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March 3, 2014

VIA U.S. MAIL AND E-MAIL

Michael Buckman, Senior Environmental Scientist  
Hearings Unit Chief, Division of Water Rights  
State Water Resources Control Board  
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Sacramento, CA 95812-0100  
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**RE: Protest and Objection to Temporary Urgency Change Order  
for the Central Valley Project and State Water Project**

Dear Mr. Buckman and Members of the Board:

This protest and objection letter submitted by Grassland Water District and Grassland Resource Conservation District (“GWD”) follows and incorporates our previous comment letter dated February 17, 2014, and oral comments provided at the Board’s February 18, 2014 public workshop, regarding the January 31, 2014 Board Order, as modified (“Order”), approving a Temporary Urgency Change Petition (“TUCP”) filed by the California Department of Water Resources (“DWR”) and United States Bureau of Reclamation (“Reclamation”).

It is our understanding that Board staff is recommending a narrow interpretation of the Delta diversions that would qualify as meeting the “health and safety” objectives of the Board’s Order. We strongly believe that this interpretation is both at odds with Reclamation’s intent when submitting the TUCP, and would also result in disastrous, irreparable injury to public trust wildlife resources.

March 3, 2014

Page 2

Accordingly, GWD protests and objects to the proposed interpretation of the TUCP and Order.

The Board must institute public proceedings, and must make statutorily required findings, before it may curtail Reclamation's diversions from the Delta for wildlife refuge purposes without Reclamation's consent. An overly narrow interpretation of Reclamation's "bare minimum" water export requirements is contrary to long held assumptions that are incorporated into Reclamation's operating and water forecasting models, the Biological Opinions that authorize Delta pumping under the Endangered Species Act, and the Board's own orders and responsibilities.

**1. Reclamation did not petition the Board for a curtailment of diversions to refuges**

As explained in the February 14, 2014 report submitted to the Board by Reclamation and DWR, it has long been understood that there is a bare minimum pumping rate from the Delta of 1,500 cfs, referred to in shorthand as the "minimum health and safety level for export pumping," and that this minimum level includes water needed to meet legally required deliveries to Central Valley refuges:

"The Board Order restricting deliveries to SWP and CVP export contractors to health and safety needs could be read as inconsistent with the long understanding that the minimum health and safety level for export pumping is a combined 1,500 cfs, as the water pumped at those levels is needed to satisfy the pumps' physical constraints, and, importantly, refuge supplies off the DMC and San Luis Canal. Refuge deliveries are a legal requirement of the Central Valley Project Improvement Act, yet a strict reading of the Board Order would prevent any of the export water to be used for refuge supply as the refuges are CVP contractors who receive water exported from the Delta. *An operation in strict compliance with this provision of the Board Order is impractical and is not consistent with safe operation of the facilities.*" (Emphasis added.)<sup>1</sup>

This statement in the joint Reclamation/DWR report is consistent with Reclamation's TUCP application submitted on January 29, 2014, which stated that

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<sup>1</sup>[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/docs/tucp/report\\_health\\_safety\\_exports.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/report_health_safety_exports.pdf), p. 4.

the “sustainable level of 1,500 cfs... [for] exports for health and safety is recognized in the USFWS Delta Smelt Biological Opinion for CVP and SWP Operations on page 296.”<sup>2</sup> Reclamation’s position that refuge supplies are included in the minimum health and safety diversion level is expressly supported by the 2008 Biological Opinion. The USFWS Biological Opinion determination cited by Reclamation provides:

“In order to allow the CVP/SWP to provide health and safety needs, critical refuge supplies, and obligation to senior water rights holders, the combined CVP/SWP export rates will not be required to drop below 1,500 cfs in [multiple dry-year] circumstances.”<sup>3</sup>

All parties have assumed that Reclamation’s 1,500 cfs minimum pumping level includes pumping to meet the baseline critical water requirements of refuges. There is no evidence that Reclamation had any different intention when it submitted the TUCP. This fact is further reinforced by Reclamation’s February 14th report and its initial water allocation of a (historically low) 40% initial Level 2 water allocation to refuges.<sup>4</sup> The Board is not legally authorized to “order” a different change than that sought by Reclamation in the first place, and certainly not without first providing public notice and a hearing.

It should be noted that the Biological Opinions also consider deliveries to senior water rights holders as part of the 1,500 cfs minimum baseline. All of the San Joaquin Valley refuges who receive water from Reclamation rely on the water delivery canals of the San Joaquin Valley Exchange Contractors in order to receive local delivery of their water supplies. Without minimum baseline water deliveries to the Exchange Contractors, there would also be substantial physical limitations for moving needed water to the refuges.

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<sup>2</sup> [http://www.swrcb.ca.gov/waterrights/water\\_issues/programs/drought/docs/tucp/bd\\_tucp.pdf](http://www.swrcb.ca.gov/waterrights/water_issues/programs/drought/docs/tucp/bd_tucp.pdf), p. 15 of 66.

<sup>3</sup> [http://www.fws.gov/sfbaydelta/documents/SWP-CVP\\_OPs\\_BO\\_12-15\\_final\\_OCR.pdf](http://www.fws.gov/sfbaydelta/documents/SWP-CVP_OPs_BO_12-15_final_OCR.pdf), p. 296.

<sup>4</sup> <http://www.usbr.gov/mp/PA/water/> (as explained in GWD’s previous letter to the Board, this constitutes approximately 25% of full refuge water supply needs, because Level 2 water deliveries make up only two thirds of the refuges’ full water demands).

**2. The Board has made no findings and presented no evidence that a narrow interpretation of its Order would not unreasonably affect wildlife**

The Board cannot grant a TUCP that will unreasonably affect wildlife.<sup>5</sup> As explained in our previous letter, the refuges of the Central Valley provide the last remaining critical mitigation habitat for internationally protected migratory waterfowl and for state and nationally protected sensitive species. Terminating the relatively small amount of water exported for refuge use in the San Joaquin Valley will have an unreasonable and irreparable adverse effect on these wildlife species. Migratory wildlife patterns established over the millennia and the habitat of existing populations of sensitive resident species cannot be relocated or altered. Even with Reclamation's 40% Level 2 water allocation to refuges, there is a grave risk of disease outbreaks and significant wildlife mortality. The Board not only has a statutory responsibility to consider and avoid adverse wildlife impacts when granting a TUCP, but it also has a public trust responsibility.<sup>6</sup> A Board order that precludes Reclamation from making these minimum refuge deliveries would almost certainly result in an ecological catastrophe.

**3. Curtailing deliveries to refuges would violate the "no take" provision of both the Order and the federal and state Endangered Species Acts**

The Board's Order prohibits actions that would result in "take" of sensitive wildlife species. Further reductions in exports to refuges would likely lead to a "take" of the last known population of giant garter snake in the western San Joaquin Valley, which resides in the State-owned Volta wildlife area within GWD. As explained in GWD's prior comment letter, in addition to the giant garter snake, there are numerous other threatened and listed species that depend upon the Central Valley refuges for survival.

Furthermore, the Biological Opinions under which the CVP and SWP currently operate presumed that Delta exports would not fall below 1,500 cfs, and that this minimum export level would include deliveries of "critical refuge

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<sup>5</sup> Water Code § 1435(b)(3).

<sup>6</sup> *National Audubon Society v. Superior Court Alpine County* (1983) 33 Cal.3d 419, 446 (the Board has an "affirmative duty" to consider the public trust doctrine when allocating water and it must protect public trust resources "whenever feasible"); *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1366 (members of the public have a right to object if public agencies entrusted with the preservation of wildlife fail to discharge their responsibilities).

supplies.”<sup>7</sup> Ordering Reclamation to curtail deliveries to refuges would run afoul of the Biological Opinions, and any resulting “take” of protected species would have no regulatory coverage under the federal or state Endangered Species Acts.

4. **A narrow interpretation of the Board’s Order would contradict its prior orders, which explain that refuge deliveries are part of the CVP “baseline”**

Water deliveries to refuges are part of the “baseline” operation of the CVP, and cannot be lawfully restricted by Board action. As explained in GWD’s previous comments, Board Order WRO 2004-007 stated that refuge water “constitutes a base supply . . . similar to water bypassed or released to meet water quality standards or prior rights,” and that refuge water deliveries are “part of the costs of overall project operation.”<sup>8</sup> Just as Reclamation assumed a minimal level of refuge deliveries when it submitted the TUCP, and just as the U.S. Fish and Wildlife Service assumed a minimal level of refuge water deliveries when it set forth the bare minimum Delta exports in its Biological Opinion, so too has the Board acknowledged that refuge water deliveries are unique, mandatory, and required to protect the state’s public trust wildlife resources.

5. **Refuge deliveries are legally mandated by federal law and may preempt the Board’s authority to curtail diversions**

The Board cannot grant a TUCP that will cause injury to other legal users of water, or that is not in the public interest.<sup>9</sup> Refuges are “legal users of water” protected by federal statute and by rights established under federal contracts, which both provide that refuge water deliveries shall not be reduced by more than 25 percent in a Critically Dry year such as this one.<sup>10</sup>

As the Board acknowledged in Decision D-1641, Reclamation’s federal law obligation to deliver refuge supplies has “the potential for federal preemption of

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<sup>7</sup> See footnote 3, *supra*.

<sup>8</sup> [http://www.swrcb.ca.gov/waterrights/board\\_decisions/adopted\\_orders/orders/2004/wro2004\\_0007.pdf](http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/orders/2004/wro2004_0007.pdf)

<sup>9</sup> Water Code §§ 1435(b)(2), 1435(b)(4).

<sup>10</sup> CVPIA, Public Law 102-575, Title 34, 106 Stat. 4706, § 3406(d); Reclamation Contract with GWD, Contract No. 01-WC-20-1754, Article 9(a), *available at*: [http://www.usbr.gov/mp/cvpia/3406d/env\\_docs/final/1754\\_grassland\\_cnt\\_11-14-00.pdf](http://www.usbr.gov/mp/cvpia/3406d/env_docs/final/1754_grassland_cnt_11-14-00.pdf); *see also* Board Order WRO 2004-007, fn. 7, *supra* (Reclamation is legally obligated to make refuge water deliveries).

state requirements.”<sup>11</sup> As noted in D-1641, Reclamation has already met the CVPIA’s “compliance with state water law” requirement, by adding fish and wildlife uses as a purpose of use under its water right permits.<sup>12</sup> We do not believe that the Board is authorized to interfere with Reclamation’s CVPIA refuge water obligations. As applied here, an overly narrow interpretation of the Board’s Order would preclude federally mandated water deliveries to refuges, entirely frustrating an important purpose of the CVPIA.<sup>13</sup>

**6. A Board Order that curtails diversions to refuges should entail further public process**

If the Board were to propose an interpretation of its Order that precludes all diversions from the Delta for baseline CVP water needs, it is required to first hold a public hearing and allow the submission of evidence. It must also make the findings required by the Water Code, and must support those findings with evidence.

Reclamation has received a copy of this protest and objection letter and has been informed by telephone about the nature of GWD’s objections. It is our understanding that Reclamation does not agree with the Board staff’s recommendation that diversions for “health and safety” purposes should exclude diversions to meet Reclamation’s refuge water supply obligations. GWD will withdraw its protest and objections on the condition that the Board clarify and refrain from enforcing an interpretation of its Order that would prevent water deliveries to San Joaquin Valley refuges.

GWD does not file this protest and objection letter in an attempt to obtain a Board determination on each and every point raised above. GWD only asks that the Board *not* adopt an impermissibly narrow interpretation of its Order, and instead follow Reclamation’s reasonable intent to maintain minimal diversions in order to continue Reclamation’s (historically low) water deliveries to refuges. GWD welcomes the opportunity to provide further testimony to the Board about these

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<sup>11</sup>[http://www.swrcb.ca.gov/waterrights/board\\_decisions/adopted\\_orders/decisions/d1600\\_d1649/wrd1641\\_1999dec29.pdf](http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf), p. 125.

<sup>12</sup> *Ibid.*, CVPIA § 3411(a).

<sup>13</sup> *NRDC v. Patterson* (E.D. Cal. 2004) 333 F.Supp.2d 906, 920 (citing *California v. U.S.* (1978) 438 U.S. 645, 650, 678, and *NRDC v. Houston* (9th Cir. 1998) 146 F.3d 1118, 1132, for the rule that Reclamation must comply with state water laws and conditions unless they are directly inconsistent with clear congressional directives regarding the CVP).

March 3, 2014

Page 7

important issues, at a properly noticed public hearing.

Sincerely,



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