HERUM \ CRABTREE \ SUNTAG
ATTORNEYS

**Jeanne M. Zolezzi**
jzolezzi@herumcrabtree.com

**VIA EMAIL**
commentletters@waterboards.ca.gov

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State Water Resources Control Board
Clerk to the Board
Post Office Box 100
Sacramento, CA 95812-0100

**SUBJECT**: 3/17/15 BOARD MEETING Agenda Item #9. Consideration of a proposed Resolution amending and readopting a drought emergency regulation regarding Information Orders.

These comments are provided on behalf of Banta-Carbona Irrigation District and Patterson Irrigation District ("**Districts**"), to the proposed amendment and readoption of drought related emergency regulations regarding information orders. While the Districts recognize the severity of the ongoing drought, they oppose the emergency regulation. The drought should not be used as justification for achieving wholesale changes in the method of administering water rights. The proposed amendments to the emergency drought regulations regarding information orders would fundamentally change the role of the State Water Resources Control Board ("**Board**") regarding pre-1914 rights. Simply put, the Board is overreaching.

The Resolution proposes to amend and readopt emergency regulation Section 879(c), which became effective on June 2, 2014. Section 879(c) authorized the Deputy Director to order the disclosure of information regarding pre-1914 and riparian water rights, if she receives (1) a complaint alleging interference with a water right by a riparian and pre-1914 appropriative right holder; or (2) information that indicates riparian or pre-1914 water right holders are unlawfully diverting stored water. Section 879(c) expired on February 28, 2015. The proposed expanded regulation would significantly expand the justification for issuing information orders, and would allow the Deputy Director to issue such an order under much broader circumstances. The proposed regulation attempts to expand the jurisdiction of the Board without justification, and the wording invites mischief.

SPECIFIC COMMENTS:

- **Section 879(c)(1)(A)** would allow an information order to be issued upon "*Receipt of a complaint alleging interference with a water right by a water right holder, diverter or user*".

Obviously receipt of any complaint, even a frivolous one, should not trigger such an order. To prevent such an occurrence, we would suggest this section be re-written as follows:

(A) Upon receipt of a complaint, determined by Division staff to be reasonable and substantiated, alleging interference with a valid water right by a water right holder, diverter or user.

- **Section 879(c)(1)(B)** would allow an information order to be issued "*Where a water right holder, diverter or user asserts a right to divert under a pre-1914 or riparian right in response to an investigation, curtailment order or any notice of curtailment, and no Statement of Water Diversion and Use for such right was on file with the Board as of January 17, 2014*".

We believe this regulation is justified, as filing a Statement of Water Diversion and Use is required by law.

- **Section 879(c)(1)(C)** would allow an information order to be issued "*Where as water right holder, diverter or user responds to an investigation, curtailment order or any notice of curtailment by asserting a right to divert under a contract or water transfer for which the Board has not approved a change petition and for which no record had been previously filed with the Board*".

This section should not be adopted as it is completely unauthorized by law and unjustifiable. The Board does not have the authority to regulate pre-1914 and riparian rights, and its authority to investigate them is similarly limited. Expanding the requirements of section 879(c) to allow the Deputy Director to require disclosure of information that shows "compliance with transfer law" with regard to a pre-1914 transfer effectively circumvents or negates the jurisdictional limitations of the Board with regard to pre-1914 transfers.

The Board does not have jurisdiction over pre-1914 water rights or the transfer of pre-1914 water because the rights pre-exist the development of and are separate from the permitting system administered by the Board. To the extent a water user claims injury from the transfer of a pre-1914 water right, the injured party has the ability to challenge the transfer in court. The Board does not have the jurisdiction to determine a challenge to a pre-1914 water transfer or otherwise make a determination regarding the validity of such a transfer. For this reason, it is unclear why the Deputy Director would be requesting information that would suggest the Board has the authority to make a determination regarding the validity of a transfer of pre-1914 water.

Several courts have recently addressed the issue of the 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 Board "does not have jurisdiction to regulate riparian and pre-1914 appropriative rights." *Id*. at p. 404, and

- the 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 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 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 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. Relying upon *Young*, the Board would have the authority to demand information from a pre-1914 or riparian water user establishing its right. In other words, enough information to make the "threshold determination" that a right exists. Here, however, the Board overreaches such "threshold determinations" and attempts to obtain information sufficient to determine the validity of a pre-1914 or riparian water right holder's actions upon its water rights, whether by contract or transfer, <u>which it cannot do</u>.

Pursuant to *Young,* the 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 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 Board, only a court. In order to make such a determination of priority, the 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. 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 Board cannot do.

- **Section 879(c)(1)(D)** would allow an information order to be issued "*Upon Receipt of information indicating an actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversion of water by any water right holder, diverter, or water user*."

The language in this section invites abuse. As evidenced by the Board's February 4, 2015 Information Order WR 2015-0002-DWR, the Division interpreted similar language in expired Regulation 879 in a broad, and unsupported, manner. An information order was issued not based upon "information indicating an unlawful diversion", but based solely upon a letter *claiming* an unlawful diversion, without factual support of any kind; in other words, without any "information" indicating an unlawful diversion. Given the Division's loose interpretation, this section should be re-written to provide water right holders, diverters and users with some protection against frivolous information orders:

> (D) Upon receipt of information, <u>supported by evidence determined by Division staff to be reasonable and substantiated,</u> indicating an actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversion of water by any water right holder, diverter, or water user.

- **Section 879(c)(2)** would add "compliance with transfer law" to information the Deputy Director may require in an order.

This section is an unwarranted and should not be adopted because it is an illegal infringement upon pre-1914 rights, for the reasons set forth above in comments to **Section 879(c)(1)(C)**. Expanding the requirements of section 879(c) to allow the Deputy Director to require disclosure of information that shows "compliance with transfer law" with regard to a pre-1914 transfer effectively circumvents or negates the jurisdictional limitations of the Board with regard to pre-1914 transfers.

**CONCLUSION**

The districts here believe that more lies under the surface. While the Board and Division staff attempt to paint the proposed emergency regulation as innocuous; however, what sounds simple in fact includes the reinvention of the water right priority system and the expansion of Board jurisdiction over riparians and pre-1914 appropriators.

Very truly yours,

JEANNE M. ZOLEZZI
Attorney-at-Law

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