

CALIFORNIA AIR RESOURCES BOARD

COMMENTS, OBJECTIONS, AND RECOMMENDATIONS OF THE STATE WATER CONTRACTORS ON THE NOTICE OF PUBLIC HEARING TO CONSIDER ADOPTION OF A PROPOSED REGULATION FOR A CALIFORNIA RENEWABLE ENERGY STANDARD

September 21, 2010

1. Introduction

In response to the Notice of Proposed Action (“NOPA”) submitted by the California Air Resources Board (“ARB”) and published by the Office of Administrative Law on June 4, 2010, for adoption of a California Renewable Energy Standard (“RES”), the State Water Contractors (“SWC”) hereby file these written Comments, Objections, and Recommendations (“NOPA Comments”) that are specifically directed at ARB’s proposed action.

The SWC is a non-profit, mutual benefit corporation organized under the laws of the State of California, comprised of 27 public agencies¹ holding contracts to purchase water delivered by the State Water Resources Development System, otherwise known as the State Water Project (“SWP”), which is owned and operated by the California Department of Water Resources (“DWR”). SWC’s public agency members are the beneficial users of the SWP, which provides water for drinking, commercial, industrial, and agricultural purposes to a population of more than 20 million people and to over 750,000 acres of farmland throughout the San Francisco Bay-Area, the Central Valley of California, and Southern California. The primary purpose of the SWP is to store and deliver water to the SWP contractors, who pay all of the costs incurred by the SWP.

The SWC has a vested interest in the ongoing development of regulations for implementing AB 32 since the final regulations will affect the operation of California’s electrical

¹The SWC members are: Alameda County Flood Control & Water Conservation District, Zone 7; Alameda County Water District; Antelope Valley-East Kern Water Agency; Casitas Municipal Water District on behalf of the Ventura County Flood Control District; Castaic Lake Water Agency; Central Coast Water Authority on behalf of the Santa Barbara County Flood Control & Water Conservation District; City of Yuba City; Coachella Valley Water District; County of Kings; Crestline-Lake Arrowhead Water Agency; Desert Water Agency; Dudley Ridge Water District; Empire-West Side Irrigation District; Kern County Water Agency; Littlerock Creek Irrigation District; The Metropolitan Water District of Southern California; Mojave Water Agency; Napa County Flood Control & Water Conservation District; Oak Flat Water District; Palmdale Water District; San Bernardino Valley Municipal Water District; San Gabriel Valley Municipal Water District; San Geronimo Pass Water Agency; San Luis Obispo Co. Flood Control & Water Conservation District; Santa Clara Valley Water District; Solano County Water Agency; and Tulare Lake Basin Water Storage District.

system. The SWP's ability to deliver water throughout the state is critically dependent on a reliable, efficient power system. Delivery of this water is vital to the health, welfare, and productivity of the State of California.

The SWC actively participated in all workshops held prior to the NOPA and submitted written and oral comments, recommendations, and objections during that time. The SWC comments submitted to ARB on November 20, 2009, and April 9, 2010, should be included in the record for this NOPA and are attached as Exhibits 1 and 2. In these NOPA Comments, the SWC evaluates the RES proposed regulations based on the standards of necessity, authority, consistency, reference, and non-duplication as mandated for regulations by the California Administrative Procedure Act ("APA").²

2. Executive Summary of Objections Specifically Directed at ARB's Proposed Action

Objection 1: To the extent that the RES places regulatory obligations on the California Department of Water Resources ("DWR"), the RES violates Government Code section 11342.1 and shall not be effective because it exceeds the scope of authority conferred on ARB by Division 25.5 (commencing with Section 38500) of the California Health & Safety Code (hereinafter "AB 32").

Objection 2: To the extent that the RES places regulatory obligations on DWR, the RES violates Government Code section 11342.2 and is invalid because it is inconsistent with, and conflicts with, both AB 32 and Chapter 4 (commencing with Section 12890) of Part 2.5 of Division 3 of Title 2 of the California Government Code (hereinafter "SB 85").

Objection 3: To the extent that the RES places regulatory obligations on DWR, the RES violates Government Code section 11342.2 and is invalid because it is not reasonably necessary to effectuate the purpose of AB 32.

Objection 4: To the extent that the RES places regulatory obligations on DWR, the RES should be disapproved by the Office of Administrative Law because the RES fails to comply the standards of necessity, authority, consistency, reference, and non-duplication as required by Government Code Section 11349.1.

² Gov't Code § 11340, *et seq.*

3. Discussion of Objections

Objection 1: To the extent that the RES places regulatory obligations on DWR, the RES violates Government Code section 11342.1 and shall not be effective because it exceeds the scope of authority conferred on ARB by AB 32.

ARB cites twelve California Health & Safety Code sections in AB 32 for the authority to apply the RES to Regulated Parties.³ Yet, only three of those code sections could be interpreted to either grant, limit, or circumscribe ARB's authority in relation to other state agencies. They are discussed below.

- Section 38501: This section articulates the Legislature's findings and declarations for AB 32. The section does not state that ARB has authority over other state agencies but rather, expressly provides that ARB should "coordinate with state agencies . . . in implementing [AB 32]." ⁴ Moreover, this section provides that the Climate Action Team comprised of numerous state agencies including DWR and ARB, is to "continue its role in coordinating overall climate policy." ⁵ Therefore, Section 38501 indicates the Legislature's clear intent to not grant exclusive authority to any single state agency.
- Section 38510: This section is a general statement of responsibility charging ARB with a duty to monitor and regulate sources of greenhouse gases. Following the traditional rules of statutory interpretation, Section 38510 must be read in harmony with the entire statutory scheme of AB 32. ⁶ Importantly, AB 32 includes several code sections expressly ensuring that other state agencies retain and exercise their authority for implementing their own GHG reduction policies. ⁷ Therefore, taking AB 32 as a whole, Section 38510 cannot be read to give ARB exclusive and comprehensive authority over other state agencies.
- Section 38592: ARB's assertion of authority over DWR directly conflicts with Section 38592 which places an affirmative emission reduction obligation on DWR by stating that "[a]ll state agencies shall consider and implement strategies to reduce their greenhouse gas emissions." ⁸ Section 38592 expressly requires DWR to exercise its decision-making (consider) and operational (implement) functions for achieving AB 32's goals (GHG reduction). As stated above, to properly interpret this code section, it must be read in harmony with the entire statute and particularly Health & Safety Code Sections 38574 and 38598. Section 38574 is an express restriction of ARB's authority by stating that ARB may not "alter any programs administered by other state agencies for the reduction

³ Proposed Regulation § 97001.

⁴ Health & Safety Code § 38501(f).

⁵ Health & Safety Code § 38501(i).

⁶ The rules of statutory interpretation are discussed in Objection 2, below.

⁷ See Health & Safety Code §§ 38574, 38592(a), 38598(a).

⁸ Health & Safety Code § 38592(a).

of greenhouse gas emissions.” Section 38598(a) states that “nothing” in AB 32 “shall limit the existing authority of a state entity to adopt and implement greenhouse gas emissions reduction measures.” Moreover, Section 38598(b) ensures that AB 32 relieves no public agency of complying with “other applicable” laws, regulations, or requirements “for protecting the public health or environment.”⁹ Read in harmony with each other, these sections comprise a powerful and clear exposition of the Legislature’s intent for DWR to take responsibility for its emission reduction measures.

In the Informative Digest of Proposed Action and Policy Statement Overview for the RES, ARB listed a multitude of California laws and policies that have been implemented to expand the use of renewable energy. This list includes the California Renewable Portfolio Standard (“RPS”) in the Public Utilities Code, Executive Orders S-14-08, and Executive Order S-21-09. None of these laws or policies, however, apply to DWR. Moreover, the renewable energy targets set forth in the Executive Orders pertain expressly to retail sellers of electricity and not to any other public or private entities.

“Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, *but it is their obligation to strike down such regulations.*”¹⁰ Preferably, the RES should be amended by deleting all sections and references related to DWR as a Regulated Party. In spite of this preferred approach, the SWC and DWR met with ARB staff and presented alternative regulatory language that included DWR but defined it as a “Cooperating Agency” with voluntary reporting criteria. In rejecting the language, however, ARB staff stated that removing DWR from being a Regulated Party would “send a signal” that ARB was treating state agencies differently than other entities. ARB’s concern, although possibly rightly motivated, is a policy matter and not based in the law. “It is fundamental that an administrative agency may not usurp the legislative function, no matter how altruistic its motives are.”¹¹ As described above, DWR has obligations to implement emission reduction measures and provide annual reports to Cal EPA that are independent of any regulatory action taken by ARB. Nor, can any action by ARB remove this obligation from DWR. Therefore, one acceptable method for ARB to alleviate its concern is by removing DWR from being a Regulated Party, and including language in its Final Statement of Reasons describing DWR’s independent obligations established by AB 32 and SB 85. The improper, unlawful, and unnecessary method for alleviating ARB’s policy concern is by asserting regulatory authority over DWR in the RES. The RES will be invalidated if it exceeds the statutory power of the ARB, regardless of whether it “is wise or reasonable as a matter of policy.”¹²

For all of the reasons discussed above, the RES exceeds the scope of authority granted to ARB and should be disapproved unless amended.

⁹ Health & Safety Code § 38592(b).

¹⁰ *Morris v. Williams*, 67 Cal. 2d 733, 748 (1967) (emphasis added).

¹¹ *San Joaquin v. State Bd. of Equalization*, 9 Cal. App. 3d 365, 374 (1970).

¹² *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 419 (1976).

Objection 2: To the extent that the RES places regulatory obligations on DWR, the RES violates Government Code section 11342.2 and is invalid because it is inconsistent with, and conflicts with, both AB 32 and SB 85.

In determining whether the RES exceeds “the breadth of discretion conferred upon ARB by [AB 32, the courts will] analyze it in accordance with accepted principles of statutory construction.”¹³ “A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law.”¹⁴ “In construing a statute, our first task is to look to the language of the statute itself.”¹⁵ “When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms.”¹⁶ Additionally, the courts acknowledge that they must consider the context of the entire statute and the statutory scheme of which it is a part. “We are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them.”¹⁷ “If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.’ [Citation.] . . . ‘When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear.’ [Citations.] ‘Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.’ [Citations.]”¹⁸

When applying these principles to AB 32, it is clear that the statutory scheme of AB 32 places an obligation on DWR to “consider and implement strategies to reduce [its] greenhouse gas emissions.”¹⁹ In addition to this affirmative statement, AB 32 includes two “savings clauses” that significantly limit ARB’s authority in relation to other state agencies.

- Section 38574: This states that “[n]othing in this part or Part 4 (commencing with Section 38560) confers any authority on the state board to alter any programs administered by other state agencies for the reduction of greenhouse gas emissions.” In 2009, DWR considered and implemented a Sustainability Policy for the purpose of reducing GHG emissions from operations related to electricity generation and procurement.²⁰ Among other things, the Policy incorporates a progressively increasing procurement of renewable resources to achieve the state’s GHG targets of reaching 1990 levels by 2020 and 80% below 1990 levels by 2050 as described in Executive Order S-3-05. The stated purpose of the RES is “to reduce greenhouse gas emissions associated with the generation of

¹³ *Clean Air Constituency v. California State Air Resources Board*, 11 Cal. 3d 801, 814 (1974).

¹⁴ *Nickelsberg v. Workers' Comp. Appeals Bd.*, 54 Cal.3d 288, 294 (1991).

¹⁵ *Id.*

¹⁶ *Hutnick v. United States Fidelity & Guaranty Co.*, 47 Cal.3d 456, 464 (1988); *see* Code Civ. Proc., § 1858, 1859.

¹⁷ *Moyer v. Workmen's Comp. Appeals Bd.*, 10 Cal.3d 222, 230 (1973); *see also Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1386-1387 (1987).

¹⁸ *Moyer*, 10 Cal.3d at 230-231.

¹⁹ Health & Safety Code § 38592(a).

²⁰ The DWR Sustainability Policy is attached as Exhibit 3.

electricity.”²¹ Therefore, regulating DWR under the RES is entirely inconsistent with, and in conflict with, Section 38574. The clear and unambiguous interpretation of Section 38574 is that ARB has no authority to issue any regulation that would alter any aspect of DWR’s Sustainability Policy.

- Section 38598(a): This states that “[n]othing in this division shall limit the existing authority of a state entity to adopt and implement greenhouse gas emissions reduction measures.” Through its enabling statutes, DWR has the authority to purchase power, own and operate facilities for generating electricity, and implement rules for their efficient use. Therefore, the RES conflicts with this express savings since ARB proposes to regulate DWR in an area that has been expressly reserved to DWR.

A recent California case interpreting the authority of two different state agencies provides insight into the strength and purpose of a savings clause. In *Pacific Lumber Company v. State Water Resources Control Board*, 37 Cal. 4th 921 (2006), Pacific Lumber argued that the California Forest Practices Act (“Act”), which by the words of the statute is “a comprehensive system of regulation,” displaced the Control Board’s authority in regard to certain water quality issues.²² The California Supreme Court, however, used the accepted principles of statutory construction to reject Pacific Lumber’s argument in light of the Act’s “*express* disclaimer of any interference with agency responsibilities, and the absence of any irreconcilable conflict between the savings clause and the other provisions of the [Act].”²³

The Court discussed at length the savings clause which provides that “no provision“ of the Act is a limitation “on the power of any state agency in the enforcement or administration of any provision of law which it is specifically authorized or required to enforce or administer.”²⁴ Pacific Lumber argued that the savings clause only preserved the Control Board’s authority in matters *unrelated to the Act*. The Court, however, stated that Pacific Lumber’s “interpretation makes no sense; the very purpose of the savings clause is to preserve state agencies’ authority as to matters implicated by the [Act].”²⁵ The Court also pointed out that the phrase “no provision” was unambiguous and meant exactly what it said, i.e., that “no provision” of the Act could bar the Control Board from fulfilling its independent obligations.²⁶ The Court went on to utilize principles of statutory construction whereby a statute “should be construed so as to harmonize and give meaning to its various elements.”²⁷ In so doing, the Court said that “[t]he savings clause can be read as consistent with - and indeed, a vital part of - a regulatory scheme that encourages interagency teamwork . . . by providing forums for collaboration and the

²¹ Proposed Regulation § 97000.

²² *Pacific Lumber Co. v. State Water Resources Control Bd.*, 37 Cal. 4th 921, 931 (2006).

²³ *Id.* at 926 (emphasis in original).

²⁴ *Id.* at 934.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

airing of any disagreements that may arise, but not at the cost of stripping state agencies of their respective authority”²⁸

The Court’s analysis in *Pacific Lumber* is directly analogous to the savings clauses and regulatory scheme of AB 32. The AB 32 savings clauses should be read literally since they are unambiguous and consistent with the Legislature’s intent that California achieve certain greenhouse gas emission reduction targets using a comprehensive system involving independent actions by all state agencies. The comprehensive system expressly involves interagency coordination and precludes ARB, as a sister agency of DWR, from intruding into the latter’s sphere of authority.²⁹ The savings clauses expressly reserve the authority of state agencies to implement their own programs for reducing GHG emissions. Accordingly, ARB’s attempt to exert regulatory authority over DWR in relation to a policy for reducing DWR’s emissions conflicts with AB 32.

Adding support to the AB 32-specific conclusion that ARB should cooperate with, as opposed to regulate, DWR, is Senate Bill 85 which was passed by the Legislature in 2007.³⁰ SB 85 added several sections to the California Government Code that drive home the point of interagency cooperation and individual state agency authority/obligation for reducing GHG emissions. The relevant sections are shown below.

12890. The Legislature finds and declares all of the following:

- (a) The California Global Warming Solutions Act of 2006 . . . requires all state agencies to consider and implement measures to reduce their greenhouse gas emissions.
- (b) Executive Order S-3-05 issued by the Governor on June 1, 2005, commits state agencies to climate emission reduction targets as part of overall state emission reduction targets.
- (c) It is vital that state government lead by example in meeting California's greenhouse gas emission requirements.
- (d) The purpose of this chapter is to do all of the following: (1) Ensure that state agencies consider and implement measures and strategies under their authority to reduce their greenhouse gas emissions in furtherance of the targets in the Climate Action Team Report and the California Global Warming Solutions Act of 2006. (2) Establish routine, quantified, verified, consistent, and public reporting of those measures and their effectiveness in reducing greenhouse gas emissions. (3) Ensure that these reports and metrics are independently audited and verified to achieve compliance.

²⁸ *Id.* at 935.

²⁹ *See id.* at 939.

³⁰ Chapter 178 (Stats. 2007).

12891. For the purposes of this chapter, the following terms have the following meanings: . . . (f) "State agency" means a state agency listed in the Climate Action Team Report, a state office, department, division, bureau, board, or commission whose operations or programs result in greenhouse gas emissions that are subject to [AB 32] ,

12892. (a) On or before October 1 of each year, each state agency shall prepare and submit to the [California Environmental Protection Agency] . . . : (1) A list of those measures that have been adopted and implemented by the state agency to meet GHG emission reduction targets and a status report on actual GHG emissions reduced as a result of these measures. (2) A list and timetable for adoption of any additional measures needed to meet GHG emission reduction targets. (3) An estimate of the department's own greenhouse gas emissions, as well as an explanation of any increase or decrease compared to the previous year's emissions.

(d) The report card shall compare the actions taken and proposed to be taken by individual state agencies and their projected annual GHG emission reductions against the state agency GHG emission reduction targets and statewide GHG emission reduction limits.

12893. Not less than once every three years, each state agency reporting pursuant to Section 12892 shall, . . . , conduct an independent audit . . . in order to ensure that the state agency is achieving GHG emission reduction targets.

The stated purposes of SB 85 are to ensure that state agencies implement emission reduction measures and to establish a system of accountability through annual reporting to the California Environmental Protection Agency ("Cal EPA"). The message of SB 85 is entirely consistent with that of AB 32, i.e., California's emission reduction goal is a statewide target and the authority and duty for achieving it is not left to one agency only (i.e., ARB). Achieving this important target requires the coordinated action of "state government" as a whole. The "state government" as a whole is required to "lead by example" and so all state agencies are required "to consider and implement measures to reduce their greenhouse gas emissions." Through SB 85, the Legislature established a scheme for holding these agencies accountable to the public and the Legislature via annual reports and triennial audits. These "routine, quantified, verified, consistent, and public" reports are delivered to the Cal EPA and not to ARB.³¹

DWR is a "state agency" as defined in Government Code Section 12891(f) and has a reporting obligation pursuant to Section 12892. Yet, even in the statutory scheme of SB 85, DWR is not regulated by Cal EPA. SB 85 evidences that the Legislature has continued to exercise its plenary authority over all state agencies but utilizes the Cal EPA as the most logical

³¹ Gov't Code §§ 12890(d)(2), 12892(a).

mechanism for collecting the information. “Administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them.”³² This “principle is equally applicable when the regulation contravenes a provision of a different statute,” i.e., ARB’s regulation to implement AB 32 is void because it contravenes SB 85.³³

SB 85 also added Section 142 to the California Water Code that specifically obligates DWR to implement measures for increasing the use of renewable energy and to submit annual progress reports. The relevant sections are shown below.

142. (a) In order to reduce greenhouse gas emissions associated with water and energy usage, on and after January 1, 2008, the department shall do all of the following: . . . (2) Use reasonable, feasible, and cost-effective efforts to use energy efficiently, and to increase use of renewable energy in the department's water operations

(b) On or before March 1, 2008, and at least once every year thereafter until December 31, 2015, the department shall report to the Legislature and the Governor on the implementation of this section, including, but not limited to, all of the following:

(1) The status of any contracts it has for fossil fuel generated electricity and its efforts to reduce its dependency on fossil fuels.

By reading both AB 32 and SB 85 in harmony “in order to give each one maximum possible effect,” the conclusion is inescapable that the Legislature has not delegated any authority to ARB for regulating emission reduction measures or reporting obligations related to DWR’s renewable energy programs.³⁴ The RES should be disapproved unless amended to remedy its conflict with AB 32 and SB 85.

Objection 3: To the extent that the RES places regulatory obligations on DWR, the RES violates Government Code section 11342.2 and is invalid because it is not reasonably necessary to effectuate the purpose of AB 32.

Even if ARB had the authority to regulate DWR in relation to its emission reduction measures, the RES is not reasonably necessary to effectuate the purpose of AB 32 as it relates to DWR. As stated above, AB 32 requires DWR to consider and implement its own GHG emission reduction measures. DWR’s Sustainability Policy implements measures to increase DWR’s procurement of renewable energy which effectuates the purpose of the AB 32. SB 85 charges DWR with increasing its renewable energy usage and establishes a reporting mechanism to hold state agencies accountable for achieving emission reductions. Government Code Section

³² *Morris v. Williams*, 67 Cal. 2d 733, 737 (1967).

³³ *Agricultural Labor Relations Bd. v. Tulare County*, 16 Cal. 3d 392, 420 (1976).

³⁴ *Pacific Legal Foundation v. Brown*, 29 Cal. 3d 168, 197 (1981).

11350(b)(1) states that a court may invalidate a regulation if it finds “[t]he agency’s determination that the regulation is reasonably necessary to effectuate the purpose of the statute . . . that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.”³⁵ Especially, in the light of obligations established by SB 85 to ensure that DWR complies with AB 32, ARB has provided *no* evidence that an independent reporting requirement is necessary to effectuate the purpose of AB 32.

For these reasons, the RES should be disapproved unless amended.

Objection 4: To the extent that the RES places regulatory obligations on DWR, the RES should be disapproved by the Office of Administrative Law because the RES fails to comply the standards of necessity, authority, consistency, reference, and non-duplication as required by Government Code Section 11349.1.

The APA requires the Office of Administrative Law (“OAL”) to review all regulations adopted by ARB using six standards.³⁶ The OAL shall disapprove a regulation if it fails to comply with any or all of the six standards.³⁷ The RES fails to comply with the standards for necessity, authority, consistency, reference, and non-duplication by including the following sections:

- Section 97002(a)(15): DWR is specifically named as a “Regulated Party.”
- Sections 97006(f), (g): As a Regulated Party, DWR is subject to RES reporting and recordkeeping obligations.
- Section 97009: As a Regulated Party, DWR is subject to the RES enforcement and penalty provisions.

The APA requirement for “necessity” means that rulemaking record “demonstrates by substantial evidence” that the regulation is necessary “to effectuate the purpose of the statute, . . . , or other provision of law that the regulation implements”³⁸ As explained in the discussion on Objection 3, AB 32 and SB 85 place independent duties on DWR to increase its usage of renewable energy, implement emission reduction programs, and submit reports on its progress. Therefore, the RES is not necessary to achieve any statutory purpose as it relates to DWR.

The APA requirement for “authority” shall be presumed to exist only if an agency cites a California constitutional or statutory provision which: (1) expressly permits or obligates the agency to adopt the regulation; or (2) grants a power to the agency which impliedly permits or obligates the agency to adopt the regulation in order to achieve the purpose for which the power

³⁵ *Pulsaki v. California Occupational Safety and Health Standards Board*, 75 Cal. App. 4th 1315 (1999); *Esberg v. Union Oil Co.*, 28 Cal. 4th 462 (2002).

³⁶ Gov’t Code § 11349.1.

³⁷ Gov’t Code § 11349.3.

³⁸ Gov’t Code § 11349(a); 1 Cal. Code Regs. § 10.

was granted.³⁹ As described above in the discussion for Objections 1 and 2, the Legislature has included a combination of express compliance requirements on state agencies in addition to savings clauses which prevent ARB from interfering with those state agencies. When the statute is read as a whole, the words clearly indicate a legislative scheme utilizing interagency cooperation and not a system of ARB supremacy over other state agencies. ARB has been given no authority to regulate DWR as proposed in the RES.

The APA requirement for “consistency” means that the regulation is “in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”⁴⁰ Under the proper legal standard of review, a court will determine whether the agency reasonably interpreted its legislative mandate when deciding that the challenged regulation was necessary to accomplish the purpose of the statute. In other words, “the court will determine whether the regulation is reasonably designed to aid a statutory objective.”⁴¹ As described above in the discussion on Objection 2, ARB’s interpretation of being able to regulate DWR is entirely inconsistent with AB 32’s express delegation of duty to DWR.

The APA requirement for “reference” means that the agency must cite the statute or other provision of law that the agency is empowered to implement.⁴² As described above in the discussion on Objection 1, ARB has not cited any statute that would give it authority to regulate DWR in the manner proposed in the RES.

The APA requirement for “non-duplication” means that a regulation shall not overlap or duplicate any state statute or regulation without justification.⁴³ As described above in the discussion on Objection 3, the RES proposes to implement a reporting requirement that is duplicative of existing statutory obligations established for DWR by SB 85. ARB has offered no justification for placing these overlapping obligations on DWR.

For all of these reasons, the RES should be disapproved unless amended.

4. Recommendations for Amendments to the Proposed RES Regulatory Language

The easiest, most administratively effective, and legally sustainable way to remedy the RES is by deleting all sections and references related to DWR. As described above, DWR has an independent statutory obligation to implement emission reduction measures and provide annual reports to Cal EPA. DWR’s obligation doesn’t depend upon any action taken by ARB and no act by ARB can give “release” DWR from fulfilling its obligations to the state. Therefore, the RES should be amended by removing DWR from being a regulated party, and language should be included in the Final Statement of Reasons describing DWR’s independent obligations established by AB 32 and SB 85.

³⁹ Gov’t Code § 11349(b); 1 Cal. Code Regs. § 14.

⁴⁰ Gov’t Code § 11349(d).

⁴¹ *Benton v. Board of Supervisors*, 226 Cal.App.3d 1467, 1479 (1991).

⁴² Gov’t Code § 11349(e); 1 Cal. Code Regs. § 14(b).

⁴³ Gov’t Code § 11349(f); 1 Cal. Code Regs. § 12.

Even though the preferred approach is to remove all references to DWR, in the spirit of administrative accommodation, the SWC and DWR met with ARB staff on numerous occasions to discuss alternative regulatory language that included DWR. Since, the unambiguous intent of the Legislature is that state government should work together for the purpose of achieving AB 32's goals, the alternative language described DWR as a "Cooperating Agency" rather than a "Regulated Party." In an overt expression of DWR's cooperative intent, the alternative language does not delete any of the proposed RES reporting criteria directed at DWR. The minor change in the proposed alternative language is merely that DWR will report voluntarily. The alternative language is consistent with AB 32 and SB 85 in that: (1) it preserves DWR's authority to consider and implement emission reduction measures; (2) it does not exceed the scope of ARB; and (3) it indicates a cooperative relationship within state government for achieving the statewide emission reduction targets. The alternative language proposed by the SWC is shown below.

§ 97002. Definitions and Acronyms

(a) For the purposes of this Article, the following definitions apply.

(1) "**California Department of Water Resources**" means the department within the California Natural Resources Agency, established by section 120 of the Water Code, ~~responsible for California's regulation and management of water use.~~

...

(15) "**Regulated Party**" means any of the following:

- (A) Local publicly owned electric utility;
- (B) Electrical corporation;
- (C) Electric service provider;
- (D) Community choice aggregator;
- (E) Electrical cooperative; and
- (F) Community aggregator; ~~;~~
- ~~(G) California Department of Water Resources; and~~
- ~~(H) Western Area Power Administration.~~

(27) "Cooperating Agencies" means the Department of Water Resources which is a participating member of the Climate Action Team, and the Western Area Power Administration.

§ 97004. Renewable Electricity Standard Obligations

(a) RES Obligation for Regulated Parties

Except as provided in Section 97003, each Regulated Party ~~(other than DWR and WAPA)~~ shall retire....

(d) No part of this section 97004 shall apply to or create any obligation on the part of a Cooperating Agency ~~DWR or WAPA.~~

§ 97006. Monitoring, Verification, and Compliance

(a) *WREGIS Verification.* Each Regulated Party, except those exempted by section 97003 ~~and DWR and WAPA~~, shall register with WREGIS and maintain compliance with all WREGIS requirements.

(b) *Filing of Achievement Plans.* By July 1, 2012, each Regulated Party, except those exempted by section 97003 ~~and DWR and WAPA~~, shall submit an achievement plan to ARB for the overall 2020 RES target containing the following information: . . .

(c) *Filing of Annual Progress Reports.* Beginning July 1, 2013, and July 1st of each year thereafter, each Regulated Party, except those exempted by section 97003 ~~and DWR and WAPA~~, shall submit the following information for the prior calendar year to ARB: . . .

(d) *Filing of Compliance Interval Reports.* By July 1, 2015, July 1, 2018, July 1, 2020, and on July 1st annually thereafter, each Regulated Party, except those exempted under section 97003 ~~and DWR and WAPA~~, shall submit the following information for the preceding compliance interval to ARB: . . .

(f) ~~DWR and WAPA Reporting~~ *by Cooperating Agencies.* Beginning July 1, 2013, and July 1st of each year thereafter, the Cooperating Agencies ~~DWR and WAPA~~ shall voluntarily submit the following information for the prior calendar year to ARB:

(1) Information Requirements

(A) Contact name, mailing address, phone number, and email address; and

(B) Name of and contact information for Responsible Official for entity;

(2) Electricity Procured or Generated

(A) For each contract or transaction engaged in for the purchase of electricity, specify the amount of electricity procured or generated, the generator fuel type, and the name and location of the entity or power pool from which the electricity was purchased; and

(B) For each owned source used to generate electricity, specify the total amount of electricity generated, the name and location of the generator, and the generator fuel type.

(3) Electricity Used or Sold

(A) Identify the total amount of electricity used to convey, pump,

and store water, or to serve individual water delivery contracts;
(B) For each contract or transaction engaged in for the sale of electricity to retail end-use customers, specify the total amount of electricity sold, the name and location of the generator or source of sold power, the generator or contract source fuel type, and the name and location of the entity to whom the electricity was sold; and
(C) For each contract or transaction engaged in for the sale of electricity not reported pursuant to subsection (B) above, specify the total amount of electricity sold, the name and location of the generator or source of sold power, the generator or contract source fuel type, and the name and location of the entity to whom the electricity was sold.

§ 97009. Enforcement

[\(c\) No part of this section 97009 shall apply to a Cooperating Agency.](#)

5. Conclusion

In accordance with the clear mandates of AB 32 and SB 85, the Legislature has expressed its intent of retaining plenary authority over DWR in relation to the latter's obligations to implement emission reduction measures. The Legislature also intends that DWR should work cooperatively with ARB and other agency members of the Climate Action Team to develop statewide policy for implementing AB 32.

The SWC respectfully requests the ARB to: (1) delete all sections or references to DWR in the RES; or (2) in the alternative, consider and incorporate SWC's recommendations into newly revised Proposed Regulations, including SWC's proposed alternative language identified above. Lastly, SWC requests responses to all NOPA Comments included herein, as required by Government Code § 11346.9(a)(3).

Dated: September 21, 2010

Respectfully submitted,



Bruce McLaughlin
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Attorneys for the State Water Contractors

Exhibit 1
to the State Water Contractor NOPA Comments

November 20, 2009



Mr. Dave Mehl
Energy Section Manager
California Air Resources Board
1001 I Street
Sacramento, CA 94814

Re: California Air Resources Board's "Proposed Concept Outline for the California Renewable Electricity Standard"

Dear Mr. Mehl:

The State Water Contractors (SWC) submit the following comments on the California Air Resources Board's (ARB) "Proposed Concept Outline for the California Renewable Electricity Standard" (Concept Outline) released in October 2009. The SWC¹ is a non-profit, mutual benefit corporation organized under the laws of the State of California, comprised of 27 public agencies holding contracts to purchase water delivered by the State Water Resources Development System, otherwise known as the State Water Project (SWP), which is owned and operated by the California Department of Water Resources (DWR). SWC's public agency members are the beneficial users of the SWP, which provides water for drinking, commercial, industrial, and agricultural purposes to a population of more than 20 million people and to over 750,000 acres of farmland throughout the San Francisco Bay-Area, the Central Valley of California, and Southern California. The primary purpose of the SWP is to store and deliver water to the SWP contractors, who pay all of the costs incurred by the SWP.

The SWC has a vested interest in the ongoing development of regulations for implementing AB 32 since the final regulations will affect the operation of California's electrical system. The SWP's ability to deliver water throughout the state is critically dependent on a reliable, efficient power system. Delivery of this water is vital to the health, welfare and productivity of the SWP contractors' service areas.

DIRECTORS

Steven Robbins
President
Coachella Valley Water
District

Stephen Arakawa
Vice President
Metropolitan Water District
of Southern California

Curtis Creel
Secretary-Treasurer
Kern County Water Agency

Russell Fuller
Antelope Valley-East Kern
Water Agency

Thomas Hurlbutt
Tulare Lake Basin Water
Storage District

Joan Maher
Santa Clara Valley Water
District

Dan Masnada
Castaic Lake Water Agency

David Okita
Solano County Water Agency

Ray Stokes
Central Coast Water
Authority

General Manager
Terry Erlewine

¹The SWC members are: Alameda County Flood Control & Water Conservation District, Zone 7; Alameda County Water District; Antelope Valley-East Kern Water Agency; Casitas Municipal Water District on behalf of the Ventura County Flood Control District; Castaic Lake Water Agency; Central Coast Water Authority on behalf of the Santa Barbara County Flood Control & Water Conservation District; City of Yuba City; Coachella Valley Water District; County of Kings; Crestline-Lake Arrowhead Water Agency; Desert Water Agency; Dudley Ridge Water District; Empire-West Side Irrigation District; Kern County Water Agency; Littlerock Creek Irrigation District; The Metropolitan Water District of Southern California; Mojave Water Agency; Napa County Flood Control & Water Conservation District; Oak Flat Water District; Palmdale Water District; San Bernardino Valley Municipal Water District; San Gabriel Valley Municipal Water District; San Geronimo Pass Water Agency; San Luis Obispo Co. Flood Control & Water Conservation District; Santa Clara Valley Water District; Solano County Water Agency; and Tulare Lake Basin Water Storage District.

The Concept Outline requests feedback in several areas, including: (1) whether RPS requirements with respect to eligible resources should be modified for the Renewable Electricity Standard (RES); and (2) whether DWR should be included as a regulated Party under the RES.

In November 2007 and August 2008, the SWC commented on ARB's reporting regulations and scoping plan development regarding the need to acknowledge the renewable nature of all hydro generation by incorporating this resource, which can be critical to the reliability of the power system, into the mix of emission reduction strategies. The SWC continues to believe that public policy should not be prejudiced against renewable hydropower, particularly where stringent regulatory oversight of that hydropower generation results in rigorous environmental preservation and enhancement. Since ARB is developing the RES under the auspices of AB 32, it is also important to recognize the GHG emission-free nature of large hydropower generation.

With regard to the specific issue of the appropriateness of regulating DWR and other entities that serve only wholesale load, Executive Order S-14-08 provides that "[a]ll *retail sellers* of electricity shall serve 33 percent of their load with renewable energy by 2020." (Emphasis added.) In Executive Order S-21-09, the Governor directed ARB to "adopt a regulation consistent with the 33 percent renewable energy target established in Executive Order S-14-08 by July 31, 2010." The importance of this retail/wholesale distinction is currently reflected in ARB's mandatory GHG emission reporting regulations (17 Cal. Code Regs. §§ 95100-95133). Under these regulations, DWR is not included within ARB's definition of "retail provider" (Section 95102(a)(173)). It is also notable that DWR is expressly excluded from the definition of "retail seller" by California's Renewable Portfolio Standard (RPS) in Public Utilities Code section 399.12(g)(4). Since DWR does not serve any electricity load at retail, there does not appear to be any legal basis for including it in the RES regulations.

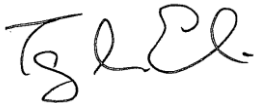
DWR's management of electricity is very different from the operations of retail sellers of electricity, and the SWP should not be subject to regulatory requirements that are built on concepts that are developed for retail sellers' operations. The primary purpose of the SWP is to deliver water, and its energy management is operated accordingly. The SWP's electricity load is highly variable due to hydrologic and regulatory uncertainties, which complicates how its annual procurement might reasonably be measured for RES compliance using an RPS model. DWR currently generates primarily on-peak electricity from its hydropower facilities for sale to the electricity market and replaces that power by purchasing off-peak electricity, much of which is transacted in the short-term markets due to SWP operations variability. That operation benefits the California electricity grid by providing reliable on-peak electricity that can ramp-up very quickly and shift a significant electricity demand at the pumping plants to the off-peak demand periods. Those operations taken together with the annual and within-year variability of SWP pump operations suggest that DWR strategies to make long-term commitments to secure renewable resources must be tailored to SWP operations to sustain the water and electricity benefits from the SWP. It is also worth noting that short-term energy purchases to support SWP operations will help absorb the anticipated increase in off-peak energy supplies created by the must-run nature of renewable energy sources.

Mr. Dave Mehl
November 20, 2009
Page 3

Finally, we agree that DWR should be responsive to the Governor's energy policies by reducing its SWP emissions. It should not, however, be treated differently from other state agencies that are responsible for generating and managing emissions and should be allowed to develop its own approach to achieving emissions reductions. We support DWR's adoption of an emissions reduction policy that embraces renewable energy procurement, energy efficiency, and a decision to forego renewal of the Reid Gardner contract for inexpensive coal-fired generation.

The SWC appreciates this opportunity to comment on the Concept Outline and respectfully requests that ARB not include DWR as a regulated party under RES. We would welcome the opportunity to meet with ARB staff to discuss our comments further.

Sincerely,

A handwritten signature in black ink, appearing to read "T Erlewine". The signature is fluid and cursive, with the first letter of the first name being a large, stylized "T".

Terry Erlewine
General Manager

Exhibit 2
to the State Water Contractor NOPA Comments

April 9, 2010

Mr. Dave Mehl
Energy Section Manager
California Air Resources Board
1001 I Street
Sacramento, CA 94814



DIRECTORS

Steven Robbins
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Stephen Arakawa
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Kern County Water Agency

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Joan Maher
Santa Clara Valley Water
District

Dan Masnada
Castaic Lake Water Agency

David Okita
Solano County Water Agency

Ray Stokes
Central Coast Water
Authority

General Manager
Terry Erlewine

Re: California Air Resources Board's "Preliminary Draft Regulations for the California Renewable Electricity Standard"

Dear Mr. Mehl:

The State Water Contractors (SWC) submit the attached comments on the California Air Resources Board's (ARB) "Preliminary Draft Regulations for the California Renewable Electricity Standard" that were issued March 11, 2010. In the accompanying Question and Answer Document issued simultaneously with the Draft Regulations, the ARB staff stated their openness to considering comments on any provisions.

The SWC¹ is a non-profit, mutual benefit corporation organized under the laws of the State of California. The SWC is comprised of 27 public agencies holding contracts to purchase water delivered by the State Water Resources Development System, otherwise known as the State Water Project (SWP), which is owned and operated by the California Department of Water Resources (DWR). SWC's public agency members are the beneficial users of the SWP, which provides water for drinking, commercial, industrial, and agricultural purposes to a population of more than 20 million people and to over 750,000 acres of farmland throughout the San Francisco Bay-Area, the Central Valley of California, and Southern California. The primary purpose of the SWP is to store and deliver water to the SWP contractors, who pay all of the costs incurred by the SWP.

The SWC has a vested interest in the ongoing development of regulations for implementing AB 32 since the final regulations will affect the operation of California's electrical system. The SWP's ability to deliver water throughout the state is critically dependent on a reliable, efficient power system. Delivery of this water is vital to the health, welfare and productivity of the SWP contractors' service areas.

¹The SWC members are: Alameda County Flood Control & Water Conservation District, Zone 7; Alameda County Water District; Antelope Valley-East Kern Water Agency; Casitas Municipal Water District on behalf of the Ventura County Flood Control District; Castaic Lake Water Agency; Central Coast Water Authority on behalf of the Santa Barbara County Flood Control & Water Conservation District; City of Yuba City; Coachella Valley Water District; County of Kings; Crestline-Lake Arrowhead Water Agency; Desert Water Agency; Dudley Ridge Water District; Empire-West Side Irrigation District; Kern County Water Agency; Littlerock Creek Irrigation District; The Metropolitan Water District of Southern California; Mojave Water Agency; Napa County Flood Control & Water Conservation District; Oak Flat Water District; Palmdale Water District; San Bernardino Valley Municipal Water District; San Gabriel Valley Municipal Water District; San Geronimo Pass Water Agency; San Luis Obispo Co. Flood Control & Water Conservation District; Santa Clara Valley Water District; Solano County Water Agency; and Tulare Lake Basin Water Storage District.

Mr. Dave Mehl

April 9, 2010

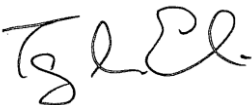
Page 2

In November 2009, the SWC commented on the ARB's "Proposed Concept Outline for the California Renewable Electricity Standard." In those comments, the SWC provided justification why DWR should not be included as a regulated Party under the Renewable Electricity Standard (RES). This submittal provides additional background information supporting ARB excluding DWR as a regulated party under the RES.

The SWC is not arguing that DWR should be exempt from any requirement to reduce GHG emissions in accordance with the applicable portions of AB 32. Rather, the SWC believes that DWR is both required and authorized to develop and implement GHG emissions reduction policies specific to its operations. These policies must be developed in coordination with DWR's policies for achieving its core water management mission and for implementing climate change adaptation strategies. DWR has taken the initial steps in this process by developing the *California Water Plan Update 2009*, a *Sustainability Policy* and contributing to the California Natural Resource Agency's *2009 California Climate Adaptation Strategy*. The proposed structure and metric of the RES, however, are inconsistent with DWR's mission and mitigation/adaptation obligations. The RES, as ordered by Executive Orders S-14-08 and S-21-09, is directed specifically at retail electricity providers. Accordingly, ARB should remove DWR from the list of Regulated Parties in the RES regulations.

The SWC appreciates this opportunity to comment on the Preliminary Draft Regulation for the California Renewable Electricity Standard and respectfully requests that ARB not include DWR as a regulated party under RES. We would welcome the opportunity to meet with ARB staff to discuss our comments further.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Erlewine". The signature is fluid and cursive, with the first letter of the first name being a large, stylized "T".

Terry L. Erlewine
General Manager

Attachment

COMMENTS OF THE STATE WATER CONTRACTORS

PRELIMINARY DRAFT REGULATIONS FOR THE CALIFORNIA RENEWABLE ELECTRICITY STANDARD

April 9, 2010

1. Introduction

These comments are submitted by the State Water Contractors (SWC) in response to the Preliminary Draft Regulation (PDR) for the California Renewable Electricity Standard (RES) that was issued on March 11, 2010. In the accompanying Question & Answers (Q&A) document issued simultaneously, the Air Resources Board (ARB) staff stated their openness to considering comments on any provision.¹

2. Statement of the SWC's Position

- The Department of Water Resources (DWR) should not be subject to the RES. The PDR lists DWR as a Regulated Party² but does not include any regulatory language or metric that could reasonably be applied to DWR's electricity operations for the State Water Project (SWP). The SWP generates electricity, uses electricity, and participates in energy markets only to the extent necessary to fulfill its water related responsibilities, and the SWP serves no end-use (retail) customers.
- DWR, as a state agency, has an independent duty to consider and implement strategies to reduce its GHG emissions for the purpose of mitigating climate change. AB 32 expressly states that "nothing in [it] shall limit the existing authority of [DWR] to adopt and implement GHG emissions reduction measures." DWR is currently pursuing this mandate through the implementation of its Sustainability Policy that is the most cost-effective, technologically feasible means for DWR to achieve the emission reduction and policy goals of AB 32.
- DWR is responsible for simultaneously implementing complementary policies designed to: (1) *adapt* California to the impacts of climate change; and (2) *mitigate* future climate change. The *2009 California Climate Adaptation Strategy* and the *California Water Plan Update 2009* present a comprehensive and diverse set of resource management strategies designed to meet these responsibilities.
- DWR has an "imperative" for implementing adaptation strategies that respond to the anticipated changes in California's environment, public health, and economy as a result of water-related issues. There are few, if any, other entities or agencies that have a more direct role in actually preparing California to adapt to a changing climate. DWR must develop and implement these adaptation strategies in a comprehensive and coordinated way with other state agencies that are also responsible for executing adaptation strategies. The RES, as proposed by Executive Orders S-14-08 and S-21-09, is directed at retail electric utilities that do not have similar requirements for implementing adaptive strategies.
- DWR has incorporated significant mitigation strategies into its Sustainability Plan for achieving the AB 32 goals and policies applicable to DWR. These include pursuing efficiency in water and

¹ PDR Q&A, at 2.

² PDR § 97002(a)(12)(F).

energy use at every opportunity while also reducing GHG emissions by procuring additional clean energy resources for operating the SWP.

3. Overview of DWR and the California Water Plan 2009

DWR is a state-level water agency. DWR is neither a private entity, a local government agency, nor an electric utility under California law. DWR's primary mission is monitoring, conserving, and developing California's water resources, providing for the public safety, and preventing property damage due to floods. DWR operates the SWP for the main purpose of storing water and distributing it to 29 urban and agricultural water suppliers located throughout California. The SWP generates electricity, uses electricity, and participates in energy markets only to the extent necessary to fulfill its water-related responsibilities. The SWP does not directly serve any retail electricity customers.

On March 30, 2010, DWR published the *California Water Plan Update 2009* (Water Plan). A key objective of the Water Plan is to present a comprehensive and diverse set of resource management strategies that can help meet the water-related resource management needs of California.³ The Water Plan lays out objectives and actions that will help California adapt to the many water supply and demand changes that will result from climate change effects. That Water Plan is incorporated by reference in these comments.

California's reservoirs, water delivery systems, and operating rules were developed using historical hydrology, but, DWR's new Water Plan recognizes that these assumptions may no longer be valid due to climate change.⁴ The future hydrology of California is not like the past. Without DWR's active management, California would face an uncertain future as climate change reduces California's snowpack storage, increases the frequency and intensity of floods, adversely impacts ecosystems and watershed health, and impairs groundwater and surface water quality.⁵ At the same time, California's water system has an aging infrastructure in need of improvement but the State is undergoing a financial crisis amidst a world-wide recession.⁶ Immediate actions must be taken and DWR must choose the most cost-effective actions to achieve the greatest benefit to California. DWR recognizes that it must take action now to provide integrated, reliable, sustainable, and secure water resources and management systems to protect California's health, economy, and ecosystems.⁷

a. DWR will serve the dual roles of mitigating and adapting to climate change

California's water resources are stressed in the current day, but this will intensify under the affects of climate change. DWR must act in the short-term to *adapt* to the affects of climate change while also implementing longer term solutions to *mitigate* future changes. The more critical of these two tasks is DWR's "imperative" for implementing adaptation strategies that respond to the anticipated changes in California's environment, public health, and economy as a result of water-related issues.⁸ Several of the

³ Water Plan, at 1-5.

⁴ Water Plan, at 8, 2-5; "Traditional approaches for predicting the future have been based on projecting past trends into the future. Today, there is better understanding that strategies for future water management must be dynamic, adaptive, and durable. In addition, the strategies must be comprehensive and integrate physical, biological, and social sciences and economics." Water Plan, at 2-22.

⁵ Water Plan, at 2-5, 2-9, 2-30.

⁶ Water Plan, at 9, 2-6.

⁷ Water Plan, at 1, 2-9, 2-11..

⁸ Water Plan, at 2-21, 5-6.

Water Plan objectives and actions will help California adapt to climate change and are ready for immediate adoption.⁹

Simultaneously, DWR is implementing mitigation strategies to reduce GHG emissions from water-related energy use. As described further below, DWR is pursuing increased water and energy efficiency throughout its operations and also reducing GHG emissions by procuring additional renewable energy resources for operating the SWP. Even so, the existing SWP hydroelectricity system provides substantial benefits to California's electricity grid and climate change mitigation efforts by generating California's largest source of GHG emissions-free energy.

b. The key themes of the Water Plan are integrated water management and sustainability

The Water Plan strategies must be well-coordinated at the state, regional, and local levels to maximize their affect and not be driven solely by a single policy objective directed at the electric utility sector like the RES.¹⁰ The new Water Plan is a California-wide plan developed by an interagency steering committee representing 21 state government agencies, California Native American Tribes, and in coordination with federal agencies.¹¹

DWR's methods for implementing adaptation and mitigation strategies must conform to all of California's goals, while also achieving its core mission. The Water Plan recognizes that water is a vital natural resource for all Californians and the environment. It states that water management activities must occur in the context of sustainable resource management and environmental protection and stewardship.¹² The Water Plan acknowledges that water resources are finite and that more sustainable management practices are required than were practiced in the past. The Water Plan states that:

“Given the uncertainties and risks in the water system, some management strategies may provide for a more sustainable water supply, flood management, and ecosystems than another set of management strategies. Recognizing that change will continue to occur and that additional uncertainties and risks are likely to surface in the future, water management actions must be dynamic, adaptive, and durable.”¹³

As a consequence, DWR must apply its specialized expertise to achieve its core mission related to the changing requirements of California's water resources. These critical decisions should not be guided or limited by standards developed for electric utilities.

4. The Water Plan and DWR's Sustainability Policy present the most cost-effective, technologically feasible means for DWR to achieve GHG emissions reductions

DWR's Sustainability Policy and Water Plan proposals comprise the most cost-effective, coordinated, comprehensive, and technologically feasible means for DWR to achieve the objectives and policies of AB 32. As shown below, the Sustainability Policy meets the requirement for state agencies to implement

⁹ Water Plan, at 2-21.

¹⁰ Water Plan, at 2-13, 2-16.

¹¹ Water Plan, at 12, 2-17. These agencies include the ARB, California Energy Commission, California Public Utilities Commission, and the California Environmental Protection Agency.

¹² Water Plan, at 2-8, 2-22, 2-29, 7-21.

¹³ Water Plan, at 2-23, 5-16, 5-17.

GHG emission reduction strategies. Moreover, the Sustainability Policy was crafted in harmony with a multitude of policy goals that are applicable to ARB's regulations.

In accordance with Health & Safety Code § 38592(a), all state agencies shall consider and implement strategies to reduce their GHG emissions. Also, pursuant to Health & Safety Code § 38598(a), nothing in AB 32 shall limit the existing authority of a state entity to adopt and implement GHG emissions reduction measures.

DWR is already making efforts towards meeting GHG emission reduction goals. In April 2009, DWR management approved a Sustainability Policy that includes a number of steps to reduce its GHG emissions. Specifically, the energy-related components of the Policy state that DWR will:

- Incorporate energy efficiency and water efficiency and conservation in all capital and renovation projects, as well as operations and maintenance activities, within budgetary constraints;¹⁴
- Model state-of-the-art water efficiency practices within State Government, with a goal of reducing its per capita water consumption by at least 20% by 2020;¹⁵
- Maximize the use of technically feasible and cost-effective clean and renewable energy sources for the State Water Project and DWR's business operations;
- Track and report its GHG emissions to ARB and The Climate Registry;
- Reduce its GHG emissions to at least 1990 levels by 2020, consistent with the ARB Scoping Plan goal for State government in the AB 32 Scoping Plan; and
- Utilize its purchasing power to meet its sustainability objectives.

In accordance with Health & Safety Code §§ 38561 and 38501(f), ARB should coordinate with other state agencies to implement AB 32 and should consult with state agencies with jurisdiction over sources of GHGs to ensure that the reduction activities are complementary, non-duplicative, and implemented cost-effectively.

- DWR's Mission is water management and delivery: DWR's primary mission is monitoring, conserving, and developing California's water resources, providing public safety, and preventing property damage related to floods. DWR has the special expertise to achieve these goals in the most cost-effective and technologically feasible manner.
- DWR's mission is threatened by climate change. This poses monumental risks to DWR's mission through reduced Sierra snowpack, decreased water storage and delivery, and increased risks to Delta levees. DWR is best situated to develop adaptation and mitigation strategies that are complementary, non-duplicative, and may be implemented cost-effectively.
- DWR will implement plans to reduce the energy consumption of water and wastewater management systems by implementing the water-related strategies in the AB 32 Scoping Plan to mitigate GHG emissions.¹⁶ Water-use efficiency will reduce energy demand because significant amounts of energy are used in water conveyance, distribution, and use.
- DWR worked on the Water Plan collaboratively with 21 state government agencies with jurisdictions over different aspects of water resources, California Native American Tribes, and federal agencies.

¹⁴ Water Plan, at 7-13.

¹⁵ Water Plan, at 7-11 to 7-14.

¹⁶ Water Plan, at 7-33 to 7-35.

In accordance with Health & Safety Code §§ 38501(h), 38560, 38560.5(b), and 38562(a)-(b), AB 32 promotes emission reduction measures that also achieve certain policy goals. As shown below, the current DWR Water Plan and Sustainability Policy is in full conformance with these AB 32 measures and goals.

- **The Policy minimizes costs and maximizes benefits to California's economy; and complements the state's efforts to improve air quality.**
 - DWR operates the SWP in the most cost-effective manner based on varied regulatory requirements, environmental limitations (ESA, salinity control, etc.), agriculture, flood protection, urban water demand, and agricultural needs.
 - The SWP participates in California's Demand Response Program. This reduces the need for the least efficient on-peak thermal generation and, subsequently, improves air quality.

- **The Policy improves and modernizes California's energy infrastructure and maintains system reliability.**
 - DWR has implemented an energy efficiency program that entails refurbishment or replacement of hydroelectric units at SWP facilities, and which increases the efficiency of these units from an average of approximately 89.5% to as high as 93.3%.
 - DWR's role in grid stability assists GHG emission reductions: In addition to the vital role of the SWP as California's water delivery system and the functions it performs in managing floods, the SWP makes a critical contribution to the reliability and stability of the California Independent System Operator's wholesale power grid operations.
 - The SWP attempts to pump primarily during off-peak hours and generate during peak periods. As a result, clean hydropower provides tremendous operational flexibility to the grid and replaces "dirty" power sources during peak demand periods.

- **The Water Plan and Policy are equitable and doesn't disproportionately impact low-income communities.**
 - The SWP provides water to 2/3 of the state's population located in southern California that includes many low-income communities. The SWP also provides water to support agriculture in the central valley, which employs many low-income persons.
 - The Water Plan is designed to improve Tribal water and natural resources.¹⁷
 - The Water Plan is designed to increase the participation of small and disadvantaged communities in State processes and programs to achieve fair and equitable distribution of benefits.¹⁸

- **The Policy encourages early action.**
 - DWR will meet the first AB 32 goal 12 years early. GHG emission levels from SWP operations will meet the AB 32 goal of reducing emissions to 1990 levels well in advance of the 2020 deadline.
 - DWR is phasing out the Reid Gardner coal plant and acquiring less carbon-intensive energy. Subsequent to the passage of AB 32, DWR formally notified the plant's owner that DWR will not renew this agreement, which expires in 2013.

¹⁷ Water Plan, at 7-39 to 7-41.

¹⁸ Water Plan, at 7-41 to 7-43.

- **The Water Plan and Policy promote the diversification of energy sources.**
 - DWR is replacing its coal-based energy with a combination of cleaner, more efficient resources, improvements to the SWP system, and renewable energy resources, significantly reducing the SWP's emissions.
 - The production from the SWP's existing hydroelectric facilities is sufficient to meet 40 to 60 percent of SWP's annual pumping energy needs. The hydroelectric generation produces no GHG emissions.
 - DWR will implement a progressively increasing procurement of renewable resources to achieve the state's GHG targets of 1990 levels by 2020 and 80% below 1990 levels by 2050 (as described in Executive Order S-3-05).

- **The Policy promotes overall societal benefits and other benefits to the economy, environment, and public health.**
 - The proper operation of the SWP is essential to California's water and flood management. The SWP provides the foundation for the state's economic vitality, providing water supply, sanitation, clean electricity, recreation, agriculture, and flood protection (2009 California Climate Adaptation Strategy).
 - The Water Plan is designed to protect and restore water and groundwater quality to safeguard public and environmental health and secure California's water supplies for beneficial uses.¹⁹
 - The Water Plan will promote, improve, and expand environmental stewardship to protect and enhance the environment by improving watershed, floodplain, and in-stream functions and to sustain water and flood management systems.²⁰
 - The Water Plan sets as co-equal goals a healthy Delta ecosystem and a reliable water supply for California.²¹

- **The Policy minimizes the administrative burden to ARB.**
 - Regulation of DWR by ARB is not mandated by Executive Orders S-14-08 and S-21-09 since DWR is not a retail provider. Establishing special regulations for DWR will require an extra burden for ARB. DWR, as a sister state agency, has sufficient authority and specialized expertise to develop and implement its own emission reduction measures as directed by Executive Order S-13-08 and S-3-05.
 - Oversight and enforcement is possible since DWR is making open and transparent emissions reports to ARB through the AB 32 mandatory reporting process. DWR also describes its energy use, purchasing activities, efforts to reduce its emissions, and use of renewable energy in three reports to the Governor and Legislature each year.

In accordance with Health & Safety Code § 38562(e), AB 32 requires that ARB rely upon the best available economic and scientific information and the assessment of existing and projected technological capabilities when adopting regulations.

- The Policy is integrated with the 2009 California Climate Adaptation Strategy and both are based on the best available economic and scientific information and DWR's assessment of the technological capabilities of California's infrastructure.

¹⁹ Water Plan, at 7-18 to 7-21.

²⁰ Water Plan, at 7-21 to 7-23.

²¹ Water Plan, at 7-26 to 7-31.

- Executive Order S-13-08 directed California and DWR to begin a consistent statewide, thoughtful, sensible, science-based approach to climate change adaptation. DWR worked with other state agencies to develop the 2009 California Climate Adaptation Strategy document that included 10 specific Water Management Adaptation Strategies. These included actions to achieve aggressive water use efficiencies and several strategies aimed to sustain, protect, and improve California's ecosystems in the face of climate change.²²

5. Recommendation to ARB

The SWC is not arguing that DWR should be exempt from any requirement to reduce GHG emissions in accordance with the applicable portions of AB 32. Rather, the SWC believes that DWR is both required and authorized to develop and implement GHG emissions reduction policies specific to its operations. These policies must be developed in coordination with DWR's policies for achieving its core water management mission and implementing climate change adaptation strategies. DWR has initiated these steps by developing the Water Plan and Sustainability Policy. The proposed structure and metric of the RES, however, are inconsistent with DWR's mission and mitigation/adaptation obligations. The RES, as ordered by Executive Orders S-14-08 and S-21-09, is directed specifically at retail electricity providers. Accordingly, ARB should remove DWR from the list of Regulated Parties in the RES regulations.

²² 2009 California Climate Adaptation Strategy, at 79-91.

Exhibit 3
to the State Water Contractor NOPA Comments

Memorandum

Date: April 22, 2009
To: All DWR Employees
From: Department of Water Resources
Subject: Sustainability Workgroup

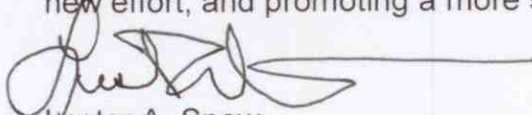
As we celebrate Earth Day this year, the Department of Water Resources (DWR) must resolve to carry out its mission in a more sustainable manner, by minimizing its impact on the environment and reducing its greenhouse gas (GHG) emissions. DWR is already responding to the Governor's Climate Change Initiative (Executive Order S-03-05), Green Building Initiative (Executive Order S-20-04), the Global Warming Solutions Act (AB 32), and State Agency Recycling and Waste Diversion (AB 75) requirements by making changes to the Department's business operations and the State Water Project.

We must now build upon these existing efforts to become a sustainability leader within State government and the California water community. These changes will not only make us better stewards of the environment, but should also yield long-term cost savings to State taxpayers through reduced operations and maintenance costs, as well as provide healthier and more productive work environments for staff and visitors. Overall, sustainability must be integrated into every aspect of DWR's work.

DWR's goals and measures for ecosystem stewardship and sustainability will be achieved through implementation of DWR's new Sustainability Policy (attached). Implementation of the policy will explicitly consider technical feasibility and cost-effectiveness of changes, utilize environmental management systems, and focus on the following business areas:

- Climate Protection Practices;
- Ecosystem Stewardship;
- Sustainable Business Operations;
- Greening Facilities;
- Greening Fleet;
- Recycling and Waste Management; and
- Environmentally Preferable Procurement.

With this memo, I am creating a Sustainability Workgroup, under the leadership of John Engstrom and Dale Hoffman-Floerke, to collaboratively develop the guidelines for implementing the new Sustainability Policy, informed by industry best practices, by no later than April 2010. Please join me in supporting John and Dale in this exciting new effort, and promoting a more sustainable future for DWR.



Lester A. Snow
Director

**Department of Water Resources
Sustainability Policy
April 2009**

Sustainability¹ of natural resources may be the defining issue of 21st century. It is the policy of the Department of Water Resources (DWR) to become a sustainability leader and ecosystem steward within State government and the California water community. DWR will do so by promoting, advocating, and facilitating sustainability practices throughout its business operations and the State Water Project (SWP). The Department will consider sustainability and ecosystem stewardship in its current and future activities and plans and, in the context of technical feasibility and cost-effectiveness, will make sustainability a criterion in all decision-making processes. Specifically, DWR will:

- Incorporate energy and water efficiency and conservation in all capital and renovation projects, as well as operations and maintenance activities, within budgetary constraints and programmatic requirements;
- Model state-of-the-art water use efficiency practices within State government, with a goal of reducing its per capita water consumption by at least 20% by 2020;
- Maximize the use of technically feasible and cost-effective clean and renewable energy sources for the SWP and DWR's business operations;
- Track and report its greenhouse gas (GHG) emissions to the California Air Resources Board (CARB) and the California Climate Action Registry²;
- Reduce its GHG emissions to at least 1990 levels by 2020, consistent with the goal set for State government leadership by CARB in the AB 32 Scoping Plan;
- Minimize the amount of waste sent to landfill by maximizing opportunities to reduce, reuse, and recycle materials;
- Develop sustainable business practices for its facilities, fleet, workplaces, procedures, and management decisions, through collaborative opportunities for sustainability with other State agencies and the water industry;
- Utilize its purchasing power to meet its sustainability objectives; and
- Promote sustainability in its grantmaking processes.

With this commitment in mind, DWR will convene a standing, working group on sustainability, which will develop guidelines to implement this Sustainability Policy by April 2010. To ensure this policy's effectiveness, the Department shall keep abreast of best practices for sustainability, monitor progress, and adjust this policy and its implementing guidelines as needed. Each February, the Deputy Directors for the SWP and Business Operations shall prepare an annual report regarding implementation progress, including any recommendations of changes, for the Director's review.

¹ The *California Water Plan Update 2005* defines "sustainability" as "a specific resource that avoids complete depletion over a specified time horizon" and "the continued feasibility of a specified economic activity over a specified time horizon, usually influenced by management and policy actions".

² In 2010, the California Climate Action Registry will become The Climate Registry.