



O'Laughlin & Paris LLP

(3/17-18/15) Board Meeting- Item 8
Emergency Regs- Fisheries
Deadline: 3/16/15 by 12:00 noon

Attorneys at Law

March 12, 2015



Via Email: commentletters@waterboards.ca.gov

Jeanine Townsend, Clerk of the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

**Re: 3/17-18/15 BOARD MEETING: Item #8
Emergency Regulations Regarding Insufficient Flow**

To State Water Resources Control Board:

The San Joaquin Tributaries Authority (SJTA) reviewed the State Water Resources Control Board's (State Water Board) proposed Resolution titled "*To Update and Readopt a Drought-Related Emergency Regulation for Curtailment of Diversions Due to Insufficient Flow for Specific Fisheries*" (Resolution) and proposed changes to California Code of Regulations, title 24, sections 877, 878, and 879 as documented in Item No. 8 for the State Water Board meeting on March 17, 2015 (Proposed Regulations). The SJTA opposes the adoption of the Resolution and/or the Proposed Regulations. The State Water Board has not made the necessary findings to support the Resolution or the Proposed Regulation. In addition, the SJTA is concerned with the Proposed Regulations because they are not supported by law.

BACKGROUND

The State Water Board adopted a series of emergency regulations in 2014 pursuant to authority provided in Water Code section 1058.5. Specifically, sections 877, 878, and 879 were enacted to address alleged insufficient flows in Deer, Mill, and Antelope Creeks (Insufficient Flow Regulations). The Insufficient Flow Regulations were adopted on May 21, 2014, became effective on June 2, 2014, and were in place for 270 days. The Insufficient Flow Regulations expired on February 28, 2015.

On March 6, 2015, the State Water Board released the Resolution and Proposed Regulation. The State Water Board did not provide any findings in support of the Resolution or the Proposed Revisions.

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The Insufficient Flows Regulations adopted last year determined that diversions that would cause flows to fall below drought emergency minimum flows were a waste and unreasonable use of water. (Cal. Code of Regs., tit. 24, section 877.) The Proposed Regulations seek to make changes to the previous Insufficient Flows Regulations by changing the period of regulation.

REASONS FOR OPPOSITION

I. Findings Are Required to Adopt Emergency Regulations

In order to adopt emergency regulations pursuant to Water Code section 1058.5, the State Water Board must make findings that (a) an emergency exists; (b) the emergency could not be addressed through non-emergency regulations; and (c) the proposed regulation addresses the emergency. (Water Code, § 1058.5; Govt. Code, § 11346.1.) When adopting emergency regulations in 2014, the State Water Board drafted findings that sought to comply with the above requirements.

The Insufficient Flow Regulations expired on February 28, 2015. Therefore, the State Water Board is proposing to adopt and amend the Proposed Regulations. The adoption of the Proposed Regulations is subject to the same finding requirements as any other emergency regulation. Before considering the proposed Resolution and adoption of the Proposed Regulations, the State Water Board must make findings that satisfy the Water Code and Government Code requirements above. Specifically, the State Water Board must make findings that justify emergency regulations in 2015, analyze the impact of last year's regulations on fish and water users, and make findings specific to the proposed schedule changes. The State Water Board has not made these findings and therefore cannot lawfully adopt the Proposed Regulations.

II. Confusion Between Curtailment and Unreasonable Use

The Resolution and Proposed Regulation proposes to "curtail" water rights by making a determination of unreasonable use. The references to curtailment via unreasonable use reflects a fundamental misunderstanding of the rules that govern water law. If a use of water is determined to be unreasonable, the right to use water is terminated and no longer exists. There can be no curtailment of a non-existent water right. The State Water Board's intermingling of the doctrines of curtailment and unreasonable use is imprecise and confusing; in addition, it seeks to minimize the serious nature with which a determination of unreasonable use is made, by characterizing it as somehow temporary or fleeting. To the extent the State Water Board determines a use of water is unreasonable, the Board must recognize this determination results in the termination of a water right and the reference to curtailment is no longer appropriate.

III. Proposed Regulations Are Not Authorized by Water Code 1058.5

(A) Unreasonable Use Determination Disguises Public Trust Action

Water Code section 1058.5 provides the State Water Board the authority to enact emergency regulations to prevent the unreasonable use of water. (Water Code, § 1058.5.) The State Water Board does not have the power or authority to enact emergency regulations based on public trust

determinations. Although the State Water Board invokes the term unreasonable use, the actual determination and findings made by the State Water Board are not based on preventing unreasonable use, but rather, are based on public trust considerations.

Specifically, the proposed regulation defines the reasonableness of water use not by the attributes of diversion, application, or other components of water use, but instead, by the quantity of water that will remain in Deer, Mill, and Antelope Creeks for fisheries purposes. Thus, rather than finding the use of water is unreasonable, the State Water Board appears to be balancing two beneficial uses against each other. The balancing of beneficial uses is the basis of a public trust action and has no place in the determination of whether a use of water is reasonable.

Because the proposed regulations are not preventing the unreasonable use of water, but rather, preliminarily weighing and balancing beneficial uses against one another, the regulations are the result of public trust determinations and are not authorized by Water Code section 1058.5.

(B) Unreasonable Use Cannot Be Applied Through Broad Regulation

Water Code section 1058.5 allows emergency regulation to “prevent the unreasonable use of water.” (Water Code, § 1058.5.) The State Water Board appears to assume Water Code section 1058.5 provides it with the authority to determine that broad categories of water use are unreasonable through regulation. This assumption is not supported.

Courts have specifically determined the State Water Board may not define unreasonable use categorically, without looking at the details of the particular use of water. (*Light v. State Water Resources Control Board* (2014) 226 Cal. App. 4th 1463; *State Water Resources Control Bd. v. Forni* (1976) 54 Cal. App. 3d 743) Although these determinations were made before Water Code section 1058.5 was amended to allow the State Water Board to enact emergency regulation to prevent the unreasonable use of water, the determination remains valid. The reason that Courts do not allow the State Water Board to determine unreasonable use through regulation is that to do so would violate the due process rights of water right holders. Due process is a fundamental right that cannot be changed or rescinded through amending the Water Code. Therefore, the Proposed Regulation, which attempts to regulate unreasonable use through broad definition not specific to the use of water, is outside the bounds of Water Code section 1058.5.

IV. Proposed Regulations Violate Due Process

The right to divert water is a property right. Because article 10 section 2 of the California Constitution declares there can be no right to use water unreasonably, the determination that a use of water is unreasonable terminates the right to divert water, which is a right to property.

There is no method or process to reinstate a right to use water once it has been determined to be an unreasonable use. Rather, the right to use water has been extinguished and no longer exists. A former water right holder may reapply for a new right. However, the priority of the previous right cannot be reinstated and the approval of a new right is not guaranteed.

Because the determination that a use of water is unreasonable is a termination of a property right, such a determination cannot be made without first providing due process protections. The State Water Board has not afforded the water right holders on Deer, Mill, and Antelope Creeks the basic rights of due process, including the right to cross examine witnesses, test evidence, rebut evidence, and otherwise defend against allegations before extinguishing Plaintiffs right to property. For these reasons, the State Water Board must decline the adoption of the Resolution and the Proposed Regulations.

V. Proposed Regulations Amount to a Regulatory Taking

Private property may not be taken by the government for public use without the provision of just compensation. (Cal Const., art. 1, § 19; *Armstrong v. United States* (1960) 364 U.S. 40, 49.) The Proposed Regulations seek to take property rights for public use without providing just compensation. For this reason, the Proposed Regulations amount to an unlawful taking.

VI. Proposed Regulations Violate the Rules of Water Right Priority

Water right priority has long been the central principle in California water law. (*El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 961; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243.) The rules of water right priority require the State Water Board to curtail all junior use prior to reducing senior water rights when implementing water quality objectives. (*El Dorado*, at 963-964.) Even when the State Water Board has the authority to subordinate the rules of water right priority for public trust considerations, the State Water Board must make every effort to implement consistent with the rules of priority. (*Id.*)

Section 877 defines unreasonable use as any diversion that “would cause or threaten to cause flows to fall beneath the drought emergency minimum flows.” The Proposed Regulations do not make every effort to consider the priority of the water right holders affected by Section 877. To the contrary, Section 877 makes absolutely no effort to consider the priority of rights to divert water from Deer, Mill, and Antelope Creeks. In fact, the only consideration the State Water Board makes in the determination of whether a diversion is reasonable is whether it affects achieving minimum flows. This treats all diversions of water, regardless of priority, the same. Because the Proposed Regulation fails to make any to effort consider water right priority, it is unlawful and cannot be adopted by the State Water Board.

VII. Minimum Health and Safety Needs

The Proposed Regulations make the determination that a diversion “under even a more senior right for any other use when supplies required for minimum health and safety needs cannot be met is a waste and unreasonable use of water.” (Section 878.1(b).) Again, the State Water Board is unlawfully using the determination of unreasonable use to re-configure water right priorities based on type of use, rather than date of priority. The State Water Board simply does not have the authority take away the rights of senior water users because it prefers that fish or other junior water right holders be able to use the water.

Section 878.1 is also exceedingly overbroad. A strict reading of the language would suggest that no water user may divert if there is an unmet health and safety need somewhere in the state. Certainly, at the very least, the provision must be revised to be more narrowly tailored to focus on water users that could affect the unmet need. In addition, the revision should make an effort to further narrow the provision to consider priority and avoid the determination that senior water right holders are unreasonably using water when there is sufficient water from junior water diversions to meet the unmet health and safety needs.

To those not familiar with the system of priority and provision of emergency water services, the elevation of public health and safety needs above all other water uses may not appear radical. However, it is radical; the State Water Board has never previously been allowed to completely restructure the system of water right priority and designate a category of beneficial water use senior to all other water rights.

CONCLUSION

The SJTA opposes the Resolution and Proposed Regulations because they are not supported by necessary findings or applicable law. The SJTA requests the State Water Board decline to adopt the Resolution and Proposed Regulations. The SJTA recommends the State Water Board direct staff to work with the stakeholder community to develop a more supportable method to address drought impacts on instream flows. The SJTA would be happy to work with staff on resolving the issues raised in this letter and avoid the danger of emergency regulations causing further instability during drought conditions.

Very truly yours,

O'LAUGHLIN & PARIS LLP



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