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June 30, 2014

*Via email transmission:*
commentletters@waterboards.ca.gov

Felicia Marcus, Chair
State Water Resources Control Board
P O Box 100
Sacramento, California 95812-0100

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

Dear Board Members:

The following comments to the State Water Board's July 1, 2014 Agenda Item 5 for draft Emergency Curtailment Regulations are respectfully submitted on behalf of the San Joaquin River Exchange Contractors Water Authority:

## 1. The Proposed Emergency Regulations Should Not Apply to Either Pre-1914 or Riparian Water Rights Both Because the SWRCB must Utilize Court Enforcement and Because the Staff of the SWRCB Should Concentrate its Efforts on the Water Rights the Board Itself Granted.

### 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 curtail 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 junior post-1914 water rights.

### B. It is Improper to Regulate Curtailment of Pre-1914 and Riparian Water Rights In the Manner Proposed. The Courts have exclusive jurisdiction.

Commenters contend that it is inappropriate for the State Water Board to curtail pre-1914 and riparian water rights. The Courts have uniformly held that the SWRCB is not to regulate the use of pre-1914 and riparian rights and states instead that the Courts are provided that authority. *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, 404 ("No one disputes that the Water Board does not have jurisdiction to regulate riparian and pre-1914 appropriative rights.") Under the label "unreasonable use," the SWRCB staff attempts to avoid this rule and aggregate and enlarge its power, despite this clear direction from the Courts. In the matter of the Tehama County streams it was claimed that this rule did not apply, even though in each case a Court had adjudicated the rights to water from those streams and in each case the lands were subject to Spanish Land Grants and therefore exempt from public trust claims.

Now the SWRCB staff claims another exemption: That the power to regulate pre-1914 and riparian uses exists because it must protect senior water rights from trespass and interference in times of water shortage. Such a claim can be made in both wet and dry years, and therefore the Staff of the SWRCB now contends that the Court rulings quoted above are to be ignored and the SWRCB power to regulate now extends to all pre-1914 and riparian water rights by the expedient of claiming there is no water to utilize, therefore, use is unreasonable. The Division of Water Rights' assertion that there is no water for use by holders of rights is therefore claiming the power of regulation in light of the threatened fines and the fact that no hearing on the Staff assumptions regarding hydrology will occur unless the accused user has the resources to challenge the assertion after the fact. The Board is simply being asked to knowingly ignore the Courts' rulings under a subterfuge and should reject the proposed regulations. If the SWRCB believes that there are violations, it has the standing to commence Court actions, which is what its predecessors did in the 1976-77 drought. Interestingly, the hydrological assumptions become a great deal more certain when a pleading must be filed under the equivalent of penalty of perjury.

## 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 constitutional protections. The emergency regulations would permit curtailment at the stroke of a pen of the Deputy Director of the Division of Water Rights (or her designee) without any advance notice to the affected owners and users of the water rights. Without notice, water right holders will be unable to plan and mitigate for impending curtailment or even protest the underlying technical basis for curtailment, such as whether there is actually a senior water right holder with unmet demands, before the effective date of the curtailment. The curtailment order immediately triggers 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 a desist order.

In the Notice of Proposed Rulemaking, State Water Board staff seems almost giddy describes the curtailment process under the proposed regulations as follows:

> 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). 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 terrorize 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 terrorize 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 certainly appreciate the severity of the current drought and the desire and need to promptly act, but such actions should provide minimum levels of constitutional protections out of respect for constitutionally protected rights to reasonably and beneficially use water. Notice of the curtailment order should be provided to groups of water right holders along with an expedited opportunity to object and present evidence before the order takes effect. 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 reflect 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© 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 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.

[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.

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 accused, 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 Should Strictly Enforce the Water Right Priority System And Avoid Creating a "Health and Safety" Super Priority for Post-1914, Pre-1914 and Riparian Users.

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, 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 estimated damages from the taking made before the taking (Cal. Constr., Art. I, §§ 7, 19), and payment 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.

The California Constitution, Article I, § 7, states: "A person may not be deprived of property without due process of law." In *Grannis v. Ordean* (1914) 234 U.S. 385, 394, the United States Supreme Court stated in regard to the due process requirements of taking property and Article 5 of the U.S. Constitution; "The fundamental requisite of due process of law is the opportunity to be heard." If the Director of Water Rights made a determination that health and safety water was required, your regulations would provide no hearing, no due process and no deposit of the estimated amount of damages to be suffered by the party deprived of their use of water.

Governor Browns' Drought Declarations do not grant you the power to condemn without due process, nor do they appropriate money to your budget for those types of actions. Nor is it good policy. Let the unfortunate domestic users or public agency that they are served water by who did not plan adequately for a drought explain to a judge why their use of water is more necessary and important than their neighbors' right to use water and therefore their neighbors right should be temporarily taken.

The Staff report does not explain how the SWRCB could avoid the requirements of Water Code Section l245 which states that when an attempt to take water within a watershed for municipal or domestic purposes occurs, the party must:

> ...pay...for all damage suffered or sustained by them ("persons, firms, corporations whose property, business, trade procession or occupation is within or conducted or carried on with the watershed") for all damage suffered or sustained by them either directly or indirectly because of injury, damage, destruction or decrease in value of any such property, business trade, profession or occupation resulting from or caused by the taking of any such lands or waters...

Again, under the mantra of avoiding "cumbersome procedures," the channeling of discussion appears to be attempting to distract all from the question of adoption of regulations that are already prohibited by Constitutional requirements and specific procedural requirements. The "health and safety" emergency that does not exist, and that already has condemnation procedures available to relieve domestic water shortages if they ever do exist, will not serve to distract from the attempt to create new powers out of orders of the SWRCB with no evidentiary basis and the threats of hundreds of thousands of dollars of fines.

## 4. 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.

**5. <u>Preserving the Historic Credibility of the SWRCB as a quasi-judicial body.</u>**

A) The refusal of the SWRCB to set forth in a brief hearing before adoption of curtailment notices their hydrologic conclusions in regard to the availability of water before attempting to give notice to pre-1914 users and riparians, B) the fact that for the second time in 2014 the Board Staff has claimed that the regulations can be changed before submission and has positioned the adoption of emergency regulations over a holiday so that the five-day deadline for comments to the Office of Administrative Law on subjects such as the analysis of economic impacts involves only one business day for gathering evidence and objecting to the OAL, and C) "waving the flag" of potential injury to domestic water users' health and safety and protection of senior rights when there is no evidence that the system is not presently functioning to respond to those risks, all threaten to irreversibly damage the credibility of the SWRCB. The Board is to act as an impartial judge. These actions aggregating power to the staff of the SWRCB are inconsistent with that role of the SWRCB as a quasi-judicial body. If the Board is to be policeman, fine collector and judge combined, an attempt to avoid "cumbersome" procedures becomes authoritarian government. Were the Board Members directed by the Governor to reject the past role of the SWRCB as a body entitled to judicial respect but also bound by the protections applicable to Courts? If so, we do not see that in the Drought Declarations.

Very truly yours,

MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP

By: _____
PAUL R. MINASIAN, ESQ.

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cc: San Joaquin River Exchange Contractors Water Authority
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