

# HARRIS, PERISHO & RUIZ

ATTORNEYS AT LAW

JOHN M. HARRIS  
JOEL T. PERISHO  
S. DEAN RUIZ  
HEATHER D. RUBINO

BROOKSIDE CORPORATE CENTER  
3439 BROOKSIDE ROAD, SUITE 210  
STOCKTON, CALIFORNIA 95219  
TELEPHONE: (209) 957-4254  
FACSIMILE: (209) 957-5338  
[www.harrisperishoruiz.com](http://www.harrisperishoruiz.com)

June 30, 2014

Felicia Marcus, Chair  
State Water Resources Control Board  
c/o Clerk of the Board  
Via Electronic Mail: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)



Re: **7/1-2/14 Board Meeting Item 5 – Consideration of a proposed Resolution regarding drought related emergency regulations for curtailment of diversion to protect senior water rights**

Dear Chair Marcus:

These comments are submitted on behalf of the South Delta Water Agency ("SDWA"), the Central Delta Water Agency ("CDWA"), Woods Irrigation Company ("WIC"), and those who divert water from the Delta within those service boundaries. On behalf of these interests, we strongly urge the State Water Resources Control Board, the ("Board"), not to adopt the proposed emergency regulation curtailing senior water right holders, or in the alternative, to exempt the Delta from same.

**A. The Proposed Regulation Attempts to Elevate Junior Water Right Holders Above Senior Water Right Holders.**

The asserted premise of the proposed regulation is to improve the Board's ability to protect senior water right holders. Unfortunately, this begs the question of who are the senior water right holders that need protecting, and from whom do they need protection? Diverters in the South Delta, Central Delta, and WIC service areas have riparian and/or pre-1914 water rights. While we recognize health and safety concerns, the current drought situation is not a surprise and the State Water Project ("SWP") and Central Valley Project ("CVP"), collectively the "Projects", have been allowed to divert significant amounts of water over the past year while the drought situation was clearly upon us. Thus, it appears clear to us that the proposed regulation is intended to allow the preservation of existing storage for future export to junior water right holders south of the Delta. The attempt to confuse this fact with true health and safety concerns is not persuasive and detracts from the real issue which is whether it is sensible and permissible to curtail senior water right holders to preserve storage for future export to junior water right holders? We do not believe it is justified, equitable or legal to do so.

## **B. The Proposed Regulation Would Effectuate a Violation Of In-Delta Diverters' Right to Meaningful And Required Due Process.**

The proposed regulation would inextricably allow the Deputy Director for the Division of Water Rights, the ("Deputy Director") to curtail senior diverters without any timely and, thus, meaningful, due process. Specifically, the proposed regulation delegates to the Deputy Director the ability to issue a Curtailment Order without any form of evidentiary hearing. The regulation further provides that a diverter may contest the issuance of a Curtailment Order by petitioning for reconsideration pursuant to Water Code Section 1122. Unfortunately, said section provides the Board with 90 days to decide upon such petition. In many past instances, the Board has not even bothered to issue a decision in response to a petition for reconsideration. Either way, the irrigation season will be over prior to the expiration of the 90 days. Because complete discretion to issue the Curtailment Order would be delegated to the Deputy Director, diverters will otherwise be forced to exhaust their administrative remedies through the petition for reconsideration prior to being able to bring an action in court. Obviously, any such action would be heard well after a diverter has either been compelled to allow his crop to die, or has diverted under the threat of financially devastating penalties. It is difficult to imagine a more clear violation of a diverter's meaningful right to due process.

For the proposed regulation to provide any meaningful due process, the regulation must be amended to allow diverters to exhaust administrative remedies by requiring that any petition for reconsideration be decided by the Board within 14 calendar days of submission and require that the deputy director share all evidence supporting a decision to issue a Curtailment Order at the time said order is noticed. The suggestion that such a process would create a backlog for the Board is not a justification for the deprivation of meaningful due process.

## **C. The Proposed Regulation Is An Unlawful Delegation Of Authority And Is, Thus, Unconstitutional.**

The separation of powers doctrine prohibits branches of government from unlawfully delegating their functions in a way that impedes the separation of powers. Thus, the legislature cannot confer on an administrative agency unrestricted authority to make fundamental policy decisions.<sup>1</sup> It must itself make fundamental policy determinations and provide adequate safeguards to prevent abuse of power.<sup>2</sup> Similarly, the Board, acting in quasi-legislative capacity in considering the proposed regulation, cannot confer on staff, authority to make fundamental policy decisions without adequate safeguards to prevent abuse of power.

The proposed regulation confers complete discretion upon the Deputy Director to issue Curtailment Orders. There are no adequate safeguards provided and no provision for requiring that the legislature remain meaningfully involved in the process. The Deputy Director's function, as contemplated by the proposed regulation, is far from ministerial.

<sup>1</sup> *People v. Wright* (1982) 30 Cal.3d 705, 712; *State Board v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, 448.

<sup>2</sup> *People v. Wright* (1982) 30 Cal.3d 705, 712; *Kugler v. Yocum* (1968) 69 Cal. 2d 371, 376; *State Board v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, 448. Not all court decisions mention the need for adequate safeguards (see, e.g., *Clean Air Constituency v. California St. Air Resources* (1974) 11 Cal.3d 801, 816-17), but the need for adequate safeguards is still often cited (*People v. Wright* (1982) 30 Cal.3d 705, 712).

Rather, the Deputy Director will unavoidably make far-reaching and significant policy decisions when determining which senior water right categories and diverters to curtail.

While the legislature's ability to delegate authority is fairly expansive, it is not unlimited. The legislative body must 1) retain control over the power to make fundamental policy decisions; and 2) the procedure established for the exercise of delegated power must adequately safeguard those affected.<sup>3</sup> Here, the proposed regulation provides for a process by which the Deputy Director, without any form of evidentiary hearing, can curtail senior water right holders in the Delta in order to "protect senior water rights" without any requirement that the delegating authority have any further oversight or policy role.

**D. The Proposed Regulation And Its Supporting Materials Fail to Recognize The Fact That The Delta Always Has Title Inflow And, Therefore, Always Has Water Available In The Channels to Divert.**

It has long been recognized that because of the tidal influence, the Delta is never short of water. The reduction in water quality within the Delta channels due to a diminished fresh water inflow does not reduce the quantity available to Delta diverters. The proposed regulation is devoid of any recognition of this commonly understood fact and should be revised accordingly.

**E. Any Curtailment Orders Issued By The Deputy Director Must Account For The Overlap Of Senior Water Rights In The Delta.**

Many diverters in the Delta enjoy both pre-1914 and riparian water rights. This is particularly true for diverters within the WIC service area. There, individual landowners within WIC, divert both under riparian and pre-1914 water right claims while WIC itself enjoys a significant pre-1914 water right. The delineation between the landowners' senior water rights, and those belonging to WIC, have yet to be determined. The Deputy Director must take careful consideration with respect to the unique situation within the WIC service area prior to any decision or attempt to classify, designate, or curtail one category of senior water right holders. The complexity with respect to WIC further highlights the untenable process contemplated by the proposed regulation through which the Deputy Director would be allowed to curtail senior water right holders in the absence of any form of evidentiary or fact-finding hearing.

**F. The Proposed Regulation Fails To Recognize The Direct Relationship Between Ground Water And Natural Flow In The Delta.**

The direct interrelationship between ground water and natural flow in the Delta is unique and well-recognized. The proposed regulation should direct the Deputy Director to re-consider the interconnectivity of ground water and surface water in the Delta as part of any curtailment analysis. This again emphasizes the glaring need for pre-curtailment due process in the form of an evidentiary or fact-finding hearing.

---

<sup>3</sup> *Grouch v. City of Berkeley* (1981) 118 Cal.App.3d 518.

**G. The Proposed Alternative Water Sharing Agreements Are Also Void Of Required Due Process.**

Proposed section 878.3 included in the June 20, 2014, draft regulation provides for the possibility that the Deputy Director could approve regional water sharing agreements in lieu of, or in connection with, curtailment. While all regional and/or watershed based agreements are clearly superior to curtailment, the proposed regulation fails to assure that any parties objecting to a water sharing agreement will be provided with due process. Rather, the proposed regulation indicates that the Board may hold a hearing in response to any objection received to a water sharing agreement. Again, in order for the regulation to provide any meaningful due process, it must assure that an objection/petition for reconsideration is heard and decided in a very short order, not to exceed 14 calendar days. Moreover, any decision by the Deputy Director to approve a water sharing agreement, while pursuing curtailment against other diverters, is clearly and undeniably a policy decision of paramount importance. Any such decision is further evidence that the proposed regulation is an overreaching, improper, and unconstitutional delegation of authority which cannot sustain legal scrutiny.

**Conclusion**

We urge the Board to reject the proposed regulation and to consider curtailment on a case by case basis after a diverter has been allowed proper due process. Alternatively, we urge the Board to exempt the Delta from the proposed regulation.

Very Truly Yours,

HARRIS, PERISHO & RUIZ  
Attorneys at Law

  
\_\_\_\_\_  
S. DEAN RUIZ, Esq.

SDR/ajf