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BY HAND DELIVERY

Victoria Whitney
Chief, Division of Water Rights
State Water Resources Control Board
1001 I Street
Sacramento, California 95814

Re: Department of Fish and Game Complaint Regarding Diversions of Unappropriated Water in Upper Rubicon Basin

Dear Ms. Whitney:

On July 1, 2005,[1] the California Department of Fish and Game ("CDFG) filed a water rights complaint (the "CDFG Complaint") with the State Water Resources Control Board ("SWRCB") against the Sacramento Municipal Utility District (the "District"). The Complaint alleges that the District has repeatedly exceeded its water rights at Rubicon and Buck Island Reservoirs and as a result has caused the fish below those reservoirs to be "not in good condition." The Complaint is based almost entirely on speculation, fundamentally misrepresents the few facts it does cite, and ignores the wealth of scientific information relating to the impacts of the District's Upper American River Project (the "UARP") on the environment. Consequently, the District respectfully requests the SWRCB reject the Complaint without requiring an answer by the District in order to avoid wasting scarce public resources on unsubstantiated claims.

First, the CDFG Complaint presents no substantial evidence that the District's diversions have had any adverse effect upon public trust resources. All available evidence demonstrates that the fish below Rubicon and Buck Island Dams are in "good condition," as explained in the attached technical report and as thoroughly documented in the stream fishery and channel morphology reports that CDFG itself cites. Further, the CDFG Complaint ignores the singular benefit that the UARP provides to the fishery below Rubicon and Buck Island Reservoirs. The District's reservoirs serve to provide reliable flows in the upper American River system and so

[1] Although the Complaint transmittal letter said a copy of the Complaint was being sent to the District on July 1, 2005, the District did not receive a copy of the Complaint until July 7, 2005.

enable fish to survive year-round in the affected stream reaches, which would otherwise dry up in most dry years.

Second, the CDFG Complaint's contentions regarding the District's water rights compliance are inaccurate and reflect a lack of understanding of the water right license that controls the diversions at Rubicon and Buck Island Dams. Water right exceedances occurred only in rare high-flow years or during extremely turbulent stream spikes resulting from rapid spring snowmelt. The District has not exceeded its right to directly divert water at either Rubicon or Buck Island Dam for at least seven years. The Water Code defines the diversion of unappropriated water as a trespass, and the statute of limitations for trespass is only three years. Accordingly, there is no basis for an enforcement action.

Third, to the extent that the SWRCB believes the CDFG Complaint asserts any substantiated harm to public trust resources, that claim should be resolved in the context of the District's water rights application, which was filed on May 24, 2005 to address the diversions about which CDFG complains. The SWRCB has a longstanding policy for resolving issues of water right compliance in the context of the application process, including when a hydroelectric generator files an application with the SWRCB to ensure that existing powerhouse diversions are fully covered by recognized water rights. Adhering to this policy is particularly appropriate here, where the District has openly shared its diversion information with the Division of Water Rights and then filed an application to address the exceedances after consultation with Division staff.

1. *The CDFG Complaint Lacks Substantial Evidence for Its Allegations.*

The CDFG Complaint primarily asserts that the District's historical water right exceedances at Rubicon and Buck Island reservoirs have interfered with geomorphic processes in the Rubicon and Little Rubicon rivers and thereby harmed aquatic habitat and biota. In particular, CDFG asserts that native species complexes have been altered, and fish below Rubicon Springs on the Rubicon River are not in "good condition" within the meaning of Water Code section 5937.[2] CDFG asserts that the species in some Upper Rubicon stream reaches "are not reflective of native species complexes" in similar Sierra Nevada streams, and suggests that a significant change in these species "can have a negative impact to native aquatic biota." The CDFG Complaint then states that fish populations for one site downstream from the Rubicon and Buck Island Dams "are severely depressed and do not represent all age classes for the coldwater species present," indicating that the fishery is not in good condition. The CDFG Complaint also suggests that water quality and temperature impacts caused in part by beaver dams compound these harms, and that SMUD's intermittent excess diversions may be preventing beaver dams from being washed out. In these ways, the CDFG Complaint intimates it is possible that intermittent diversions may be having an impact while failing to cite any data showing such an impact.

[2] Fish and Game Code section 5937 requires a dam operator to "allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."

As described in the attached report prepared by EIP Associates and Mussetter Engineering[3] ("Technical Report"), these assertions are inconsistent with the available data, which uniformly show that geomorphic processes are functioning properly and fish are in good condition at the individual and population level in the upper study reach of the Rubicon River closest to SMUD's diversion facility at Rubicon Dam. If intermittent diversions in excess of 500 cfs and 200 cfs were having an adverse effect upon aquatic biota, this is the area where impacts should be most noticeable. In the lower study reach of the Rubicon River subject to additional downstream flow accretions, fish and fish populations are not "severely depressed" as asserted by the CDFG Complaint, but are in good condition according to an evaluation based on accepted biological criteria. Further, all available data support the conclusion that geomorphic processes in the lower reach are functioning normally, and that hydrological flows are not interfering with local river channel development.[4]

a. *Existing UARP flows are sufficient to mobilize riverbed material on approximately the same number of days as would occur if diversions were limited to an instantaneous 500 and 200 cfs flow rate.*

The CDFG Complaint suggests that diversions in excess of the 500 and 200 cfs limits at Rubicon and Buck Island Reservoirs, respectively, diminish streamflows in the Rubicon and Little Rubicon Rivers in sufficient magnitude and frequency to interfere with stream channel morphology. This conclusion is based in part on CDFG's assumption that 168–189 cfs streamflows downstream from the District's diversion facilities are required to mobilize Rubicon riverbed material.

The available evidence shows that existing UARP operations do not limit streamflows in a manner that impairs channel morphology. As part of the FERC relicensing process for the UARP, the District used a hydrologic Water Balance Model to simulate streamflows in 15-minute increments within the affected reaches. These simulations show that under existing Project operations, mean daily streamflows in the Rubicon River are high enough to mobilize bed material on 3.7 days in the only area where bedload mobilization studies have been conducted. Other simulations show that bedload mobilization would occur on 5.5. days if diversions were limited to an instantaneous 500 and 200 cfs.[5]

[3] EIP Associates and Mussetter Engineering did not participate in creating the numerous technical reports that were generated as part of the District's FERC relicensing process and that provide the bulk of the data relied on in the Technical Report.

[4] The bulk of the data cited in the Technical Report is presented in the numerous technical documents developed to prepare for the FERC relicensing of the UARP. CDFG and other resource agencies reviewed the drafts of these documents and recommended a few modifications. At a meeting on May 15, 2004, CDFG and the other resource agencies said that these documents would be adequate if those recommended modifications were made. The versions of the documents relied upon for the Technical Analysis include all of the requested modifications.

[5] As CDFG concedes, SWRCB policy is to calculate these diversions based on 14-day averages. If the simulation had accounted for 14-day averaging, the 5.5-day figure would be lower. If the simulation had further

Daily flow data mask the fact that streamflows can be substantially higher based on hourly and instantaneous flow rates. For example, as indicated in the Technical Report, on November 9, 2003, hourly streamflows reached 635 cfs in the Rubicon River when daily streamflows were below 100 cfs. The simulations show that hourly streamflows exceed threshold levels for bed material mobilization on approximately the same number of days under both existing operation and instantaneous 500/200 cfs scenarios. Thus, the Technical Report concludes that streamflows believed by CDFG to mobilize all reaches of the Rubicon River occur "significantly more frequently than the mean daily flow data indicate."

b. *Channel morphology in the Rubicon and Little Rubicon Rivers is functioning properly under the current flow regime.*

The CDFG Complaint alleges that the intermittent diversion exceedances from Rubicon and Buck Island Reservoirs have negatively affected channel morphology downstream in a way that harms aquatic biota. The Complaint cites *none* of the data developed in the technical reports for FERC relicensing, data readily available to CDFG, describing the quality of the channel morphology—data which conclusively show that the channel morphology is functioning properly in all evaluated areas.

There are two types of stream channels downstream of the reservoirs: bedrock-dominated (non-regime) and alluvium-dominated (regime). Seventy percent of the affected Rubicon River stream reach and the entire Little Rubicon River are bedrock-dominated, so reduction in stream flow cannot affect the channel morphology on anything less than a geological time frame. As shown in the Technical Report, diversion of flows above the District's water right license can have no impact upon the channel morphology of these reaches.

The other type of channel is alluvium-dominated and must be subject to sufficient stream flows to maintain an appropriate sediment load. Thirty percent of the affected stream reach in the Rubicon River is alluvium-dominated, and all of this area is located within two sections. The upstream section is narrow and located about 1.6 miles downstream from Rubicon Reservoir. The other, downstream section is approximately 4 miles downstream from the reservoir and is referred to in the CDFG Complaint as the Rubicon Springs area, where the Complaint alleges fish are severely depressed.

Surveys of the upstream alluvium-dominated section reveal that geomorphic processes are functioning and the channel is in an equilibrium state where sediment inflow and transport capacity are balanced. As CDFG acknowledges, bed material mobilization occurs there at 168-189 cfs. As discussed above, bed material mobilization occurs on average 3.7 days per year under current Project operations and 5.5 days per year based on an instantaneous 500/200 cfs diversion limit, but occurs on the same number of days based on hourly flow data. Despite this reduction in average days per year, factors such as bed stability, fine sediment deposition, and

accounted for the District's right under License 11074 to divert water to storage at Loon Lake through the Rubicon–Rockbound and Buck–Loon Tunnels, the 5.5-day figure would be even lower.

bank stability indicate that the channel morphology and sediment dynamics are in balance with the current flow regime, and that the flow diversions have not adversely affected the channel morphology.

The CDFG Complaint assumes that bed material mobilization rates are identical at the upper and lower alluvium-dominated sites and suggests, without any support in the data, that the geomorphology at the lower site is not functioning properly and aquatic biota are not in good condition as a result. In fact, the lower site—like the upper site—is an alluvium-dominated reach, and all available data show that geomorphic processes in the upper site are functioning properly. There is no reason to suppose that the factors that produce a well-functioning channel geomorphology in one area should not, on CDFG's theory, produce an equally well-functioning channel geomorphology in a nearby downstream area. Thus, as the attached Technical Report concludes, "there is no evidence that the geomorphic processes of the river are not functioning as they should."

c. *Fish and fish populations in the Rubicon River are in good condition.*

Fish in the Rubicon and Little Rubicon Rivers are in good condition and there is no substantial evidence presented in the CDFG Complaint to the contrary. To begin, as described in the Technical Report, the Upper Rubicon has never supported a native fish population. In fact, before the "mid-nineteenth century, nearly *all* lakes and streams in the Sierra Nevada above about 6,000 feet in elevation[6] were fishless." Given that there are not and have never been native fish populations in the Upper Rubicon, CDFG's claim that the District's operation has altered the native fishery is baseless.

More importantly, if CDFG is correct that any excessive diversions at Rubicon and Buck Island Dams are harming fish, one would expect the fish that do exist upstream of the dams to be in very good condition, the fish immediately below the dam would be in poor condition, and the fish well downstream of the dam would be in fair condition given that additional downstream accretions would enhance the water supply in the downstream reaches. But the scientific data collected on the affected streams reaches indicates that exactly the opposite situation is occurring.

In the stream reach above Rubicon Dam, the hydrology is unregulated by UARP operations. The habitat structure is almost entirely bedrock and boulder, with scarce granite substrate and no cover other than large boulders. During late summer and early fall in dry years, the river dries up. Any fish in the stream at that time would either be restricted to remnant deep pools or else perish. Although this area has not been surveyed for fish, these conditions make it questionable whether the fish in the stream reach above Rubicon Dam are in "good condition."

[6] Rubicon Reservoir is at about 6,545 feet in elevation, and Buck Island Dam is at about 6,420 feet in elevation.

Below the dams, the Upper Rubicon supports several introduced fish species (brown trout, rainbow trout, golden shiner, speckled dace, California roach) that are in good condition. Most of the data about the fishery is derived from repeated sampling at two stream reaches, located 1.6 and 4.1 miles downstream from Rubicon Reservoir. The upper stream reach contains deep pools and large boulders, and is good habitat for trout. Two trout species (rainbow and brown) live in the reach, both of which demonstrate all the traits of healthy fish. The individual fish meet all the accepted requirements for determining whether fish are in good condition. The available data show that the fish occur in a wide variety of lengths and have a robust (plump) body form, indicating that they have a good food supply. They are also free of disease, parasites, and lesions, and they respond appropriately to external stimuli. The trout populations likewise meet all the accepted requirements for determining whether fish populations are in good condition. The available data again show that the fish occur in multiple age classes, suggesting that they are viable and reproducing. The biomass of the trout population in this reach is excellent—in fact, so excellent that the figure surprised a CDFG biologist participating in the UARP relicensing Aquatic Technical Working Group who intimated that the figure should be much lower. As indicated in the Technical Report, even though the fish were studied in below-normal water years, "the available scientific data . . . indicate unambiguously that individual fish and the fish populations are in 'good condition.'"

Fish and fish populations in the lower reach 4.1 miles below Rubicon Dam are also in good condition. The sample area includes much shallower pools, fewer boulders, and more riffle and run sections than the upstream reach, conditions that are well suited to the principal fish species in the lower reach—the speckled dace and the California roach (a CDFG species of special concern). Like the trout in the upper reach, the dace and roach are in "good condition" at both the individual and population levels. The available data all show that these fish are abundant, reproduce widely, grow to reasonable sizes, have long-term viability, are free of disease, parasites, and lesions, and respond appropriately to external stimuli.

The reach also supports relatively small numbers of rainbow and brown trout. Most of the rainbow trout were less than a year old, though brown trout of all age classifications were present. All individual trout identified in the surveys were in good condition with a robust form that indicates a sufficient food supply.

The CDFG Complaint, however, suggests because trout are less abundant in the lower reach than in the upper reach that the fish population in the lower reach is "severely depressed" and not in "good condition." This assertion contradicts the available evidence. As explained above, the roach and dace are in indisputably good condition at both the individual and the population level. The CDFG Complaint fails to demonstrate any causal link between the operation of the UARP and the limited number of older trout in the lower reach.

The available scientific data, however, readily explain why adult trout appear in lower numbers at the lower reach and why UARP operations have not caused those lower numbers. To begin, the habitat structure in the lower reach is not optimal for adult trout. Mature rainbow trout prefer more cover (e.g., large boulders, woody debris) than is available in the reach, and brown

trout prefer habitat with deep riffles and pools, which are not common in the reach. The habitat is suitable for spawning and rearing for younger trout of both species, which explains their presence. Further, salmonids such as trout are one of the most sensitive fishes to high water temperatures. As shown in the Technical Report, samples gathered closest to the lower reach indicate that temperatures there are 1–2°C higher than temperatures in the upper reach. Given that temperatures throughout the reach (including above Rubicon Reservoir) are already higher than optimal for trout, the 1–2°C difference is "a potential contributing factor to reduced trout populations there." Even water temperatures high in the reach are not controlled by the District; they result from the fact that water flows over the warm bedrock slabs that comprise most of the stream channel.[7] In fact, during the hottest part of summer, the reach would dry up under natural conditions. The District's year-round instream flow releases provide a distinct benefit to fish.[8]

Human-caused impacts beyond the District's control[9] exacerbate problems for trout in the lower reach. The Rubicon Trail parallels the lower reach for about a mile and receives substantial off-highway vehicle (OHV) use. About 35,000 OHVs use the trail each year, and the trail crosses Rubicon River near the fish sampling site. The El Dorado County Rubicon Trail Master Plan concludes that trail erosion increases sedimentation into the river and the OHVs discharge hazardous oil and gas along the trail. Potential sanitation problems associated with the numerous trail users and the nearby OHV campground also likely compound the impacts to the river. The Technical Report concludes that fishing by OHVers, campers, and other users can "reduce the adult trout population to low abundance" and that this harvest is a "very likely factor contributing to the limited number of adult trout."

d. *Invertebrates downstream from Rubicon and Buck Island Dams are in good condition.*

Benthic aquatic macroinvertebrates ("BMI") are also a critical element of the Rubicon River ecosystem, though are not addressed in the CDFG Complaint. The District conducted BMI surveys at three Rubicon River sites as part of the FERC relicensing. Based on several metrics designed to measure BMI status, the BMI at the two survey sites nearest the upper fishery reach (1 to 1.6 miles downstream from Rubicon Dam) were in above-average condition and equivalent to the reference stream. BMI at these upper reach sites also displayed taxa richness and species diversity equivalent to that of the reference stream. The BMI in the two upper reach sites are in "good condition."

[7] The Technical Report concludes that the "operation of the Project has no effect on ambient water temperatures during the late summer, nor can it control water temperatures to keep them at 20°C or less."

[8] The Complaint suggests low dissolved oxygen levels in the area may be "driving the species complex," but, as explained in the Technical Report, the dissolved oxygen levels upstream and downstream of the reservoir are "very similar and probably not statistically different."

[9] The part of the Rubicon Trail that adversely affects the lower Rubicon reach lies largely outside the project area of the UARP and is regulated not by the District, but by the United States Forest Service and El Dorado County.

The lower reach BMI site, by contrast, had metric scores lower than those in the upper reach, the reference stream, and the subregion generally. These low scores are likely due to the fact that the samples were taken selectively from the few nongravel sections there (instead of randomly from the reach in general), the sampling site was downstream of a meadow that supports a different type of invertebrate community, and the lower reach suffers impacts from heavy OHV use in the immediate vicinity. None of these factors are the result of UARP operations and so those operations are not responsible for the low BMI scores at the lower reach.

e. *Presence of beavers in the Rubicon Springs area benefits aquatic biota, and the available data shows no adverse effect.*

The CDFG Complaint cites the presence of beaver dams as a potential adverse factor affecting water quality and stream habitat in the lower reach of the Rubicon River, and asserts that the District's excess diversions may be preventing beaver dams from being washed out. But as discussed in the Technical Report, the scientific literature describes beavers, an introduced species in the area, as a benefit to aquatic biota. Beavers create pools, prompt increases in invertebrate populations, and benefit fish by providing critical rearing habitat and over-wintering habitat. By contrast, the available evidence reveals no harmful effects from beavers. No data has been collected in the area to show any impact upon water quality. Furthermore, survey flyovers have revealed only one beaver dam in the area. It is also unclear whether increased flows in the lower reach could wash out area beaver dams. A recent freshet of at least 600 cfs failed to wash out the one beaver dam known in the area.

f. *Fish populations downstream from Buck Island Dam are appropriate given the habitat structure.*

The CDFG Complaint also suggests that UARP operations have harmed native fish assemblages in the Little Rubicon River below Buck Island Dam. This suggestion also lacks substantial evidence. As in the Rubicon, there have never been native fish in the Little Rubicon. A few introduced fish live there, and the available data show that these are in "good condition." Moreover, the lack of introduced fish in the river is almost inevitable given the river's physical characteristics. Nine physical barriers inhibit fish movement from downstream reaches, and there is virtually no spawning gravel present. It is likely that most of the fish in the river simply washed downstream from Buck Island Reservoir when water spilled over the dam. The District-induced alteration in the flow regime there cannot have affected geomorphic processes because the Little Rubicon is a granite chute, impervious to change in less than geological time. Consequently, changes to geomorphology could not have induced any changes to the bedrock-dominated "habitat."

g. *Conclusion*

The District and a number of state and federal resource agencies made extensive efforts to compile a common set of data in connection with the relicensing of the UARP. These studies were designed in a collaborative manner, drafts were presented by the District to resource

agencies, the resource agencies indicated that the reports would be acceptable if the District made certain changes, and the District made those changes. Rather than relying on this wealth of data, however, CDFG based its complaint on the selective citation of a few pieces of isolated data from the technical reports and speculated that the District's operations might have an adverse effect on fish.[10] CDFG cites no data that demonstrate UARP operations have any adverse effect upon fish. When CDFG speculation and selective citation of evidence in the record is compared to well-documented technical reports prepared after peer review and specifically to evaluate the condition of fish in the Upper Rubicon, the strained reasoning in the CDFG Complaint does not constitute a legitimate scientific disagreement, and it provides *no* substantial evidence that the Upper Rubicon fishery below the dams is in anything other than good condition.

2. *The CDFG Complaint Misstates the District's Water Rights and Therefore Substantially Exaggerates the Volume of Unappropriated Water Diverted from the Rubicon and Little Rubicon Basins.*

The CDFG Complaint substantially overstates the frequency and magnitude of the unappropriated flows diverted by the UARP. License 11074 gives the District the right to directly divert 500 cfs at Rubicon Reservoir and an additional 200 cfs at Buck Island Reservoir. As CDFG recognizes, the SWRCB calculates these volumes based on the average flow of all water directly diverted over a 14-day period.[11]

CDFG does not acknowledge that License 11074 gives the District the right to divert water into storage at Rubicon Reservoir, Buck Island Reservoir, Loon Lake, and Union Valley

[10] For instance, the CDFG Complaint states: "Water quality issues . . . *may* be driving the species complex"; "Beaver dam complexes . . . *could* also be contributing"; "The reduction of geomorphic flows *may* also encourage encroachment of riparian vegetation." (emphasis added).

[11] CDFG criticizes the SWRCB's use of the 14-day average in calculating the volume of water that a water right holder may divert to generate hydroelectric power under an existing license. The District believes that the SWRCB has ample ground to apply the 14-day averaging policy, as it has over the past half century, because the 14-day average provides a realistic estimate of the total volume of water available for diversion on streams with flashy hydrology, such as those in the Upper Rubicon Basin. If the SWRCB were to reject 14-day averaging and grant licenses based on the highest instantaneous rate available, operations such as the UARP could always divert the highest available flows, instead of being restricted to the average flow of a lower overall volume.

Of course, CDFG has every right to object to the 14-day averaging policy and recommend that the standard term for diversions for hydropower projects be amended to focus on fishery resources. But the proper process for accomplishing that goal is to request the SWRCB to engage in rulemaking, not to file a complaint against a water right holder. Furthermore, the District's water rights were applied for and developed based on 14-day averaging. The SWRCB's file on License 11074 (Application 12624) is replete with references to the use of the 14-day average to demonstrate the District's development of its water right. A simple change in SWRCB policy could not be used to substantially diminish the water rights embodied in License 11074 without improperly taking a vested property right held by the District

Reservoir.[12] License 11074 does not impose a limit on the rate at which the District may divert water from the Rubicon and Little Rubicon watersheds to onstream or offstream storage. On the vast majority of days that CDFG accuses the District of exceeding its water rights, the District was simply diverting water into seasonal storage at Loon Lake under the express terms of License 11074.

For instance, CDFG claims the District's direct diversions at the Buck–Loon Tunnel exceeded the combined diversion limit of 700 cfs at the Buck-Loon Tunnel for 430 days or 2.9% of the time from October 1963 through September 2003. Using the most reliable data set available (1976 through 2004) and properly accounting for the storage diversions flowing through the tunnel, the District's direct diversions at the Buck-Loon Tunnel only exceeded 700 cfs on 46 days or 0.4% of the time. Similarly, the exceedance frequency charts included in the CDFG Complaint (Figures 10 and 11) and the flow comparison graphs (Figures 12 through 17) ignore the storage element of the District's water right and so substantially overstate the frequency and magnitude of unappropriated flows diverted by the UARP. Further information on the volume of unappropriated water diverted historically by the UARP is included in the water availability analysis submitted with the District's water rights application.

3. *The Issues Raised in the CDFG Complaint Should Be Addressed, If at All, in the Context of a Protest Against the District's Water Rights Application.*

The SWRCB has a longstanding policy of relying on the water right application process to resolve situations where an ongoing operation lacks sufficient water rights.[13] This policy should control the present situation where the District is complying with a recommendation made by the Division of Water Rights that the District file for new water rights.

The District itself discovered the occasional exceedances while developing a new computer model to evaluate stream flows and tunnel diversions as part of the UARP's federal relicensing process with the Federal Energy Regulatory Commission. At an October 15, 2004 meeting at SWRCB headquarters, the District discussed this information with you and other senior managers at the Division of Water Rights and sought guidance on how to modify the UARP water rights to reflect historical operations. The recommendation from Division staff was that the District should file a new water rights application to cover the diversion of unappropriated water. After conducting an extensive analysis of UARP diversions, modeling the results, and drafting a water availability analysis, the District held a follow-up meeting with you

[12] On February 3, 1998, the Chief of the Division of Water Rights issued an Order on behalf of the SWRCB recognizing the District's right to store water at Rubicon and Buck Island Reservoirs.

[13] *See, e.g.,* SWRCB, *In the Matter of Administrative Civil Liability Complaint No. 262.5-14,* Order No. WR 2000 – 11 (July 20, 2000) (bringing enforcement action only after operator failed to file water rights application); SWRCB, *In the Matter of Administrative Civil Liability Complaint No. 262.10-02,* Order No. WR 98-02 (January 22, 1998) (same); *In the Matter of Water Right Permit 20864,* Order No. WR 96-05 (Oct. 17, 1996) (rejecting enforcement action because water right application had been filed); SWRCB, *In the Matter of Application 25144,* Decision No. 1578 (September 17, 1981) (recommending enforcement only if applications are denied).

and your staff on May 17, 2005 to confirm that the District was approaching the water rights application process appropriately. The District then filed the application on May 24, 2005.[14] The application only seeks the right to divert the unappropriated water the District has diverted historically at Rubicon and Buck Island Dams.

Previously, the SWRCB has rejected calls for enforcement when a hydroelectric project operator has filed a water rights application to cover any unappropriated water that it has diverted in the past.[15] In a 1996 case, a project operator apparently decided to file the application only after SWRCB staff investigated the operation and concluded it had been diverting unappropriated water.[16] Here, by contrast, the District volunteered the information about past exceedances and subsequently pursued a water right application as recommended by Division staff. Accepting the CDFG Complaint for filing in this situation would signal water users that they should avoid sharing information with the SWRCB at all costs—or risk an enforcement action even as they make a good faith effort to resolve any outstanding compliance issues.

For the above reasons, the SWRCB should reject the CDFG Complaint while the District's water rights application is pending. The proper procedure for addressing the impacts of diverting unappropriated water that is the subject of a pending application is to file a protest against the water rights application, not to file a request for an enforcement action.

4. *The CDFG Complaint's Request for a Financial Penalty Ignores the Civil Liability Provisions of the Water Code.*

The CDFG Complaint suggests that the SWRCB could require the District to pay a penalty for historical diversions equal to the dollar value of the electricity that the District generated with the water. The SWRCB's authority to seek financial penalties, however, is limited. Water Code section 1055 gives the SWRCB the authority to issue a complaint alleging any acts or failures to act that constitute a trespass or other violation. Water Code section 1052 defines any unauthorized diversion of water as a trespass and authorizes the SWRCB or a court to impose a maximum fine of $500 per day in which the trespass occurs. Even then, the SWRCB or the court must set any water trespass penalty based on "all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator."[17] In setting any fine for past diversions, or in determining whether to impose a fine at all, the SWRCB should take into account the fact that the District informed Division of Water Rights staff of the UARP's occasional water compliance issues, implemented the staff's recommendation to file a water rights application to cover future operations, and has

[14] At that time, the District also filed another water rights application to cover existing storage in four small reservoirs on two streams in another watershed.

[15] *In the Matter of Water Right Permit 20864, supra,* at 21–22.

[16] *Id.*

[17] Water Code §§ 1052(e), 1055.3.

not diverted any excess flows at the Rubicon Reservoir or the Buck Island Reservoir since discovering the intermittent problem. Furthermore, the statute of limitations for trespass is three years.[18] As discussed above, the UARP has not diverted unappropriated water from either the Rubicon or Buck Island Reservoirs for at least seven years, well in excess of the limitations period. Under these circumstances, it would be improper for the SWRCB to levy a fine of any sort against the District.

5. *Conclusion*

For all of the foregoing reasons, the District respectfully requests the SWRCB to reject the CDFG Complaint without further proceedings.

Very truly yours,

DOWNEY BRAND LLP

David R.E. Aladjem

692440.4

cc: Ryan Broddrick, Department of Fish and Game
Banky Curtis, Department of Fish and Game
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John O'Hagan, Division of Water Rights
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Einar Maisch, Placer County Water Agency
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Paul Bender, District
Scott Flake, District
Dave Hanson, District
Pierre Stephens, District

[18] Code Civ. Proc. § 338. The Legislature's decision that taking unappropriated water is a trespass makes unauthorized diversions susceptible to the three-year statute of limitations rather than the five-year limitations period applicable to other types of interference with real property. *See, e.g., Podesta v. Linden Irrigation Dist.* (1956) 141 Cal.App.2d 38, 51–52 (distinguishing permanent taking of water right from trespass); *Martin v. Western States Gas & Electric Co.* (1935) 8 Cal.App.2d 226, 230 (establishing permanent appropriative water right not "mere trespass").