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VIA EMAIL

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June 30, 2014

State Water Resources Control Board
Clerk to the Board
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SUBJECT: 7/1-2/14 BOARD MEETING Agenda Item #5
Consideration of a proposed Resolution regarding drought related
emergency regulations for curtailment of diversions to protect senior water rights

These comments are provided on behalf of Banta-Carbona Irrigation District, Patterson Irrigation District, The West Side Irrigation District and West Stanislaus Irrigation District (“**Districts**”), to the proposed drought related emergency regulations for curtailment of diversions to protect senior water rights. The Districts are very concerned and beneficially interested with the goals of the State Water Board staff in these proceedings as well as the outcome of the proceedings. While we recognize the severity of the ongoing drought, we are concerned that staff views the drought as justification for achieving wholesale changes in the method of administering water rights.

There are two issues at play here: (1) whether or not the State Water Board should (or is legally able to) curtail pre-1914 and riparian rights, and (2) whether or not the State Water Board should adopt emergency regulations that fundamentally change its procedures for issuing and enforcing curtailments. Both questions are equally important.

ADDITIONAL CURTAILMENTS

The Districts are very concerned with the State Water Board adopting pre-1914 curtailments in the San Joaquin River watershed on a practical level for several reasons.

You can’t paint all diverters in the same watershed with the same brush.

- Water availability for each individual diverter is a location and time specific determination. The Stanislaus River and the Merced River are both on the San Joaquin River watershed, but water availability in the upper watersheds of those rivers will be very different on any given day. Curtailing all San Joaquin River diverters in the same manner will injure some diverters unnecessarily while allowing others to divert who should not be able to.

- Abandoned surface flow may be available for a pre-1914 diverter on the upper San Joaquin River; if pre-1914 diverters are curtailed in favor of downstream riparians, that diverter would be injured because abandoned surface flow is not legally available to riparians. If that pre-1914 diverter is curtailed in favor of a downstream senior appropriator, the water may percolate into the San Joaquin River and never make it downstream to the senior diverter, thereby again illegally curtailing the upper appropriator.
- The State Water Board proposes to use watershed wide estimates of water use and availability; such uncertain and regional data is not a sufficient basis on which to risk the destruction of crops and livelihoods.
- **Issuing curtailments in the San Joaquin River watershed to solve a water shortage problem will create a larger problem that transcends the water shortage problem itself.**

Flows in the San Joaquin River watershed are critically low. Water right holders are currently working together in an attempt to maximize water availability to all parties in the system. This cooperation is unprecedented, and needed to maximize water availability and use in the midst of such an historic drought. Voluntary cooperation, however, is often cut short when parties are forced to protect their livelihoods from legal infringement. Similar to the adoption of the emergency regulations discussed below, adoption of curtailments against pre-1914 water right holders in the San Joaquin River will result in litigation being filed against the State Water Board, and other downstream diverters. Diverting public resources in such a manner in a historic drought year is not wise, and not in the public's best interest.

EMERGENCY REGULATIONS

The Districts are very concerned with the State Water Board adopting the proposed emergency regulations for one primary legal reason: the emergency regulations eliminate any opportunity a water right holder has to prevent an unjust State Water Board decision and do not provide any more incentive for compliance.

I. THERE IS NO NEED FOR THE ACTION

There does not appear to be a need for the State Water Board to adopt the proposed emergency regulation. To our knowledge no one asked for such a regulation, and, in particular, neither the senior water right holders on the rivers nor the State or Federal water projects asked for additional curtailments. Similarly, it is our understanding that the State Water Board has received only nominal complaints regarding water diversions thus far. It would seem to make far more practical sense to address complaints on a case-by-case basis through staff contacts than through an elaborate and unprecedented process of adopting emergency regulations. Proposing to solve the alleged crisis with the emergency regulation is akin to proposing to kill a gnat with an elephant gun.

Government Code section 11350, the statute governing judicial review of administrative regulations, states a regulation may be declared invalid if "[t]he agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the

regulation is not supported by substantial evidence.” Government Code section 11349 defines “necessity” as meaning that the record of the rulemaking “demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of the law that the regulation implements. . . .” There is little discussion in the record of rulemaking to support a need for the proposed regulation, let alone substantial evidence to justify this extraordinary action. In its documentation, the State Water Board staff indicates: “The proposed emergency regulations are intended to . . . address the *possible widespread lack of compliance*.” This is an insufficient basis to support the proposed action. Hypothesizing that there may be some future “widespread lack of compliance” does not support the action, and no evidence, other than staff members’ imaginations, support this remarkable and fact-starved conclusion. Mostly importantly, the lack of compliance appears to be illusory: **State Board staff has indicated that 78% of the water rights on the San Joaquin River have already complied with the curtailment certification and demonstrated compliance.**

The State Water Board staff argues “[t]he process of scheduling and holding full evidentiary hearings on each individual order prior to it becoming effective eviscerates any meaningful possibility of ensuring the water in fact reaches the rightful diverters during this drought emergency, and does not serve as an adequate deterrent for others during the curtailment period’. There is absolutely no evidence to support staff’s assertion that “[t]he State’s current system for curtailing diversions and enforcing those curtailments will not provide for timely and effective implementation of the State’s water right system during the current drought. . . .” In fact, all evidence and the Board’s history of enforcement are to the contrary.

As stated in the State Water Board’s curtailment letters sent out on May 27, 2014:

Those who are found to be diverting water beyond what is legally available to them may be subject to administrative fines, cease and desist orders, or prosecution in court. The State Water Board may levy fines of \$1,000 per day of violation and \$2,500 for each acre-foot diverted or used in excess of a valid water right. (See Water Code, §§1052, 1055.) Additionally, if the State Water Board issues a Cease and Desist Order against an unauthorized diversion, violation of any such order can result in a fine of \$10,000 per day. (See Water Code, §§ 1831, 1845.)

The listed fines, which were significantly increased by legislation adopted in March of this year, in legislation strongly supported by the State Board, create a tremendous financial deterrent to diverting water in the face of a curtailment. While such fines may not be due until after a full evidentiary hearing, the fines are nevertheless incurred. With or without the emergency regulation, the fines are the same; with or without the emergency regulations, a curtailment order is effective upon issuance, with or without the emergency regulation, senior water right holders are provided the same protection from unauthorized diversions. The difference provided by the emergency regulation is that the State Water Board staff has an easier job of enforcement because inconvenient things like hearings and evidence are dispensed with.

The State Water Board has not demonstrated that existing traditional methods are ineffective to deal with this alleged emergency situation, or cannot be administered or enforced in a manner to “effectuate the purpose of the statute.” To the contrary, the history is unambiguous: traditional methods have proven effective: there is evidence that the State Board staff is

currently actively enforcing the existing curtailments. The history and totality of evidence does not support a need for emergency regulations.

We are informed that there have been only a handful of complaints received by the State Water Board regarding illegal diversions during the current curtailment period. Given that fact, does it not make more sense to focus the efforts of the State Water Board staff of investigating and resolving those complaints than on the development of unnecessary emergency regulations that will result in lengthy litigation?

II. IT IS NOT CLEAR FROM THE EMERGENCY REGULATIONS OR SUPPORTING DOCUMENTS WHAT INTERESTS THE STATE WATER BOARD IS TRYING TO PROTECT

Government Code section 11342.2 states “no regulation adopted is valid or effective unless . . . reasonably necessary to effectuate the purpose of the statute.” The staff documents do not explain what “senior water rights” would be protected, or why the regulation is necessary to accomplish this purpose.

Staff’s documentation asserts that the Governor’s April 25, 2014 Executive Order “orders” the State Water Board to adopt emergency regulations pursuant to Water Code section 1058.5 to address the issues that are the focus of these regulations, when there is no such requirement. The Governor’s order states only that the Water Board will adopt such emergency regulations if necessary, and, as discussed above, the proposed emergency regulations are not necessary.

III. THE STATE WATER BOARD HAS NO AUTHORITY TO CURTAIL PRE-1914 APPROPRIATORS

While the emergency regulation may be proposed to curtail post-1914 water right holders, it cannot be used to legally do so. Several courts have recently addressed the issue of the State Water Board’s jurisdictional authority over pre-1914 appropriators. Most recently in *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, the Third District Court of Appeals clarified that authority, and confirmed that:

- the State Water Board “does not have jurisdiction to regulate riparian and pre-1914 appropriative rights.” *Id.* at p. 404, and
- the State Water Board “does have authority to prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis under which the right is held.” *Id.*

In *Young*, the court confirmed that the State Water Board has jurisdiction in enforcement proceedings to determine initially whether a diverter has either the riparian or pre-1914 appropriative rights it claims. *Young* concluded that the State Water Board must have the authority to initially determine the validity of a riparian or pre-1914 appropriative right in order to determine whether or not water was being lawfully diverted; if the diversion is authorized by a riparian or pre-1914 appropriative right, the board lacks jurisdiction to regulate. As noted by the court in *Young*, the Supreme Court has consistently held that the State Water Board has “the power or authority to make the threshold determinations necessary to execute its responsibility to regulate water in the State of California.” *Id.* at p. 406. Here, the

State Water Board overreaches such “threshold determinations” and determine the rights of valid pre-1914 appropriators viz-a-viz one another, which it cannot do.

Without evidentiary findings of unreasonable use or public trust violations, supported by substantial evidence, the State Water Board’s only authority to legally curtail a pre-1914 appropriator is pursuant to Water Code section 1052. By its own terms, this section applies only to “the diversion or use of water subject to this division other than as authorized in this division,” which does not include pre-1914 appropriations. Pursuant to *Young*, the State Water Board’s inquiry must end when it determines that the diversion is being made pursuant to a valid pre-1914 right. Provided there is water in the river subject to appropriation, a pre-1914 appropriator is exercising a valid water right not subject to curtailment by the State Water Board pursuant to §1052. While the pre-1914 appropriator may be injuring a more senior water right holder, the determination of priority among pre-1914 appropriators and/or riparians cannot legally be made by the State Water Board, only a court. In order to make such a determination of priority, the State Water Board must make detailed factual findings supported by substantial evidence, regarding the availability of natural flow, the validity, priority date and relative priorities of appropriators, and determinations regarding the availability of water at each diversion point. In addition, while riparian rights may have priority over appropriative rights in many instances, there are important exceptions: (1) when there is no natural flow available and (2) when an appropriative right is superior to the right of a riparian owner who subsequently obtains title to public land from the government, and (3) when an appropriative right holder has prescribed against a riparian. The comprehensive method of analysis required to reach these various determinations of validity and priority of rights are the very definition of “regulate,” which the State Water Board cannot do.

Here the State Water Board asserts jurisdiction to curtail pre-1914 and riparian rights - not to prevent waste or unreasonable use of water, not because the rights are being exercised in an unreasonable manner, and not even because the diversions are illegal. Rather, because, according to the Board’s finding of emergency, it has the authority to act “when water is not available under the diverter’s priority of right.” Nothing in the authorizing legislation or controlling decisional law extends the State Water Board’s authority to regulate pre-1914 appropriative water rights to instances of restricted availability.

IV. THERE IS NO EMERGENCY

A. The Law Requires a Demonstration of Emergency. Determining an emergency is present involves making detailed and elaborate findings of fact, including, as required by the California Code of Civil Procedure §11346.1(b)(2). While Water Code section 1058.5(b) states that any findings of emergency adopted by the State Water Board in adopting the proposed emergency regulation is not subject to review the Office of Administrative Law; however, those findings must nevertheless be made, and are subject to review by a court.

Government Code section 11342.545 defines “emergency” as “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.” This situation is not that. The State Water Board has existing authority to impose curtailments. It has existing authority to enforce curtailments, and is currently doing so. The regulation merely provides a way to make the State Water Board’s life more convenient by dispensing with

all due process rights of water right holders. Government Code section 11346.1(b)(2) provides expressly: A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency. The State Water Board's statement of emergency is clearly just that:

Before issuing such an order, the State Water Board must have particularized information regarding an unlawful diversion or the potential of such a diversion: the Board may not issue an enforceable order requiring diversion to cease simply based on lack of water availability, absent information that there is a risk of or actual continued diversion. Additionally, before issuing a final enforcement order, the State Water Board must first issue a draft Cease and Desist Order or a proposed ACL. If such enforcement action is proposed, a water right holder is entitled to an evidentiary hearing on all issues before the order takes effect. This individualized enforcement-based system of curtailment, in the absence of a regulation, is cumbersome and time-and resource-intensive. The process of scheduling and holding full evidentiary hearings on each individual order prior to it becoming effective eviscerates any meaningful possibility of ensuring the water in fact reaches the rightful diverters during this drought emergency, and does not serve as an adequate deterrent for others during the curtailment period.

These statements are nothing more than a lamentation of how inconvenient constitutional protections such as due process are to an agency intent upon curtailing constitutionally protected property rights.

State Water Board staff asserts the proposed emergency regulation is adopted in response to the Governor's proclamation of state of emergency; however, the statewide drought situation, the Board's new authority, and the Governor's state wide Drought Proclamations do not demonstrate the existence of an actual emergency in these particular watersheds, nor has the Board provided substantial evidence of the existence of such an emergency. This is a generic assertion, based on a generalized and subjective assessment of hydrologic conditions statewide. There is no particularized and sufficient linking of these general assertions to the need for the Board's exercise of its new authorities in relation to any factually specific condition existing on the ground. This information is required to demonstrate a necessity for the regulation.

The staff report and other State Water Board documents have not supplied substantial evidence to support each of the subfindings required before the agency can reasonably conclude that an emergency situation exists to justify extraordinary regulations adopted through a truncated process.

B. The State Board has Unreasonably Delayed. Government Code section 11346.1(b)(2) also provides "[i]f the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations adopted in accordance with the provisions of Article 5 (commencing with Section 11346), the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations. To the extent that the State Water Board is claiming there is an emergency that must be addressed, it has known about the conditions creating the "emergency" for over six months.

The State Water Board has known of the dry conditions since May of 2013, when Governor Brown issued Executive Order B-21-13, which directed the State Water Board and DWR, among other things, to take immediate action to address dry conditions and water delivery limitations. On January 17, 2014, Governor Brown issued a Drought Emergency Proclamation. The Proclamation directed the State Water Board, among other things to "...put water right holders throughout the state on notice that they may be directed to cease or reduce water diversions based on water shortages." Also on January 17, 2014, the State Water Board issued a Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions in light of anticipated supply shortages for junior and potentially senior water users. Clearly by January of this year the State Water Board knew that curtailments would be imposed during this water year. If the State Water Board pursued adoption of non-emergency regulations in January, those regulations would have been in place long before the scheduled July 1, 2014 hearing. Adoption of standard regulations under the Administrative Procedures Act takes approximately 90 to 120 days, and could have easily been in place if started in January, or as late as March; yet, the State Water Board does not explain its failure to do so.

V. THE PROPOSED REGULATION VIOLATES DUE PROCESS OF ALL WATER RIGHT HOLDERS

Once rights to use water are acquired, they are recognized constitutionally protected property rights. Such constitutionally protected rights 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. Due process is the legal requirement that the state must respect all of the legal rights that are owed to a person. Typically, "Due process" means (1) written notice, providing sufficient detail to fully inform the individual of the decision or activity that will have an effect on his/her property, (2) right to *grieve* (that being the right to complain or to disagree with the governmental actor/entity that has decision making authority) and (3) the right to appeal if not satisfied with the outcome of the grievance procedure.

Decisions affecting existing rights are quasi-judicial and require the procedural protections of notice, a hearing, the opportunity to present evidence, and individualized findings. *See In re Waters of Long Valley Creek System* (1979) 25 Cal.3d. 339, 348-349; *Mountain Defense League v. Board of Supervisors* (1977) 65 Cal.app.3d 723.

The procedure established by the proposed regulation is completely devoid of any due process protections. The emergency regulation delegates to the Deputy Director for the Division of Water Rights the authority to "issue curtailment orders to water right holders". It also sets forth a list of four criteria that the Deputy Director "may rely upon" in taking action to curtail water rights. When acting to curtail water rights, the State Water Board is performing an adjudicatory function, and findings supported by substantial evidence are required in order to bridge the analytical gap between the raw evidence and ultimate decision. *United States* at 113.

The process established by the proposed emergency regulation for curtailing water rights provides direction to the Deputy Director in less than one page. The Deputy Director is not directed to render findings about specific individual uses, their relative priority dates, or to what extent water is available at each diversion point. Rather, he is directed to look at watershed-wide *estimates* of water availability and demand; in doing so, the Deputy Director

would be making a single binding determination against a large number of water users by assuming their conditions were the same, based on limited evidence not subject to question. Without a quasi-judicial proceeding, neither the State Water Board nor the Deputy Director may curtail water rights solely on the basis of such generalized *estimates* of streamwide water availability and demands. All notice and opportunity for hearing is eliminated by delegation to Deputy Director. The Curtailment Analysis Methodology set forth in the Emergency Findings describes the complexities involved in determining whether or not a curtailment is present. An affected property owner is deprived of the right to present evidence and arguments, the right to contest evidence and arguments supplied by the regulatory body and right to be fairly appraised of the evidence relied upon by the public agency in rendering a decision. The individual rights of a water right holder cannot be adequately protected when their individual uses were never examined. *Tulare* 524-25.

Water right holders cannot be denied the guaranty of due process because of the drought or any alleged emergency that it causes. There is no legal authority that supports the extreme position that an alleged drought emergency justifies a public agency dispensing with due process rights before taking a vested property right.

The manner in which the proposed emergency regulation delegates authority to the Deputy Director completely eliminates any notice and opportunity for hearing. The Curtailment Analysis Methodology set forth in the Emergency Findings describes the complexities involved in determining whether or not a curtailment should be imposed, and upon whom. Because the action of the Deputy Director to curtail water rights is to limit particularly vested water rights, at a minimum, a judicial or quasi-judicial process must be utilized. Such a process ensures that the appropriate substantive and procedural due process requirements are met. The proposed emergency regulation fails to provide for such a process, and instead uses a quasi-legislative process to develop regulations that completely eviscerate vested property rights.

The Finding of Emergency does not limit curtailment actions to meeting the needs of senior right holders, but also discussing the need to impose curtailments “when water in the stream is from water imports or previously stored water released for downstream delivery or use, including meeting public trust and water quality requirements . . .” The California Supreme Court has clarified that public trust uses have no priority over other water uses, and all competing uses of water must be balanced. *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 445-47. Balancing is an essential component of public trust determinations; in fact the fact-finder must consider whether the protection of public trust values is consistent with the “public interest,” considering all of the beneficial uses to be made of water, including consumptive uses. *State Water Resources Control Board Cases CO44714* (2006) 136 Cal.App.4th 674. As the State Water Board has recognized: “Due to factual differences regarding public trust resources and competing uses of water in different situations, the effect of the public trust doctrine differs in each situation in which it is applied.” *In the Matter of Fishery Resources and Water Right Issues of the Lower Yuba River* (2001) D-1644 at p. 33. These determinations can be accomplished only through a judicial or quasi-judicial process. As proposed in the emergency regulation, the Deputy Director’s determination of public trust needs through a legislative process made without factual evidence or the ability to be heard clearly violates the due process of curtailed water right holders.

VI. POST CURTAILMENT APPEAL DOES NOT ELIMINATE THE DUE PROCESS VIOLATION

The proposed emergency regulations grant the curtailed water right holder a right to "reconsideration" pursuant to Water Code Sections 1122-1124. This limited curtailment appeal does not cure the due process violation. Goldberg v. Kelly, 397 U.S. 254 (1970) held that due process requires a hearing prior to deprivation of a party's interests, and the Supreme Court has upheld that requirement if the private interests at stake are essential to the individual's livelihood :

The crucial factor in this context -- a factor not present in the case of... virtually anyone else whose governmental entitlements are ended -- is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." Id. at 264.

In curtailing a water right, the State Water Board is dealing with the very livelihood of many water right holders. Imposing a curtailment order upon an agricultural water user during a hot summer period may result in death to crops and deprive an eligible recipient of the very means by which to live while he waits to pursue a post-curtailment appeal.

In addition, a petition for reconsideration after a curtailment is misplaced. While Water Code Section 1122 allows a water right holders deprived of water under its right to petition for reconsideration of the Deputy Director's decision, what right does that petition grant? Water Code section 1123 provides:

The decision or order may be reconsidered by the board on all the pertinent parts of the record and such argument as may be permitted, or a further hearing may be held, upon notice to all interested persons, for the purpose of receiving such additional evidence as the board may, for cause, allow. The decision or order on reconsideration shall have the same force and effect as an original order or decision.

Under the delegation granted to the Deputy Director by the proposed emergency regulations, there are no "pertinent parts of the record"; in fact, there is no record at all. Whether or not argument may be permitted or a hearing held to receive evidence is discretionary with the Board, and does not provide any guarantee of due process, even after the fact.

VII. FAIR HEARING VIOLATION

The proposed process also violates the Code of Civil Procedure section 1095.6's requirement for a fair hearing. In delegating extensive authority to curtail water rights, the State Water Board is granting to the Deputy Director the power to make final adjudications of fact. This amounts to an administrative board exercising adjudicatory functions based upon information of which the parties were not apprised and which they had no opportunity to controvert, and results in a denial of a hearing. Administrative tribunals such as the State Water Board, are allowed to adversely impact vested property rights only after a due process hearing. Under the emergency regulation, however, the Deputy Director would be acting upon his or her own information, information that cannot be considered as evidence because it was not introduced at a hearing of which the parties had notice or at which they were present. A hearing requires

that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced. . . ." *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171-1172 citing with approval *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158-159. The issue key to providing due process is not whether or not the evidence exists somewhere, it is whether the public agency relied upon evidence introduced during the public *hearing* rather than during a public *meeting*, in a manner designed to offer interested parties a reasonable opportunity to refute, test, explain and confront such contradictory evidence:

The procedure allowing an affected landowner with a vested water right to ask for a hearing AFTER the curtailment order has been approved and served deprives the landowner of a right to a fair hearing. A landowner in this circumstance must be offered the opportunity to be apprised of and have an opportunity to rebut the evidence relied upon by a public agency before a decision is rendered. Adopting a process where *after* a landowner is deprived of a vested right the property owner then has the right to seek a hearing to learn what evidence was relied upon by a public agency to take away a vested right violates the Fair Hearing doctrine. Offering a hearing does not cure procedural infirmities and the absence of a fair hearing. *Cohen v. City of Thousand Oaks* (1994) 30 Cal. 4th 547, 559.

VIII. REGULATIONS CONTRARY TO LAW

As set forth in the staff report, various aspects of the proposed emergency regulation do not comply with the law.

A. Carriage Water. The staff report states:

The goal of curtailments is principally to ensure that water to which senior water right holders are entitled is actually available to them. To ensure that this occurs generally requires that some water remain in most streams to satisfy senior demands at the furthest downstream point of diversion of these senior water rights. This in turn means there must also be some additional water, on top of the senior water right holder demand, to get that quantity of water to the senior water rights holder. This additional quantity of water, or "carriage" water, is defined here as the variable quantity of water needed to make up for losses to evaporation and groundwater, maintain water levels needed to facilitate pumping from a stream, and any other reasonable losses or factors that should be considered to ensure that a certain quantity of water to which a senior water right holder is entitled reaches that water right holder. Maintenance of this carriage water has the ancillary benefit of preventing normally wetted stream channels from running completely dry and may provide some additional benefit to fish and wildlife and to the riparian corridor.

Presumably this "direction" will be followed by the Deputy Director when making the factual determination of whether or not to impose a curtailment, and upon whom to impose that curtailment. However, there is a very real question as to whether or not requiring such "carriage water" is a reasonable and beneficial use of water in such a drought year in light of

other competing demands on the limited water resources in these watersheds. This determination must be made in an evidentiary hearing.

B. Priority of Rights. The draft emergency regulations directs the Deputy Director that in determining whether water is available under a diverter's priority of right: "Absent evidence to the contrary, riparian water rights are presumed senior to appropriative water rights for purpose of curtailments pursuant to this section." This is not a correct presumption under the law. While riparian rights may often have priority over appropriative rights, there are important exceptions: (1) when there is no natural flow available, (2) when an appropriative right is superior to the right of a riparian owner who subsequently obtains title to public land from the government, and (3) when the riparian right is lost by prescription. In particular, on the San Joaquin River, the majority of water in the river during the irrigation season is not natural flow – it is comprised of irrigation runoff, discharged treated wastewater, abandoned stored water, and other sources. Water from these sources is available for diversion by appropriators and not available for riparians, and must be factored into water availability determinations. Who will provide such "evidence to the contrary" when the Deputy Director is making his determination of whether or not to curtail a vested water right?

C. Water Quality. As mentioned above, the Finding of Emergency does not limit curtailments to being imposed to meet the needs of senior water right holders, but also "when water in the stream is from water imports or previously stored water released for downstream delivery or use, including meeting public trust and water quality requirements . . ." Water quality standards have been established by the State Water Board and are included in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary ("Bay-Delta Plan"). Through a series of water right orders and other actions, the State Water Board has assigned responsibility for meeting the water quality objectives established in the Bay-Delta Plan. The State Water Board has no authority, under guise of curtailment of water rights, to impose water quality requirements upon water right holders to meet existing water quality objectives when the responsibility to meet those objectives has already been imposed upon other water users. The State Water Board cannot change the assigned responsibilities for meeting those objectives through anything other than an evidentiary hearing process (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82), and in imposing obligations to meet water quality requirements, the State Board cannot disregard priorities without "substantial justification." *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 967 n. 21. Most importantly, the State Water Board has no authority to "regulate" or impose water quality conditions upon pre-1914 appropriative and riparian water right holders; as such, it cannot do so here under the guise of an emergency regulation.

IX. FACTUAL ERRORS

The information included in the Appendix and the direction to the Deputy Director regarding what factual information to use to curtail water rights, reveals serious errors in the facts relied upon by the State Water Board to determine water availability. These errors include, but are not limited to, the following:

A. DWR Full Natural Flow. The proposed emergency regulation points the Deputy Director to “projected full natural flow data supplied by the Department of Water Resources” when making curtailment decisions. To date, State Water Board staff has been using “full natural flow” to determine water availability. DWR’s full natural flow calculation is just that, a calculation. As stated on the DWR website, these figures represent the natural water production of a river basin, unaltered by upstream diversions, storage, or by export or import of water to or from other watersheds, based upon “calculations done by project operators on the respective rivers, the US Army Corps of Engineers and/or Snow Surveys.” However, neither the State Water Board Appendix nor the DWR web site describes or shows exactly how those “calculations” are made.

Even if it could be transparently described, DWR Full Natural Flow calculations are only one component of water availability - the natural water production of a river basin - it ignores substantial other sources of water as well as the actual condition of the river at any given time. In the San Joaquin River, the majority of water in the river during the irrigation season is not natural flow - it is comprised of groundwater accretions, irrigation runoff, discharged treated wastewater, abandoned stored water, and other sources. Water from these sources is available for diversion by appropriators and cannot be ignored. The districts have provided to the State Board information that they have compiled on flows on the San Joaquin River in 2014 based upon actual stream flow and diversions.

B. Water Right Demand Projections. The Deputy Director is pointed toward recent reports of water use for permits and licenses and statements of water diversion and use to determine water right demands. Such reports of water use in 2010 are not reliable estimates of water demand during a severe drought year. Based upon the districts here, current water diversions are less than 50% of 2010.

C. Stream Gages. The Deputy Director is also pointed toward stream gage data without direction or criteria as to how to use that stream gage data. Stream gages located on reservoirs do not reflect full natural flow, or water available for diversion; rather, they indicate how much water is being released (including both natural flow, releases from stored water, and water quality requirements) from the reservoir. This data may have no relevance to water availability. It is vitally important for site specific real time gage data to be evaluated when determining water availability at a particular diversion point. As explained above, on the San Joaquin River, the majority of water in the river during the irrigation season is not natural flow - it is comprised of irrigation runoff, discharged treated wastewater, abandoned stored water, and other sources. Water from these sources is available for diversion by appropriators and must factor into the determination of availability.

X. PHYSICAL SOLUTIONS

The information provided by the State Water Board indicates that it “will need to curtail water diversions when natural flows decrease so that water is available for senior water right users, and to prevent the illegal diversion of previously stored water released for downstream use or redirection, including water released to meet public trust or water quality requirements”. To the extent that the Deputy Director may curtail water rights in order to provide flow for water quality requirements, the law requires that such actions be balanced against the potential for

physical solutions. California courts have also emphasized that physical solutions must be considered as a practical way to meet the requirements of Article X, Section 2 of the California constitution before adversely affecting a vested water right. *City of Barstow*, Id. at p. 1250; *City of Lodi v. East Bay Mun. Utility Dist.* (1936) 7 Cal.2d 316, 341. Physical solutions have been promoted by courts, allowing curtailment of water rights to be imposed only where “no other relief is adequate.” *Montecito Valley Water Co. v. Santa Barbara* (1904) 144 Cal. 578, 592. The Supreme Court has gone so far as to impose an obligation upon courts to evaluate available physical solutions. *City of Lodi*, Id. at p. 341.

Earlier this year the Department of Water Resources recommended that emergency temporary barrier(s) or operable barrier(s) [gate(s)] be installed in the Delta channel(s) if drought conditions persist. DWR concluded that such emergency barriers would reduce salt water intrusion and, therefore, help protect the quality of Delta water supplies during a drought. Several such temporary rock barriers were installed at Delta locations during 1976/77 to help in the mitigation of the effects of drought conditions on water quality and fish resources, and DWR concluded that these barriers were effective at maintaining lower EC levels which resulted in lower reservoir releases being required to maintain Delta water quality. Department of Water Resources, Bay-Delta Office, *Delta Drought Emergency Barriers*, Administrative Draft, April 2009. Despite these conclusions, no barriers were installed this year. As such, before senior water right holders can be legally curtailed, DWR should be required to install the temporary barriers as a physical solution.

CONCLUSION

The districts here believe that more lies under the surface. The proposed emergency regulations are drafted in a seemingly innocuous manner – it appears to only request the power to curtail water rights in the order of priority when sufficient water is not available. But what sounds simple in fact includes the reinvention of the water right priority system, the expansion of State Water Board jurisdiction over riparians and pre-1914 appropriators, and the elimination of due process for water right enforcement in favor of a guilty first, evidence later approach.

The State Water Board is proposing to reinvent the wheel when the wheel is working fine. There is simply no need, no demand, and no reason for the emergency regulation being proposed. The State Water Board has known about the “emergency” for over seven months, but waits until July 1 of a critical drought year to take action? By inventing an emergency and creating a crisis, the State Board has lost credibility with all water right holders, and is not trusted to wield such power over the livelihoods of millions of Californians.

Very truly yours,



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