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December 15, 2014

Felicia Marcus, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



VIA ELECTRONIC MAIL c/o Ms. Jeanine Townsend at commentletters@waterboards.ca.gov

Re: Comment Letter – Safe Drinking Water Plan

Dear Chair Marcus and Board Members:

Earth Law Center (ELC) welcomes the opportunity to provide these comments on the Draft Safe Drinking Water Plan for California (Draft Plan). ELC is a non-profit organization that advances legal rights for ecosystems and species to exist, thrive and evolve, and particularly supports recognition of the right of waterways to flow as critical to the long-term health and well-being of humans and the natural world. We ask that the State Water Resources Control Board (SWRCB) revise the Draft Plan to acknowledge: (1) the need to limit development in areas that lack sustainable water supplies, and (2) the potential of flow-impairment listings to benefit safe drinking water.

As background, California's waterways are heavily stressed from over-diversion, drought, and other factors, imperiling aquatic species and habitats and jeopardizing reliable drinking water supplies. As noted in the Draft Plan, from 1993 to 2013 California's population grew from about 30 million to 38 million, and it is estimated to rise to 50 million by 2050. Statewide growth in net housing has also surged – increasing by 27 percent from 2011 to 2012 alone and further intensifying the demand for water. The ongoing drought, which may become the new normal under climate change, compounds these threats to a point of crisis in some areas. Despite the need to use less water, however, California's average residential water use still remains high. For example, residential water use averaged 125 gallons per-capita per-day (gpcd) in September 2014 (and as high as 584 gpcd in the Santa Fe Irrigation District); by comparison, Australian households thriftily use only an average of 54 gpcd for indoor and outdoor use in a similar climate.¹

Healthy waterways are essential to healthy human drinking water supplies. In recognition of the growing challenges to the integrity of the state's waters, we ask that the Draft Policy include the following additional actions to uphold and improve waterway health, actions that are essential to the long-term availability of clean drinking water:

- **Collaborate with local and regional government bodies to prevent the permitting and construction of new housing developments in areas that lack sustainable water supplies.**

ELC agrees with the Draft Policy that the SWRCB should collaborate with local and regional government bodies to “prevent ... new housing developments that do not provide adequate sources

¹ Heberger, Matthew, Pacific Institute, "New Data Show Residential Per Capita Water Use Across California" (Nov. 18, 2014), at: <http://pacinst.org/new-data-show-residential-per-capita-water-use-across-california>.

of drinking water that meet quality standards,”² such as by “[identifying] areas where new development or issuance of new building permits should be postponed until safe water is demonstrated.”³ Related of course to water quality is water quantity;⁴ adequate drinking water sources must be adequate in both quality and amount. For example, small public water systems are “especially vulnerable to drought conditions.”⁵ This is due to both acute water shortages (a quantity issue) as well as the fact that such systems also have the “largest proportion of water quality problems and the highest rate of noncompliance with drinking water standards” (a quality issue).⁶ Unless both issues are addressed during oversight of new developments, adequate supplies of safe drinking water cannot be assured.⁷

Further, new developments that propose to use low-flow waterways as a drinking water source risk violating water quality standards in affected waterways if one or more beneficial uses for such waterways cannot or will not be met due to the reduced flows.⁸ Accordingly, an “adequate” water supply cannot be one that may jeopardize already over-diverted or flow-threatened waterways. In some cases in which local surface water or ground water sources are clearly insufficient, developers have proposed using hauled water – which is broadly recognized as an inadequate long-term solution⁹ – as the sole domestic water source in new construction. Wisely, in a recent letter to the Los Angeles County of Public Works, the SWRCB Division of Drinking Water (DDW) stated its opposition to allowing new single-family developments to use hauled water as a source of supply (*see* attached letter). ELC concurs and asks that the Draft Plan specifically call for the prohibition of hauled water as a long-term supply source for new developments. The limitations of our water supplies and waterways must be recognized.

More broadly, ELC supports the Draft Plan’s call for “[identifying] areas where new development or issuance of new building permits should be postponed until safe water is demonstrated,” but asks that this policy be expanded to recognize that some development simply must not move forward in the face of significant water challenges (that is, as opposed to simply being “postponed”). Protection of the beneficial uses of affected water sources, among other concerns, call for specific attention to *preventing* new housing developments that do not provide adequate sources

² State Water Resources Control Board, “Draft Safe Drinking Water Plan for California,” pp. 33-34 (Oct. 2014), at: http://www.waterboards.ca.gov/drinking_water/safedinkingwaterplan/draft_sdwp_100314.pdf (hereinafter “Draft Plan”).

³ Draft Plan, Recommendation 2-3, p. 34.

⁴ *See, e.g., PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) (in which the U.S. Supreme Court found that the distinction between water quality and quantity is “artificial”).

⁵ State Water Resources Control Board, “Drought Impact on Public Drinking Water Systems” (updated Nov. 20, 2014), at: http://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/DroughtImpact_PublicDrinkingWaterSystems.shtml.

⁶ Draft Plan, p. 15.

⁷ Drinking water pressures are expected to increase due to climate change. For example, approximately 83 percent of counties in California face an increased risk of water shortages mid-century due to climate change, with 33 percent facing an “extreme risk.” NRDC, “Water Shortage Risk and Crop Value in At-Risk Counties, by State,” at: <http://www.nrdc.org/globalwarming/watersustainability/files/StateSummary.pdf>.

⁸ As stated by the U.S. Supreme Court, “a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.” *PUD No. 1, supra* n. 4.

⁹ *See* Torpie, Scott and Christensen, David, “Alternative Water Supplies Draft Discussion Paper for the Drinking Water Advisory Group,” WA State Dept. of Health, pp. 2-3 (Jun. 2013), at: www.doh.wa.gov/Portals/1/Documents/4200/DWAG-062413-handout1.pdf. A survey reported by the Office of Drinking Water at the Washington State Department of Health found that, of 36 responding states, 22 states “do not approve hauled water as a permanent water supply for public water systems,” with five other states only granting approval on a limited basis. *Id.* at p. 3.

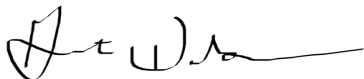
of drinking water, as noted in the report. This point should specifically be moved from the report's text (pp. 33-34) to the Recommendations (page 34) to make the policy clear.

- **Further integrate the Clean Water Act into drinking water policy through Section 303(d) flow impairment identification.**

ELC further asks that the Draft Plan recognize the benefits of creating additional surety of clean, sustainable drinking water supplies by specifically identifying whether potential water sources may be flow-impaired under CWA Section 303(d).¹⁰ For example, the North Coast Regional Water Quality Control Board recently expressed future interest in such flow listings,¹¹ and other regions may soon follow suit. One way such listings could help better ensure the sustainability of water supplies is by creating additional layers of scrutiny that new developments must pass if they want to rely directly on a surface water source that may be flow impaired, a classification that identifies potential drinking water concerns that may have gone unnoticed. Flow impairment listings can also affect the permitting of new developments that would rely on groundwater sources hydrologically connected to impaired surface waters, by providing extra leverage for county well permitting agencies to deny permits for requested drinking water wells that may draw down a flow-impaired surface water body. Accordingly, we ask that the Draft Plan be amended to call for recognition of CWA Section 303(d) flow impairments as appropriate for waterways that are existing or potential drinking water sources (either directly or indirectly through well drawdown).

In sum, we urge the SWRCB to ensure the long-term availability of safe drinking water through enhanced protection of waterway health as described above. Thank you for your attention to these comments and for your focus on this critical issue.

Best regards,



Grant Wilson
Outreach and Policy Coordinator
gwilson@earthlaw.org

Attachment: Letter from the SWRCB Division of Drinking Water to the County of Los Angeles Department of Public Works, "Hauled Water EIR Scoping Comments" (Oct. 20, 2014).

¹⁰ Section 303(d) listing Category "4C," created by U.S.EPA Guidance, is reserved for waterways that are impaired by a non-pollutant and has been used to list waterways impaired by altered flow.

¹¹ Although the North Coast Regional Water Quality Control Board (North Coast Board) did not list any waterways as impaired due to altered flow on its August 2014 approved 2012 Integrated Report, the North Coast Board Chair did "[direct] staff to host a workshop on the region's authorities over water quality and water quantity" in light of testimony provided by supporters of flow listings, and also "[reserved] its right to modify the 303(d) List in accordance with applicable rules and regulations, including the Listing Policy" in order to specifically leave open the possibility of flow impairment listings during the current listing cycle as decided during the referenced workshop. North Coast Regional Water Quality Control Board (Resolution No. R1-2014-0043, adopted Aug. 14, 2014).

State Water Resources Control Board

Division of Drinking Water

October 20, 2014

County of Los Angeles Department of Public Works
ATTN: Mr. Dale Sakamoto/Hauled Water EIR Scoping Comments
900 South Fremont Avenue, 11th Floor
Alhambra, CA 91803

Dear Mr. Dale Sakamoto

Subject: Hauled Water EIR Scoping Comments

The State Water Resources Control Board, Division of Drinking Water (DDW) (formerly CDPH or DHS) has received and reviewed your Notice of Preparation of a Draft EIR for the proposed single-family residential hauled water initiative for new development. The DDW along with California Conference of Directors of Environmental Health (CCDEH) have opposed the use of hauled water as a primary source of drinking water for new construction. CCDEH also considers utilizing hauled water for this purpose as a poor land use practice for over a decade. A joint DHS/CCDEH policy and letter are attached. California, and a number of other states, through the regulation of haulers, has sought to reduce the risk associated with using hauled water as the primary source of drinking water through the regulation of haulers and through recommendations to local jurisdictions.

One of DDW's concerns regarding water hauling is a practical one. USEPA has published a legal finding (signed 11/26/1976, revised 11/1998), stating that once a hauler serves 15 or more houses, the operation falls under the provisions of the Safe Drinking Water Act as a "constructed conveyance" (copy attached). Due to the small number of licensed haulers and small number of residences they serve, USEPA-Region 9 has not focused on this issue. However, should the use of water hauling expand to a community level, as could potentially happen in the Antelope Valley and others areas in Los Angeles County, USEPA may require DDW to enforce the more stringent requirements of the SDWA on water haulers. The DDW is not anxious to see the role of water haulers expand to the point where Region 9 would be forced to re-examine this issue.

The final decision on the use of hauled water for use by individual new homes on existing lots of record is a local land use decision. However, to ensure that a public water system (PWS) is not created, the county must not approve any land development utilizing hauled water as a source of supply that would serve 15 or more connections or result in water being provided to 25 or more persons at least 60 days out of the year (see definition of PWS). There should also be no formation of any State Small Water Systems as part of this process, i.e., serving 5 to 14 service connections. Based on this, hauled water should **not** be an option in the following circumstances:

- Any parcel map or sub-division map which identifies hauled water as a source of supply for the lot(s) being formed – particularly those that create 5 or more lots of record.
- Any lot of record within the boundary or service area of a public water system.
- Any individual lot(s), where the intended use can reasonably expected to result in a water system meeting the definition of a public water system or a state small water system.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

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- Any individual lot(s), where the intended use meets the definition of a public water system that falls under the provisions of §116282 or that is attempting to use hauled water to meet the provision for exclusion under §116280 (b).

The existing DHS/CCDEH policy is not a regulatory requirement and does not carry the force of law. If the county does decide to allow hauled water as a source of domestic water in new construction, DDW would recommend that the following provisions be considered in the development of county ordinances regulating this practice:

- The property owner be required to demonstrate, by attempting to develop an on-site individual domestic water source, that water is unavailable on the property or is of a quality that renders it unsuitable for domestic use.
- That a suitable recording be made as part of the property title, regarding the limitations of the individual water supply, so that the property owner and successors, lenders and insurance providers are fully aware of the constraints and potential liability created by a hauled water supply. Such a recording should include a limitation that the residence only be allowed to be "owner occupied".
- That owners and their successors be required to connect to a public water system when or if one becomes available without undue delay. The county should consider whether or not to require that a cash bond be held in trust by the county, and be sufficient to cover estimated future connection charges.
- That owners and their successors be provided with an informative fact sheet, acceptable to the county, that informs them about the risks and responsibilities associated with hauled water usage.
- That the owner release the state and county of any liability associated with their use of hauled water.

The DDW and the County of Los Angeles are aware of private wells serving single-family residences in the Agua Dulce area that have run dry. The homes are forming a water system, Scenic Estates Mutual Water Company to serve the Agua Dulce homes, and they are seeking a connection to Newhall CWD. The reliability of obtaining hauled water during drought conditions is very difficult and obtaining hauled water from a potable source is also very expensive. Many water systems are not allowing haulers access to the distribution water supply due to lack of water supply during the drought. **The DDW is opposed to the County allowing new development for single-family residences using hauled water.**

If you have any questions concerning this letter, please contact me at (805) 566-1326.

Sincerely,



Kurt Souza, P.E.
Action Southern California Branch Chief
Division of Drinking Water
State Water Resources Control Board