



Via E-Mail (commentletters@waterboards.ca.gov)
Facsimile (916-341-5620), and U.S. Mail

June 30, 2014

Chair and Members of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: **7/1/2014 BOARD MEETING – Item 5 – PROPOSED RESOLUTION REGARDING DROUGHT-RELATED EMERGENCY REGULATIONS FOR CURTAILMENT OF DIVERSIONS TO PROTECT SENIOR WATER RIGHTS**

Dear Chair Marcus and Members of the Board:

The undersigned organizations appreciate the opportunity to provide comments on the State Water Resources Control Board's ("Board's) proposed Resolution Regarding Drought-

Related Emergency Regulations for Curtailment of Diversions to Protect Senior Water Rights (the “proposed Regulations”), and respectfully request your considered evaluation of these comments.

This past water year has been critically dry for most areas of the state, and California’s farmers and ranchers are keenly aware of the drought conditions prevailing generally throughout the state. The cornerstone of California’s surface water rights system is the prior appropriation doctrine, and we fully expect necessary curtailments in surface water diversion and use to follow the rule of seniority. This rule is designed from the outset to deal with changing conditions of scarcity.

We have reviewed the package associated with the proposed Regulations, and provide the following comments for your consideration:

1. Hydrologic Basis For Curtailments.

Staff has presented the Board with generalized, system-level water scarcity in a year in which it is undisputed that critically dry conditions prevail. However, we understand that the Board may be presented with independent technical analysis at a greater level of granularity and specificity that additional curtailments in July or August of this year – reaching to pre-1914 and riparian water rights – may not be necessary to protect senior users of water. While the undersigned organizations have not analyzed that information, we urge the Board to carefully consider any independent technical analyses as to water availability and curtailment, to the extent it may relieve the Board of the need to consider difficult and potentially unnecessary additional action this year.

2. Pre-1914 Appropriative Rights and Riparian Rights: Jurisdictional Issues.

As a matter of law, there are serious constraints on the Board’s ability to take action to curtail pre-1914 and riparian rights. We understand the Board to have a basic, threshold authority to investigate and stop unauthorized diversions. (Water Code §§ 1052, 1831(d); see also *Young v. State Water Resources Control Board* (2013) 219 Cal. App. 4th 397, 405.) At the same time, that authority does not go so far as to eliminate any distinction between post-1914 (jurisdictional) water rights and pre-1914 and riparian (non-jurisdictional) water rights.¹ In the final analysis, pre-1914 and riparian rights were developed under the Civil Code prior to the enactment of the Water Commission Act of 1913, and it was the Legislature’s intent in 1913 to

¹ See Water Code section 1831(e): The authority to investigate illegal diversions and issue a cease and desist order to stop them does “not authorize the board to regulate in any manner, the diversion or use of water not otherwise subject to regulation of the board[.]”

leave regulation of those rights to the court system. That rule has been undisturbed ever since.²

In the same vein, the Board has a limited authority to take all appropriate proceedings or actions before executive, legislative or judicial agencies to prevent waste or unreasonable use of water. (Water Code § 275.) Again, there is no authority for the proposition that this statutory grant of authority eliminates the distinction between post-1914 and pre-1914/riparian rights, however. Nor does the enactment of SB 104, which expanded the Board’s authority under Water Code section 1058.5 to adopt emergency regulations in certain drought years, confer such power. (Stats 2014, ch. 3, §1.) Simply put, SB 104 did *not* anywhere grant the Board final regulatory authority over pre-1914 and riparian rights.

Rather, the limited authorities suggest that the Board has some ability to make “threshold” determinations about water rights in the context of investigating and stopping unauthorized diversions, or to otherwise pursue actions to prevent waste or unreasonable use of water. These limited authorities stop some distance short of a broad regulatory authority to undertake system-wide curtailment actions with respect to pre-1914 and riparian rights. We recommend that the Board’s action on July 1st remain consistent with the scope of its overall authority, and that it avoid unnecessary controversy with broad classes of senior water rights holders over which the Board has not previously asserted jurisdiction.

3. Due Process Issues and the Regulations.

The Board is no doubt aware that water rights are a species of real property rights, and that the diversion and use of water authorized under those rights is a critical underpinning of the livelihoods of California’s farmers and ranchers. We believe that vested water rights are entitled to a full range of due process when a regulator intends to curtail them; this proposition is nothing but underscored when a regulator intends to curtail them in a jurisdictional context of first impression. We understand the need for efficient action in an emergency context, and the need to avoid a multiplicity of proofs as to common factual circumstances in curtailment. At the same time, we believe that the Board, through the proposed Regulations, may not lawfully dispense with an investigation into – and demonstration of – individualized evidence of unlawful diversion where that evidence is necessary to show that a diverter must curtail.

With respect to that latter evidence – individualized elements of unlawful diversion – the Board simply must provide diverters an opportunity to be heard, and to present their own evidence in support of their lawful use. We understand the proposed Regulations to offer a limited hearing process in this regard. We urge the Board, if the proposed Regulations are to be adopted, to instruct staff on the need for the maximum granularity of evidence on the nature and

² The Board “does not have jurisdiction to regulate riparian and pre-1914 appropriative rights.” (Id. at 404 (citing *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal. 4th 421, 429.))

scope of the unavailability of water as possible, prior to curtailment.³ In other words, the Board should not be party to broad determinations of water unavailability when the basis, quantity, and relative seniority of each use is not understood and demonstrated against the backdrop of certain and specific hydrology.

4. Health & Safety Exceptions.

While the proposed Regulations do not appear to require exceptions to protect public health and safety needs of water, these exceptions are not a clear feature of California water law and their consideration merits some remark. We do not oppose clearly-defined carve-outs to maintain water for critical human consumption and use, and indeed, an executive agency like the Board has a generalized authority under law to act in exigent circumstances to protect human health and safety. At the same time, this authority is tightly circumscribed by law, must be underpinned by a solid factual urgency, and must immediately cease when the urgency no longer persists.

A related consideration is the signal that the use of such carve-outs provides to urban water managers. It may attenuate the need for sound planning and management of urban water supplies, if used to supply urban water purveyors in critical drought years. It may also lessen the incentive for mandatory urban water conservation, which we understand is not yet in place in many urban areas. While we understand the need for basic human water uses in an emergency context, we urge the Board's consideration of this issue to focus on tightly-limited quantities to address immediate needs.

5. Compliance and Enforcement.

We note also that the Board's foray into classes of water rights which have not previously apprehended Board supervision will, as a practical matter, involve a range of compliance issues. Many diverters will receive curtailment orders *for the first time ever*, and without any willful intent to evade the Board's writ will still fail to meet the Board's orders in the precise fashion and timing that the Board suggests. In other words, there is a significant *educational* task associated with widespread compliance, even assuming the Board's actions is legally and factually proper.

We urge the Board to keep this principle in mind, if it undertakes to issue wholesale curtailments of pre-1914 appropriative rights and riparian rights under the auspices of the proposed Regulations. Regardless of the propriety of Board action as to these water right holders, as a minimal proposition it would seem that the imposition of additional penalties

³ We note that the staff report associated with this item describes the current process of individualized enforcement – with which staff has been working for decades – as “cumbersome and time- and resource-intensive”. It may be. It is also what protects farms, ranches, and the livelihoods that depend upon the associated water rights.

imposed for non-compliance under the proposed Regulations would in many cases be unduly burdensome and not calibrated to the actual willful intent of the alleged violator.

Overall, we appreciate the Board's posture of addressing critical water shortages in the context of the priority system, and recognizing the need to protect senior water rights. To the extent there is solid technical analysis which demonstrates that additional curtailments are not necessary to protect senior water rights, the undersigned organizations would request that this analysis be fully evaluated, and if valid, the proposed Regulations rejected. Given the thorny jurisdictional and due process issues involved, we respectfully submit that the Board would wisely avoid unnecessary regulation of these senior water rights holders. It is our belief that the Board would agree with this proposition.

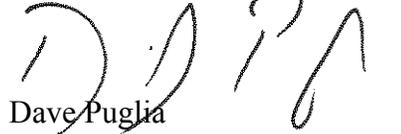
The undersigned organizations truly appreciate your consideration of the foregoing, and look forward to engaging the Board on this issue on July 1st.

CALIFORNIA FARM BUREAU FEDERATION



Christian C. Scheuring
Managing Counsel

WESTERN GROWERS ASSOCIATION



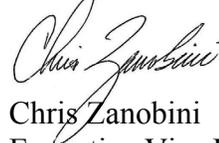
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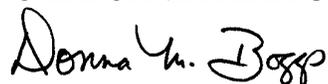
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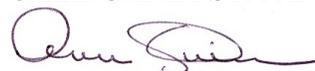
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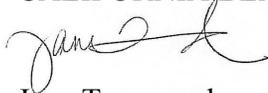
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Debra Murdock
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CALIFORNIA BEAN SHIPPERS ASSOCIATION

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

Jane Townsend
Manager