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25 September 2015

By E-Mail and Mail

Bruce H. Wolfe
Executive Officer
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Subject: Cleanup and Abatement Order R2-2015-0038
Point Buckler LLC

Dear Mr. Wolfe:

On behalf of Point Buckler LLC, we are responding to paragraph 8 of Cleanup and Abatement Order R2-2015-0038 (the "Order"), which reads as follows:

No later than 14 days from the date of this Order, the Discharger is required to acknowledge in writing its intent to reimburse the State for cleanup oversight work as described in the Reimbursement Process for Regulatory Oversight fact sheet provided to the Discharger with this Order, by filling out and returning the Acknowledgement of Receipt of Oversight Cost Reimbursement Account Letter or its equivalent, also provided with this Order.

It is not clear to us what this provision means. Water Code § 13304 provides that the Regional Board may recover "reasonable costs actually incurred" *after* waste is cleaned up or its effects abated:

If the waste is cleaned up or the effects of the waste are abated, or, in the case of threatened pollution or nuisance, other necessary remedial action is taken by a governmental agency, the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that governmental agency

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to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial action. The amount of the costs is recoverable in a civil action by, and paid to, the governmental agency and the state board to the extent of the latter's contribution to the cleanup costs from the State Water Pollution Cleanup and Abatement Account or other available funds.

(Water Code § 13304(c)(1).) The Regional Board, therefore, does not appear to have authority to require a discharger to reimburse it for costs incurred *before* “the waste is cleaned up or the effects of the waste are abated”. Please correct us if our interpretation is wrong, or if there is other authority we have not considered.

When paragraph 8 of the Order says that “the Discharger is required to acknowledge in writing its intent to reimburse the State”, the Order could be interpreted as requiring that Point Buckler LLC *must* agree *now* to reimburse the Regional Board. This interpretation would invalidate at least part of the Order as an act in excess of the Regional Board's authority.

We believe the better interpretation is that paragraph 8 of the Order includes a voluntary request. In response, Point Buckler LLC acknowledges that it may, as part of an appropriate legal process (as discussed in more detail below), be found liable and required to reimburse the Regional Board for oversight costs. Point Buckler LLC would like to discuss the reimbursement issue with you and your staff. Please let us know if you agree that paragraph 8 should be interpreted as a voluntary request.

Paragraph 8 specifically requires that a form be returned, and we are attaching a signed copy of the form. Because Mr. Sweeney is not available to sign the form, I have signed it for him. As you may have noticed, the language of the form does not conform to the language of the Order. We are returning the form, attached as Exhibit 1, because it is our intent to comply with the Order as we proceed through the legal process. Please let us know if you believe our actions do not constitute compliance, and then give us an opportunity to come into compliance. Please do not send us any bills pending resolution of the legal issues.

We have reviewed the letter dated 18 September 2015 from Wilson Wendt of Miller Starr Regalia (whom we are replacing on this matter) to you. That letter respectfully requests a hearing on the Order. We have also reviewed the e-mail dated 23 September 2015 from Agnes

Farres of your staff responding to Mr. Wendt concluding that “there is no action to take before the Board at this time” and that “it would be more appropriate to schedule a meeting with staff”.

We do not understand why a hearing has not been held and is not being held for the Order. “Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest.” (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 621.) Here there cannot be any doubt that the Order deprives Point Buckler LLC of a significant property interest. In July 2015, in the *West Side Irrigation District* case (copy attached as Exhibit 2), the Sacramento Superior Court invalidated letters sent out by the State Board—letters that commanded far less than the Order—on the grounds they were issued “without any sort of pre-deprivation hearing”. (Exhibit 2 at 5.) The court distinguished between letters that are “coercive in nature” (*id.* at 2), which require a hearing, and purely informational letters, which do not. Here the Order is indisputably coercive in nature. The court concluded that “[e]very day the Letter remains in its current form constitutes a violation of those constitutional rights.” (*Id.*)

State Board Order No. WQ 86-13, *In the Matter of the Petition of BKK Corporation*, acknowledges the need for a post-order hearing:

The Porter-Cologne Water Quality Control Act...does not require notice and an opportunity to be heard before issuance of a cleanup and abatement order. Due process is provided by an opportunity for a hearing after the order is issued.

(*Id.* at 4.)

Where a state’s interest is sufficient compelling, the requirements of procedural due process may be satisfied by a hearing provided after issuance of an administrative order....

(*Id.* at 6.)

We therefore once again request a hearing. If that request is denied, please let us know why the Regional Board believes that no hearing is required.

We also do not understand how the due-process requirements for a fair tribunal, including the requirements for separation of functions and the prohibition on ex-parte communications, have been implemented for the Order. (See *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 736-739.) *Morongo* describes the extensive

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procedures used by the State Board to satisfy these requirements. (*Id.* at 735-736.) Please let us know how these requirements are being satisfied here. Who is on the prosecution team, and who is on the advisory team? Have any procedures been put in place to prohibit ex parte communications between them?

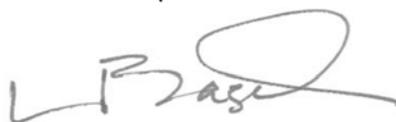
We also note that the Order invokes the Regional Board's authority under Water Code § 13267, which requires that the Regional Board "shall identify the evidence that supports requiring that person to provide the reports." (Water Code § 13267(b)(1).) Although the Order includes findings, there is no reference whatsoever to the evidence on which these findings is based. We would like to understand what evidence your staff relied on in preparing the Order, and will be submitting a Public Records Act request. Nevertheless, we would like a hearing so that your staff can present the Regional Board's evidence to an impartial fact finder, and we can rebut it.

We are sorry to have to proceed this way, but must protect our legal rights. The deadlines in the Order are much too short to resolve all the issues that need to be resolved. We therefore request that all deadline in the Order be postponed for 60 days, so that we can focus our efforts on responding to the Regional Board's needs rather than on legal proceedings to obtain a stay.

The e-mail from Ms. Farres proposes a meeting with Keith Lichten, Tamarin Austin, and Bill Hurley, and we agree that a meeting is a good idea. We will be following up on that proposal.

Thank you very much for your consideration of these questions, comments, and requests, and please call with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Bazel", written in a cursive style.

Lawrence S. Bazel

cc: A. Farres (by e-mail)
K. Lichten (by e-mail)
A. Tamarin (by e-mail)
B. Hurley (by e-mail)

EXHIBIT 1

ATTACHMENT 3

**ACKNOWLEDGMENT OF RECEIPT OF
OVERSIGHT COST REIMBURSEMENT ACCOUNT LETTER**

I, John Sweeney, acting within the authority vested in me as an authorized representative of the ~~property located at Point Buckler~~ LLC ~~in Solano County~~, acknowledge that I have received and read a copy of the attached *REIMBURSEMENT PROCESS FOR REGULATORY OVERSIGHT* and the transmittal letter, dated September 10, 2015, concerning cost reimbursement for Regional Water Board staff costs involved with oversight of cleanup and abatement efforts at Point Buckler Island in Solano County.

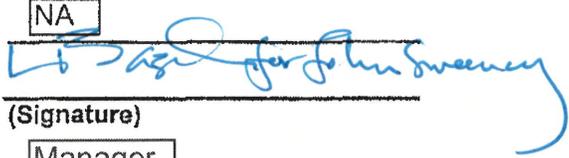
I understand the reimbursement process and billing procedures as explained in the letter. I also understand that signing this form does not constitute any admission of liability. ~~Billings for payment of oversight costs should be mailed to the following individual and address:~~

BILLING CONTACT

BILLING ADDRESS

TELEPHONE NO.

RESPONSIBLE PARTY'S SIGNATURE



(Signature)

(Title)

DATE:

EXHIBIT 2

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE:	July 10, 2015	DEPT. NO.:	24
JUDGE:	HON. SHELLYANNE W. L. CHANG	CLERK:	E. HIGGINBOTHAM
THE WEST SIDE IRRIGATION DISTRICT; CENTRAL DELTA WATER AGENCY; SOUTH DELTA WATER AGENCY; WOODS IRRIGATION COMPANY, <p style="text-align: center;">Petitioners and Plaintiffs,</p> <p style="text-align: center;">v.</p> CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; THOMAS HOWARD, EXECUTIVE DIRECTOR OF CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; and DOES 1 THROUGH 100, INCLUSIVE, <p style="text-align: center;">Respondents and Defendants.</p>		Case No.: 34-2015-80002121	
Nature of Proceedings:		ORDER AFTER HEARING ON EX PARTE APPLICATION FOR TEMPORARY STAY RE: ENFORCEMENT OF CURTAILMENT NOTICE OR IN THE ALTERNATIVE TEMPORARY RESTRAINING ORDER AND/OR FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION	

This matter came before the Court pursuant to an ex parte application by the West Side irrigation District, Central Delta Water Agency, and South Delta Water Agency. The ex parte application seeks a stay or a temporary restraining order/order to show cause concerning the May 1, 2015 and June 12, 2015, “NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT...”¹ (hereinafter referred to as the “May Curtailment Letter” and the “June Curtailment Letter”, jointly referred to as the “Curtailment Letters”) issued by the State Water Resources Control Board through its Executive Director Thomas Howard.

Counsel for Petitioners/Plaintiffs appeared at the ex parte hearing, as well as counsel for Respondents/Defendants. All parties had the opportunity to present oral arguments concerning the issues raised in the moving and opposing papers.

¹ This language is from the heading of the June 1, 2015 letter. The May 1, 2015 letter is titled, “NOTICE OF UNAVAILABILITY OF WATER AND IMMEDIATE CURTAILMENT...”

The Court finds the May Curtailment Letter is properly subject to a judicial determination of whether it violates the Petitioners' due process rights such that a temporary restraining order/order to show cause should issue.² The Court finds there is no administrative process Petitioners must exhaust prior to this determination as to the May Curtailment Letter.³

Although a petition for reconsideration is still pending concerning the May Curtailment Letter, the Court finds that this is a situation where the pursuit of the administrative remedy would result in irreparable harm absent a temporary restraining order. (See *People ex rel. DuFauchard v. U.S. Financial Management, Inc.* (2009) 169 Cal.App.4th 1502, 1512)(citing *Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1827.) Petitioners' belief that they must stop diverting water, not because to do so would be a legal violation but merely a violation of the May Curtailment Letter, will result in irreparable harm to their crops while they await a decision on the petition for reconsideration. (Decl. of Jack Alvarez, ¶¶ 7, 8, 11.) Consequently, Petitioners will be irreparably harmed should they have to wait for final resolution of the administrative process before obtaining relief from the immediate mandate the May Curtailment Letter appears to impose outside of the statutory processes provided by the Water Code.

Moreover, for the reasons stated below, the Court finds that the issuance of the May Curtailment Letter violated Petitioners' Due Process rights. Every day the Letter remains in its current form constitutes a violation of those constitutional rights. Accordingly, it is proper for this Court to issue a temporary restraining order while the administrative process is ongoing.

With regard to the June Curtailment Letter, the Court liberally construes the allegations of the Petition For Writ of Administrative Mandate, as it must, and finds that for purposes of this ex parte application, Petitioners CDWA and SDWA have adequately pled that their landowners exercise pre-1914 appropriative and/or permit licenses rights that are subject to the directives given in the Letter. (Petition, ¶¶ 13, 14.) Consequently, Petitioners CDWA and SDWA have standing to bring the instant application concerning the June Curtailment Letter.

The Court finds the 2015 Curtailment Letters are coercive in nature and go beyond the "informational" purpose the Board claims prevents a stay. Consequently, Petitioners are likely to succeed on the merits. As in *Duarte*, even though the Curtailment Letters are not

² Petitioners have filed a petition for reconsideration pursuant to California Water Code section 1126(b) which petition is still pending before the Water Resources Control Board and for which the 90-day period for reconsideration has not yet expired. (See Petition, ¶ 21; Wat. Code §1122.) The Court declines to interfere in these administrative proceedings, and consequently in no way stays the furtherance of that petition in accordance with the Water Code. The Court agrees that in light of the pending reconsideration petition, this matter is not subject to a Civil Code section 1094.5, subdivision (g) stay.

³ Respondents have not argued Petitioners are required to exhaust their administrative remedies. Respondents have instead argued the petition with regard to the May Curtailment Letter is untimely pursuant to the 30-day deadline in section 1126. However, this deadline is extended while a petition for reconsideration is pending, as is the case here.

enforceable on their own and there are no separate penalties for violating them, the language used in the Curtailment Letters results in a “command by the...[g]overnment to stop [water diverting] activities.” (*Duarte Nursery, Inc. v. United States Army Corps of Engineers* (2014) 17 F.Supp.3d 1013, 1018.) It is not a suggestion for “voluntary cessation of activities,” but instead requires Petitioners to “immediately stop diverting water.” (*Id.* at 1019; Pet. exh. B.)

Respondents argue *Duarte* is distinguishable because it involved a single letter sent to a single rights-holder, and provided that the Army Corps of Engineers had already determined that a violation of the Clean Water Act had occurred. (*Duarte*, 17 F.Supp.3d at 1015.) Respondents contend here, the Curtailment letters are form letters being sent to hundreds of appropriators, and are merely informational with no pre-determination that any individual rights-holder has violated the law.

While all parties acknowledge the Curtailment Letters were sent to more than one appropriator, the letters provided to the Court are addressed to an individual company, and identify a specific claim of rights at issue. The Curtailment Letters further declare and determine that the recipient is not entitled to divert water because that water is necessary to meet senior water rights holders, thus making a determination of the recipient’s water rights priority. (Pet., exh. B, ¶2.) Through the inclusion of this specific information, the Curtailment Letters appear not to be generalized notices, but instead a specific adjudication and command with respect to the particular rights holder.

Further, nothing in *Duarte* limits its holding to an instance involving only one notice. The *Duarte* court’s focus was on the fact that nothing in the letter notified “plaintiffs that the Corps could not take action based upon the CDO alone.” (*Duarte*, 17 F.Supp.3d at 1022.) The same is true here, as the Curtailment Letters indicate the recipient must “immediately stop diverting water” and do not clearly state that the letter is merely informational, without any legal force or effect.

The Curtailment Letters also require recipients to “document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms your cessation of diversion under the specific pre-1914 claim of right. Completion of the Form is mandatory...” Nowhere in this language do the Curtailment Letters assert that Petitioners are free to ignore the directive that they cease diverting water or that it is merely a suggestion.⁴ At the hearing on this matter, Respondents acknowledged that the Form requires diverters to sign under penalty of perjury that they are no longer diverting water.

Although the Curtailment Letters do not state that the Board has made a specific determination that the particular recipient has already engaged in illegal conduct, the letters plainly state that the recipient must “immediately stop diverting water” and that

⁴ This is similar to *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, where the Court held plaintiffs were aggrieved by a curtailment notice within the meaning of section 1126(b) because it “required plaintiffs to immediately discontinue diversion of water under their licenses.” Although *Phelps* involved only one notice, the implication of the language of the letters is the same as in this case.

the only action available is to sign the compliance certification that “confirms your cessation of diversion under the specific pre-1914 claim of right.” (Pet., exh. B.)⁵ As in *Duarte*, this strong directive implicates a pre-determination as to the availability of water pursuant to the recipient’s appropriation rights. The Board, “did not ‘notify’ plaintiffs they were operating in violation of the law, it commanded plaintiffs to stop their activities.” (*Duarte*, 17 F.Supp.3d at 1023.)

At oral argument, Respondents argued that because the Curtailment Letters did not expand or alter Petitioners’ civil liability for water diversions and are merely “informational documents”, a temporary restraining order should not issue. Respondents’ argument is not only misguided, it is also inaccurate.

The focus is not whether the Petitioners’ legal exposure remains unchanged or not, but rather whether the Curtailment Letters could be reasonably interpreted to be an order or command by the government, not merely a suggestion or request for voluntary cessation of activities. (*Duarte*, 17 F.Supp.3d at 1020.) Moreover, contrary to Respondents’ assertions, the Curtailment Letters have altered Petitioners’ legal position. The Curtailment Letters state that even if there is available water for the water user, said water is dedicated for senior water rights’ holders needs, conclude that the recipient no longer has any legal right to said water, and orders the recipient to “immediately stop diverting water...” Indeed, the Curtailment Letters appear to alter Petitioners’ civil liability as the Board has apparently concluded without hearing or notice that Petitioners are no longer entitled to divert water for their needs.

As the Court in *Duarte* stated, “If the [Letters] were simply a ‘notification’ to plaintiffs, then it should have said so, rather than clothing itself as an ‘order’ which carried with it the authority to ‘prohibit’ the plaintiffs from continuing their activities.” (*Duarte*, 17 F.Supp.3d at 1020.) The Court recognizes, and Respondents admit, that the Curtailment Letters do not subject Petitioners to any additional liability or penalties above that which they may already be subjected to due to the extreme drought conditions California is currently experiencing. However, the Curtailment Letters represent that the Board has already adjudicated that the recipients are no longer entitled to divert water and that any future diversions would be improper and a trespass [“This Form confirms your cessation of diversion under the specific post-1914 water right... Completion of the form is mandatory to avoid unnecessary enforcement proceedings”].

Respondents are free to provide truly informational notices to water diverters of the nature of the drought and the Board’s right to initiate Water Code section 1831 or 1052 proceedings. Respondents are also free to initiate inquiries with diverters as to whether they have alternate water sources and to otherwise exercise their statutory enforcement authority under the Water Code, including investigation and instituting any actions for trespass. To be clear, Respondents are free to exercise their statutory authority to enforce the Water Code as to any water user, including these Petitioners, if it deems them to be in

⁵ In *Duarte* the Court noted that the assertion that a violation has already occurred, by itself, is insufficient to satisfy the ripeness requirement. A letter or notice must also threaten consequences for failure to take certain action, as it does here. (*Duarte*, 17 F.Supp.3d at 1025.)

violation of any provisions of the Water Code, so long as the bases for said action are not the Curtailment Letters.

However, the language of the Curtailment Letters goes beyond informational and is instead coercive such that a recipient is likely to believe they are no longer allowed to divert. This belief is not because such a diversion would be a trespass or other legal violation, but because the Board has already declared in the Curtailment Letters that it has made a determination that they are no longer entitled to divert under their appropriative water rights, without any sort of pre-deprivation hearing. Respondents do not challenge Petitioners' assertion that any cessation of water diversion done in response to the Curtailment Letters, not as a result of an unavailability of legally divertible water, would cause a serious hardship to Petitioners. This is an issue ripe for judicial intervention and the Court concludes that the Curtailment Letters as presently drafted constitute a violation of the due process rights of the Petitioners.⁶

The Curtailment Letters, including the requirement that recipients sign a compliance certification confirming cessation of diversion, result in a taking of Petitioners' property rights without a pre-deprivation hearing, in violation of Petitioners' Due Process Rights. The Court hereby **GRANTS** the ex parte application for a temporary restraining order/order to show cause as to why a preliminary injunction should not issue requiring the Board to issue a revised letter/notice that is informational in nature.

A temporary restraining order shall issue staying or prohibiting Defendants State Water Resources Control Board and Thomas Howard from taking any action against the West Side Irrigation District and landowners of the other petitioner Districts on the basis of the 2015 Curtailment Letters sent by the Water Board's Executive Director, Thomas Howard, or on the basis of a failure to complete a Curtailment Certification Form.

The matter is set for an order to show cause on July 30, 2015 at 9:00 a.m. in Department 24. Respondents shall file with the clerk of Department 24 and serve (via email or fax) any supplemental Opposition to the Order To Show Cause no later than July 16, 2015. Petitioners shall file with the clerk of Department 24 and serve (via email or fax) any Reply no later than July 23, 2015. The application for a temporary stay pursuant to CCP §1094.5(g) is **DENIED**.

Counsel for Petitioners to submit a formal order for the Court's signature pursuant to CRC 3.1312.

⁶ There is no allegation that Petitioners have filed a petition for reconsideration with the Board concerning the June Curtailment Notice. Respondents made no argument that Petitioners were required to do so before bringing the instant petition and ex parte application. Consequently, the Court does not address whether such a reconsideration petition was required.