

SPALETTA LAW PC

Post Office Box 2660
Lodi, California 95241
T: 209-224-5568
F: 209-224-5589

JENNIFER L. SPALETTA
Attorney-at-Law
jennifer@spallettalaw.com

June 30, 2014

State Water Resources Control Board
c/o Clerk of the Board
Via Electronic Mail: 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 Board Members:

We respectfully submit these comments on behalf of our water right clients in the Delta including RDC Farms, Inc., Ron and Janet Del Carlo, Dino and Nicole Del Carlo, Eddie Vierra Farms, LLC, Dianne Young, Cerri & Son Partnership, Cerri Farms, Inc., Trapper Slough Ranch Corporation, Schmidt Family Properties, LLC, Schmidt Highway 4 Ranch, LLC, Robert J. Costa Farms and Terceira Properties, LLC.

These individuals and entities farm with a variety of water rights including riparian and pre-1914 appropriative rights as well as state issued permits and licenses. They have collectively undertaken extensive and costly conservation measures over the last two years to reduce water use including conversion from flood to drip irrigation and re-use of tailwater. They are taking even more extreme measures this year including limited or no irrigation during the summer months.

While these clients expected some form of curtailment of permits and licenses this year due to drought conditions, curtailment of riparian and pre-1914 appropriative rights is unexpected. Similarly unexpected is the manner in which staff is proposing that this board relinquish all control and oversight over future curtailment orders.

There is grave concern that as drafted, the proposed regulation would give staff power to issue curtailment orders that are not justified and would deprive water right holders of due process. Further curtailment this year involves fundamental policy decisions that cannot be delegated to your staff. Further, there is no evidence before you to justify such an extreme delegation of authority under the guise of an emergency.

Unlike many other locations, farmers in the Delta generally do not have access to usable groundwater. Thus, curtailment in the Delta (particularly of riparian or pre-1914 rights which have never before been curtailed in the history of this state) will have devastating economic consequences for Delta farmers and the local economies they support.

As we explain further below, the Delta is unique. There is water available for diversion with or without releases of stored water from the projects. If you decide to proceed with this regulation (which you should not due to its constitutional flaws), at a minimum you should exclude the tidally influenced Delta.

We explain each problem with the proposed regulation in detail below.

A. The Proposed Regulation Is a Radical Unwarranted Departure from Existing Practice and is not “Reasonably Necessary”

To be valid, a regulation must be reasonably necessary to effectuate an agency’s underlying statutory authority. Govt. Code sections 11342.1, 11350(b)(1).

This Board has existing authority to protect the public trust and prevent unreasonable use of water. Specifically, in this year of extreme drought, the Board has acted on temporary urgency changes to address issues related to the export projects and other water rights, and staff have issued notices of curtailment to post-1914 water right holders in the Sacramento and San Joaquin River System. This Board also has existing authority to convert these notices into orders with due process to effected parties.

There is no evidence before this Board that these prior actions are insufficient and that more needs to be done. No senior water rights holders have complained to the Board asking that the Board go further to protect their interests. In addition, the state and federal fishery agencies have not come to the Board asking for further emergency action to prevent imminent harm to fish and wildlife.

Despite this lack of evidence of necessity, staff now asks this Board to relinquish all of its authority to staff to make further curtailment orders to senior water rights in a manner that (1) is unprecedented, (2) deprives property owners of all due process of law and (3) removes all procedural safeguards otherwise available if the Board itself were to take the curtailment action.

We sincerely urge the Board not to accept staff’s invitation to act so imprudently. While the drought is an overall emergency for the state, there is not a specific water rights emergency at this point in time that requires adoption of the proposed regulation ó particularly in its current form. It is critical that this Board maintain its adjudicative function to receive and hear evidence of actual òemergencyö conditions related to water supply availability and reasonable use so that this Board can make any necessary decisions to curtail water rights in a constitutional manner that preserves due process to affected parties and ensures that regulation does not overreach to curtail diversions

absent true need.

B. The Proposed Regulation Deprives Curtailed Diverters of Due Process

Governmental decisions that are adjudicative in nature are subject to procedural due process principles.¹ A determination that water is not available under a particular water right or that the exercise of a water right in a particular manner is unreasonable are both adjudicative decisions that must be based on substantial evidence and application of law. Thus, these decisions cannot be made and implemented through a curtailment order unless the effected party is provided notice and an opportunity to be heard on the evidence used to make the decision before the decision is made final.

The State Board's current process for issuing cease and desist orders provides this due process because the diverter is provided a draft of the order and an opportunity to request a hearing on the order before the Board issues the final order requiring the diverter to stop diverting. Further, immediately upon issuance of the Board's order to stop diverting, the diverter can appeal to a Court of law if he or she believes the Board's order was wrong.

By contrast, the proposed regulation issues the order to stop diverting first, and then provides that the affected party can (1) petition for reconsideration (which can take 90 days), or (2) wait until administrative civil liability is imposed to contest the already accrued penalties. The diverter cannot immediately appeal to Court after issuance of a curtailment order by the Deputy Director.² In either case, the diverter is deprived of due process. This deprivation is particularly extreme in the case of irrigated agriculture because the irrigation season will be over before any petition for reconsideration or appeal to a Court could be had.

The Board could avoid this problem by (1) holding an evidentiary hearing on the need for additional curtailments in particular areas, after due notice to effected parties to participate, and then (2) issuing emergency regulations that are responsive to the factual findings resulting from these evidentiary hearings. This would preserve due process. The Board cannot, however, delegate all of these functions to staff and deprive affected parties of the ability to view and respond to the evidence used to make the curtailment decision before it is made.

Frankly, it is surprising that staff has not brought to this Board prior to the July 1st hearing, the actual evidence (submitted under oath and subject to cross-examination) of current and anticipated water availability and proposed specific curtailment orders. This would have solved this problem and allowed this Board to make the difficult policy decision required to go forward with further curtailments.

¹ Horn v. County of Ventura (1979) 24 Cal.3d 605, 612.

² Water Code section 1126(b) (addressing exhaustion of administrative remedies).

C. The Proposed Regulation Is An Unlawful Delegation of Authority Because it Authorizes Staff to Make Fundamental Policy Decisions

Staff's "Finding of Emergency" states that the regulation is necessary to empower staff to issue curtailment orders: (1) when water is unavailable to serve certain junior water rights due to needs of senior rights, and (2) when "diverters do not have a right" to water in the stream from releases from storage intended for downstream delivery or public trust or water quality purposes.

As noted, no senior water rights have complained that their needs will not be met, obviating the alleged first reason for the emergency.

Staff's second stated reason for the "emergency" is based on a perceived policy need to curtail riparian and senior appropriative rights to protect the release of stored water by the state and federal water projects. This second reason concerns fundamental policy decisions that cannot be delegated to staff, at least with respect to diversions in the Delta

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.³ Similarly, this board cannot confer its staff the authority to make fundamental policy decisions.

While there is law to the effect that riparians cannot compel an upstream appropriator of stored water to release stored water for their benefit. However, that is not the issue here. The law is also clear that when an appropriator (the projects) releases stored water into a natural channel for conveyance to another location, it can only do so if the action does not diminish the water rights of those with the right to take water from the natural channel.⁴ This is the relevant inquiry.

Thus, if there would be water in the Delta for diversion, absent the release of stored water by the projects, the mere fact that the projects are releasing stored water into the Delta is irrelevant to the issue of curtailment of Delta water rights based on water availability.

There would be water in the Delta this year in the absence of releases from storage because the Delta is tidally influenced. Therefore, it is impossible for a lack of "water availability" determination to support curtailments in the Delta.

Thus, when your staff say they need to curtail Delta diversions to protect stored water, what they are really doing is making a fundamental policy decision to transfer some of the responsibility for meeting fishery flow and water quality objectives to riparian and other senior appropriators, and away from the projects. Such an action would be unlawful on at least two grounds: (1) first, as an

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

⁴ Water Code section 7075; Butte Canal and Ditch Co. v. Vaughn (1858) 11 Cal. 143.

unlawful delegation of fundamental policy decision making authority; and (2) second, as a violation of the rule of priority.

D. The Proposed Regulation Is An Unlawful Delegation of Authority Because it Removes All Procedural Safeguards

To be a valid delegation of authority, the legislature must provide adequate safeguards to prevent abuse of power by the agency.⁵ Similarly, this Board, acting in quasi-legislative capacity in considering the proposed regulation, cannot confer on your staff the authority to issue curtailment orders without adequate safeguards to prevent abuse of power.

As we have explained above, if the Deputy Director is allowed to issue curtailment orders, as set forth in the proposed regulation, effected diverters will have no meaningful recourse if the orders are unlawful or unsubstantiated. They cannot obtain immediate relief from this Board or from a Court of law which unlawfully impedes the separation of powers doctrine.

If this Board is inclined to adopt the proposed regulation, at a minimum, it must add provisions to the regulation which (1) require the Deputy Director to share all evidence and analysis supporting the factual and legal findings required to issue a curtailment order to each curtailed party prior to issuance of the order, and (2) provide for an expedited process for filing and resolution of petitions for reconsideration to the Board so that aggrieved parties can immediately go to Court if the curtailment order is issued without factual or legal basis. While this would not solve all of the due process concerns with the proposed regulation, it would significantly help.

For example, consider replacing proposed Section 875(f) with the following language:

(f) All curtailment orders issued under this article shall be subject to reconsideration under Article 2 (commencing with section 1122) of chapter 4 of part 1 of division 2 of the California Water Code, except that the Board shall have three (3) days to grant or deny the request for reconsideration. A petitioner shall be deemed to have exhausted all administrative remedies on the fourth day following the filing of a petition for reconsideration.

A similar short time frame for consideration, approval, and reconsideration must also be added to proposed Section 878.3 (regarding Alternative Water Sharing Agreements) in order for that section to have the required procedural safeguards for a delegation. As currently written, there is no set time frame for staff to act to approve or deny, no process for reconsideration, and no means for an aggrieved water right holder to obtain due process or timely procedural relief for an erroneous

⁵ 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).

decision.

E. The Delta Should be Excluded from the Regulation

Staff cannot make the factual finding that water is unavailable in the tidally influenced Delta. The fact that Delta channels may not have a significant current of fresh inflow is immaterial to the exercise of the right to divert. The California Supreme Court decided this issue in 1909 when a diverter's right to take water from a stagnant slough was challenged. The Court held that the right to divert "exists in any body of water, whether flowing or not."⁶ The fact that the Delta is tidally influenced (and that diversion has occurred for more than 100 years, even during severe droughts) prohibits a finding that water is not available for diversion in the Delta.

F. Absent a Complaint from a Prior Right Holder, a Premature Curtailment Order Will Violate the Rule of Priority and Effectuate an Unconstitutional Taking of Private Property

The proposed regulations would allow the Deputy Director to issue curtailment orders prior to any complaints from senior right holders. Thus, your staff could curtail senior water rights to leave water in the system for environmental purposes or to relieve the burden on the projects to meet Delta standards.

The state has the power to take private property for public purposes if provided it pays fair compensation. What it cannot do, is effectuate a taking of private property through back-door regulation.

As proposed, the regulation would allow staff to abuse their discretion and effectuate these unlawful takings. It is imperative that this Board retain the necessary procedural safeguards to ensure that the finding of unreasonable use or no water available for diversion is made only after a proper evidentiary hearing.

Thank you for the opportunity to present these comments. We respectfully request that you not adopt the proposed regulations.

Very truly yours,



JENNIFER L. SPALETTA
Attorney at Law

⁶ *Turner v. James Canal Co.* (1909) 155 Cal. 82, 87-88, 91-92.

