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June 30, 2014

Felicia Marcus, Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
commentletters@waterboards.ca.gov

Re: ***July 1, 2014, State Water Board Meeting; Comments on Agenda Item 5 (Draft Curtailment Emergency Regulations)***

Dear Board Members:

These comments are respectfully submitted on behalf of Anderson-Cottonwood Irrigation District, Butte Water District, Cordua Irrigation District, Joint Water Districts Board, Los Molinos Mutual Water Company, Nevada Irrigation District, Paradise Irrigation District, Plumas Mutual Water Company, South Feather Water & Power Agency, South Yuba Water District, Stanford-Vina Ranch Irrigation Company, and Western Canal Water District (collectively "Commenters").

1. The Proposed Emergency Regulations Should Not Apply to Pre-1914 or Riparian Water Rights

   a. *The State Water Board Has Not Ensured Full Compliance with Prior Curtailment Orders Applicable to Junior Post-1914 Water Right Holders*

On May 27 and 29, 2014, the State Water Board curtailed all post-1914 water rights in the Sacramento River and San Joaquin River watersheds to protect senior pre-1914 and riparian water right holders. Despite these curtailments, the Digest in support of the proposed emergency regulations states that it is likely that there will be a "high degree of noncompliance during the drought that will impact senior water right holders" and notes that of the 9,528 post-1914 curtailment notices issued, only 2,036 (21.4%) have filed a curtailment certification form. (Digest, pp. 7-8).

In this severe drought, Commenters fully appreciate the need to restrict diversions, and are supportive of the State Water Board's efforts to restrict the exercise of water rights on the basis of the priority system. However, before considering additional curtailments, the State

Water Board should ensure full compliance with previous curtailment orders, including in this case actual cessation of diversions under curtailed post-1914 water rights.

b. It is Improper to Regulate Curtailment of Pre-1914 and Riparian Water Rights In the Manner Proposed

Commenters contend that it is improper for the State Water Board to curtail pre-1914 and riparian water rights for the reasons explained by Northern California Water Association in its comment letter dated June 27, 2014, incorporated herein by this reference.

2. The Emergency Regulations and Curtailment Process Utilized by the State Water Board Should Provide Fundamental Constitutional Guarantees of Due Process and Just Compensation for Takings

a. *Pre-Curtailment Notice and Prompt Reconsideration of Disputes Post-Curtailment Should Be Provided to Affected Water Right Holders*

It is "axiomatic that once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation." (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 101 [citing *Ivanhoe Irr. Dist. v. All Parties* (1957) 42 Cal.2d 597, 623, revd. on other grounds in *Ivanhoe Irrig. Dist. v. McCracken* (1958) 357 U.S. 275; *U.S. v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 752-754].)

The current draft emergency regulations do not adequately recognize reasonable and beneficial use of water as a property right entitled to such protections. The emergency regulations would permit curtailment at the stroke of a pen by the Deputy Director of the Division of Water Rights (or her designee) without any advance notice to the affected owners of the water rights. Without notice, water right holders will be unable, before the effective date of the curtailment, to plan and mitigate for impending curtailment. They will be accorded not even a minimal time to understand the basis for the curtailment, nor to protest the underlying factual basis for curtailment, such as whether there is actually a senior water right holder with unmet demands that justifies such curtailment. The curtailment orders will apparently demand immediate response and will immediately trigger enhanced penalties of $1,000 per day plus $2,500 per acre foot unlawfully diverted plus $500 per day for violating an emergency regulation plus $10,000 per day for violating a cease and desist order.

In the Notice of Proposed Rulemaking, State Water Board staff seems almost giddy in describing the punitive measures that can be brought to bear under the curtailment process described in the proposed regulations:

> In the event that the Board has adopted a regulation under section 1058.5, the Board may immediately issue an enforceable curtailment order based on lack of water availability rather than individualized evidence of unlawful diversion, instead of a notice that water is unavailable, and may immediately issue a draft cease and desist order and simultaneously issue an administrative civil liability complaint in response to violations of the regulation. (Wat. Code §§ 1058.5, subd. (d), 1845, subd. (d)(4), 1846.) Penalties for violations under the regulations would carry an additional penalty over those for unlawful diversion absent the regulations. (Wat. Code § 1845, 1846).

(Notice, p. N-2, underlining added). Regulation is more than deriving means to bring the most punitive firepower to bear in the least amount of time. It demands assurance that the immense power of such measures are being wielded with due respect for the rights that are being infringed. Providing pre-curtailment constitutional guarantees are designed, in part, to ensure that the State Water Board hears and considers the best available evidence from all interested parties before taking action. This respects the vested nature of water rights while at the same time implementing the priority system in times of shortage. The proposed regulations sacrifice these checks and balances for expediency.

No pre-curtailment notice or opportunity for hearing is provided; however, once curtailments are in effect, the regulations would require petitions for reconsideration under a non-expedited timeline. The proposed regulations at § 875(f) states that all curtailment orders "shall" be subject to reconsideration under Water Code section 1122. Section 1122 provides that the petition for reconsideration must be filed not later than 30 days from the date of the curtailment order and the Board has 90 days from the curtailment order to order or deny reconsideration.

It is a sad day for regulation when judicious regard for protecting water rights is being thrust aside in favor of facilitating the more rapid unleashing of an arsenal of punitive measures. As drafted, the proposed regulations appear to be a scheme to coerce water right holders into immediate and indefinite compliance with orders drafted by State Water Board staff. Not providing any pre-curtailment notice and opportunity to present evidence will foster unchecked, improper curtailments. The potential for astronomical financial penalties will coerce water right holders into compliance with even arbitrary, capricious, or otherwise improper curtailment orders. Finally, requiring post-curtailment petitions for reconsideration on a delayed timeline ensures that curtailment continues until this Board intervenes by granting reconsideration or an action can be filed in superior court. If the State Water Board wished to encourage costly and inefficient adjudications of water rights, no better inducement than the proposed regulations can be imagined.

Commenters understand the severity of the current drought and the desire and need to promptly act, but expediency does not justify a failure to provide minimum levels of constitutional protections owed to constitutionally protected rights to reasonably and beneficially use water. The proposed regulations should be modified to only apply to post-1914 water rights. If the Board believes conditions justify curtailment of pre-1914 or riparian water rights, notice of the proposed curtailment should be provided along with an expedited opportunity to object and present evidence before curtailment takes effect. At that review, State Water Board staff should be expected to set out its evidence to support the proposed curtailment. Finally, the State Water Board should either not require reconsideration before permitting interested parties to seek redress from the courts or should expedite its action on petitions for reconsideration.

b. *The Proposed Regulations Create Unconstitutional Bias by Having the State Water Board Adjudicate Hearings and Petitions for Reconsideration While it is Also a Beneficiary of Unauthorized Diversion Penalties*

The proposed regulations incorporate unconstitutional institutional bias by allowing the State Water Board to serve as the adjudicator in penalty proceedings while enjoying a direct benefit from the proceeds of the very penalties it imposes. This bias is enhanced due to the fact that no pre-curtailment due process is provided to affected water right holders.

When the Board imposes fines and penalties under the guise of administrative civil liability, violations of cease and desist orders, or for violations of emergency regulations, the money is routed directly to the Board, via the Water Rights Fund. (See Water Code §§ 1052(e), 1552(c)-(e), 1845(d), 1846(f).) Under section 1552, the Board is given direct authority to spend the fines and penalties that the Board itself imposes and collects in adjudicatory proceedings.[1] (Water Code § 1552(c)-(e).) This creates impermissible bias by giving the adjudicator (the Board) a strong motivation to find that violations have occurred, including denying petitions for reconsideration and predetermining the outcome of CDO hearings, in order to raise money for its own use. The proposed regulations would greatly expand the reach of section 1846(a)(2) (imposing fines for violations of emergency regulations) and expedite the collection of fines under sections 1052(c) and 1845(d) (administrative civil liability and cease and desist orders), bringing this problem to a head.

The U.S. Supreme Court unequivocally rejected as unconstitutionally biased situations in which an adjudicator has a direct financial interest in the fines and penalties derived

[1] That the legislature must perform the ministerial duty of appropriating the funds to the Board from the Water Rights Fund (Water Code § 1552) does not reduce the creation of bias. Section 1552 mandates that the Water Rights fund be used for specific purposes, each of which benefit the Board and most of which are for expenditures made directly by the Board.

from the adjudications. (*Ward v. City of Monroeville* (1972) 409 U.S. 57; see also *Tumey* v. *Ohio* (1927) 273 U.S. 510, 532, 534; *Haas v. County of San Bernadino* (2002) 27 Cal.4th 1017, 1025-26.) These courts concluded that the existence of such temptation created a bias that violated the Constitutional requirements of due process.

By expanding the types of conduct mandated and prohibited by emergency regulations and expediting administrative civil liability and cease and desist orders, while scaling back due process protections for the diverter whose diversions the Board finds are curtailed or wasteful and unreasonable, the Board only exacerbates the institutional bias inherent in its dual roles as both adjudicator of violations and as beneficiary of the proceeds of the fines and penalties imposed.

3. The State Water Board Must Develop Criteria and Protocols for Lifting Curtailments and Conduct a Workshop to Allow Public Input and Comment on the Topic Before Finalizing Its Plans to Allow Resumption of Diversions When Water Is Available to Divert This Fall.

We enclose a joint letter of Nevada Irrigation District, South Feather Water & Power Agency and Paradise Irrigation District highlighting this very important and significant issue. The State Water Board's failure to address this issue constitutes a continuing deficiency in its rush to curtail diversions. While this issue is significant to all Commenters, it is of particular concern to those districts that operate limited rim water storage facilities for the benefit of their respective customers and the stream reaches that are maintained by such storage. Given the unpredictability of fall and winter precipitation, localized fall storms may be the only significant precipitation events to augment depleted reservoir storage. As is typical of such agencies, these districts do not have access to ground water, nor do they do not operate large storage reservoirs with surplus capacity. Water lost due to an error in regulating diversions to storage cannot be retrieved. The Board does not have the luxury of time in defining the rules for resumption of diversions to storage by such agencies.

We also enclose estimates of potential loss of supply for each of the three districts we represent, making various assumptions with respect to hydrology and the date curtailments are ultimately lifted. The importance of this issue demands that it be resolved now, as opposed to when fall storms are already approaching or after some storm events have passed. Commenters and all other water right holders need a predictable, transparent, and dynamic methodology for lifting curtailments that respects the water right priority system and accounts for unpredictable nature of storms and the highly disparate impacts they have among and between different watersheds in the State.

4. The State Water Board Should Strictly Enforce the Water Right Priority System And Avoid Creating a "Health and Safety" Super Priority.

Section 875 of the proposed emergency regulations should not be subject to the minimum health and safety exemption from curtailments and water right seniority under section 878.1. As a preliminary matter, Commenters are not aware of any current or projected health and safety water needs that remain unmet, in which case the exemption is unnecessary. Even if health and safety demands arise, existing authorities of the State Water Board, including expedited processing of water transfers or the power of condemnation, are adequate to supply such needs. Condemnation, however, requires due process and an evidentiary hearing to determine a more necessary public use (Code Civ. Proc. § 1255.010), a deposit of the damages from the taking (Cal. Const., Art. I, §§ 7, 19), and payment of all direct and indirect damages caused by the taking of water for municipal or domestic use (Water Code § 1245). The courts, not the State Water Board, is the appropriate venue for such actions.

5. Proposed Section 878.3, Alternative Water Sharing Agreements, Should Be Clarified or Stricken; Existing Authority Allows for Expedited Processing of Temporary Water Transfers.

In lieu of strict conformance with the priority system, Section 878.3 of the proposed regulations would permit alternative water sharing agreements, provided there is no legal injury to other users of water and the agreements do not impose an unreasonable impact on fish and wildlife. If the State Water Board wishes to further expedite temporary transfers of water under Water Code section 1725 et seq. (as modified by the Governor's April 25, 2014, Emergency Proclamation), the regulation should be clarified to specifically state that purpose. If the regulation is not intended to further expedite temporary transfers, then it should be stricken as unnecessary because existing authority allows for State Water Board consideration and approval of temporary water transfers.

Very truly yours,

MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP

By: _____
DUSTIN C. COOPER

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