators and riparians were not legally mandated to file Statements of Water Diversion and Use ("SWDUs"). Water Code section 5100, et seq. was amended in 2010 to make SWDUs mandatory for most pre-1914 appropriators and riparians. Thus, the SWRCB no longer has any need to require monitoring and reporting beyond what is already required to be reported in SWDUs.

Water Code Section 1831(e)

Water Code section 1831(e) limits the scope of the SWRCB's enforcement authority to issue CDOs against water users holding riparian or pre-1914 water rights. Section 1831(e) states that the SWRCB is not authorized "to regulate in any manner, the diversion or use of water not otherwise subject to regulation under this part." The reference to "this part" in section 1831(e) is to Part 2 of Division 2 of the Water Code, section 1200 through section 1851, governing the SWRCB's authority to issue and regulate appropriative water rights permits and licenses. The monitoring and reporting requirements imposed in the draft CDO are a manner of regulation not authorized.

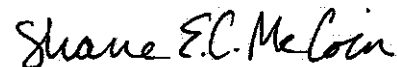
January 11, 2011

Page 3

In addition, the Water Code's requirement for most pre-1914 appropriators and riparians to submit SWDUs is within Part 5.1 of Division 2. (Water Code §§ 5100, et seq.) Therefore, while the SWRCB may require information regarding the exercise of riparian and pre-1914 water rights pursuant to sections 5100, et seq., monitoring and reporting is not an obligation that can be imposed pursuant to the SWRCB's enforcement authority.

Thank you for your time and attention to our comments. We appreciate the opportunity to comment on the draft CDO. If you have any questions regarding our comments, please do not hesitate to contact the undersigned.

Sincerely,

A handwritten signature in black ink that reads "Shane E.C. McCoin". The signature is written in a cursive style with a clear, legible font.

Shane E. C. McCoin