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**Via Email:** [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

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

**Re: *June 16-17, 2015 BOARD MEETING: Item #12 Emergency Regulations Regarding Insufficient Flow for Specific Fisheries in Tributaries to the Russian River***

To State Water Resources Control Board:

The San Joaquin Tributaries Authority (SJTA) reviewed the State Water Resources Control Board's (State Water Board) agenda item #12 for the June 16-17, 2015 meeting, which proposes to adopt *Emergency Regulations Regarding Insufficient Flow for Specific Fisheries in Tributaries to the Russian River* (Proposed Regulation). The Proposed Regulation specifically seeks to amend Title 23, Division 3, Chapter 2 by adding section 876, which declares that broad categories of water use are unreasonable.

The SJTA opposes the adoption of the Proposed Regulation and the State Water Board's continued expansion of the unreasonable use doctrine. Similar to its emergency regulation on Deer Creek, the Proposed Regulation seeks to invoke the unreasonable use doctrine broadly to elevate one particular water use over another. The Deer Creek regulations are currently being challenged in superior court because they are unlawful; the Proposed Regulation is similarly unlawful. The SJTA has great concern regarding the State Water Board's continued expansion of the unreasonable use doctrine and respectfully requests the State Water Board not adopt the Proposed Regulation.

**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 (Deer Creek Regulations). Several parties affected by the Deer Creek Regulations are challenging the regulations in superior court.

On May 28, 2015, the Department of Fish and Wildlife sent a letter to the State Water Board recommending the State Water Board take conservation actions to support salmonids on the Russian River. On June 8, 2015, the State Water Board sent a letter to landowners providing notice that it was proposing emergency regulations on the watershed with a link to the Proposed Regulation. The Proposed Regulation does not include conservation regulations, but instead, declares specific uses of water unreasonable.

## **REASONS FOR OPPOSITION**

### **I. Unreasonable Use Cannot Be Applied Through Broad Regulation**

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.) The Court allowed the State Water Board to regulate unreasonable use in *Light* because the regulation applied to specific identified water diversions and was based on an evaluation of the facts and circumstances relevant to the diversion and use of water. (*Id.*) The Proposed Regulations do not identify specific water users or specific diversions of water, but rather, apply to any user on the identified Tributaries. In addition, the Proposed Regulation is not supported by evaluation of the facts of the diversions and uses of water proposed to be regulated; the State Water Board does not disclose or otherwise identify the facts that make the regulated diversions unreasonable.

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 estimated quantity of water that will remain in the identified Tributaries for fisheries purposes. Thus, the State Water Board has presented no evidence and has not found that the diversion and/or use of water is unreasonable at all. Instead, the State Water Board appears to be balancing two beneficial uses against each other and expressing a preference for fishery beneficial uses through regulation. This is unlawful and contrary to the narrow authority provided by the doctrine of unreasonable use.

The determination that a use of water is unreasonable extinguishes the right to divert water. Because the determination actually terminates a property right – it is not a determination that should be taken lightly. The State Water Board cannot continue to substitute the unreasonable use doctrine in place of curtailment; water rights cannot be conditionally terminated and then reinstated. For these reasons, the State Water Board’s use of the unreasonable use doctrine as a temporary or emergency measure is not appropriate.

### **II. State Water Board’s Authority to Protect Fish and Wildlife**

The Proposed Regulation states: “The State Board has the authority to ensure the protection and preservation of streams and to limit diversions to protect critical flows for species, including for state- and federally-threatened and endangered salmon and steelhead species.” (Section 876(c)(1).)

This significantly over-states the State Water Board's authority. The State Water Board has the authority and duty to weigh and balance public trust considerations when allocating water resources. In addition, the State Water Board has the authority to develop water quality objectives to protect beneficial uses of water. However, before taking action pursuant to its public trust or water quality planning authority, the State Water Board is required to evaluate environmental impact, weigh and balance the impacts to other beneficial uses, develop findings, provide opportunity for public comment, and take other significant planning actions. In other words, these authorities only provide the State Water Board the authority to consider impact to fish and wildlife during planning processes; it does not provide the State Water Board with the authority to limit diversions to protect critical flows for species. In addition, the State Water Board cannot use these authorities to develop an emergency regulations; neither Water Code section 1058.5 nor any other emergency measure provides this authority.

### **III. Proposed Regulation Violates 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.*)

The Proposed Regulation defines unreasonable use as any diversion that uses water as identified in section (d). Section 876(d) includes diversion of water for washing motor vehicles, applying to ornamental turf, filling or refilling water in decorative ponds and fountains, among other water uses. The Proposed Regulation does not make every effort to consider the priority of the water right holders affected by Section 876. To the contrary, Section 876 makes absolutely no effort to consider the priority of rights to divert water from the Tributaries to the Russian River. In fact, the Proposed Regulation 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.

### **IV. The State Water Board Failed to Adopt Findings**

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 State Water Board has not done so here.

Before considering the adoption of the Proposed Regulation, 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 the Proposed Regulation, including the estimation of water that will be saved, the extent to which this saved water will benefit protected species, and the certainty with which this estimated benefit is made. The State Water Board has not made these findings and therefore cannot lawfully adopt the Proposed Regulation.

**V. Proposed Regulations Violate Due Process**

The right to divert water is a property right. “[O]nce rights to use water are acquired, they become vested property rights [and] they cannot be infringed by others or taken by governmental action without due process and just compensation” (*United States v. State Water Resources Control Bd.*, (1986) 182 Cal.App.3d 82, 101.) 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, thus terminating 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, once the use of water has been deemed to be unreasonable, the right to use that water has been extinguished and no longer exists. Although a former water right holder may reapply for a new right, 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 the Tributaries to the Russian River the basic rights of due process, including the right to cross examine witnesses, test evidence, rebut evidence, and otherwise defend against allegations before extinguishing a right to property. For these reasons, the State Water Board must decline to adopt the Proposed Regulation.

**VI. Proposed Regulation Amounts 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 Regulation seeks to take property rights for public use without providing just compensation. For this reason, the Proposed Regulation amounts to an unlawful taking.

**VII. Proposed Regulation Requirement to Report on Groundwater Exceeds the Authority of the State Water Board**

The Proposed Regulation includes section (e), which allows the Deputy Director to issue information requests that include information on groundwater wells. The State Water Board does not have the authority to regulate or otherwise require groundwater users to report well depth data to the State Water Board. To the extent this section is unclear and the well depth data does not refer to

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groundwater wells, the Proposed Regulation should be revised to make that clear. To the extent it attempts to require groundwater reporting, such an attempt is outside the jurisdiction of the State Water Board and unlawful.

**CONCLUSION**

The SJTA opposes the Proposed Regulation because it is beyond the authority of the State Water Board and not supported by necessary findings or applicable law. The SJTA respectfully requests the State Water Board decline to adopt the Proposed Regulation.

Very truly yours,

**O'LAUGHLIN & PARIS LLP**



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