



March 16, 2015

Transmitted via: commentletters@waterboards.ca.gov

Jeanine Townsend, Clerk of the Board and
Tom Howard, Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: 3/17-18/15 BOARD MEETING - Item 9: Consideration of a proposed Resolution amending and readopting a drought emergency regulation regarding Informational Orders.

Dear Ms. Townsend and Mr. Howard:

Restore the Delta has reviewed the State Water Resources Control Board's item referenced above (Item 9) and we submit the following comments.

Restore the Delta is a grassroots campaign by residents and organizations committed to restoring the Sacramento-San Joaquin Delta so that fisheries and farming can thrive together here. We work through public education and outreach so that all Californians recognize the Bay-Delta estuary as a part of California's natural heritage, deserving of restoration. We fight for a Delta with waters that are fishable, swimmable, drinkable, and farmable, able to support the health of the estuary, San Francisco Bay, and the ocean beyond. Our coalition envisions the Delta as a place where a vibrant local economy, tourism, recreation, farming, wildlife, and fisheries thrive as a result of resident efforts to protect our waterway commons.

There is a close connection between Restore the Delta's goals, the relationships among paper water, drought curtailments, and the Board's powers and duties to prevent waste and unreasonable use, to protect the public trust, to encourage the use of waters in California to the fullest extent of which they are capable, and to protect and enforce the water rights system. We see the Board and its staff grappling with all of these issues in the above-referenced item, resolution, and emergency regulation digest. It is a difficult set of issues to confront, and we commend the Board for taking what steps it has to date.

The Board issued a "drought information order" back on February 5th requiring all Central Valley and Delta water users to submit information documenting their water rights. But the emergency regulations under which the Board issued the order expired February 27th, as our

Delta colleague, attorney Osha Meserve, pointed out to Board staff in an email on March 10th. Now, to follow through legally on the original drought information order, the Board must readopt the regulations at its March 17th meeting.¹

By obtaining this information, Board water rights staff will begin the process of evaluating the quality of the water right claims in an effort to determine water demand more accurately during the drought in 2015.

Up and down the Central Valley, the prospect of the Water Board curtailing supplies for a third consecutive year worries many water users. The data the Board obtains from the February 5th order will help it figure out how many users may be directly affected, and in the Board's own terms, "this information will be used to issue, lift or refine curtailments."

This information order is issued in the midst of the Board's efforts to manage the effects of drought on the economy and environment of California. It seems to us that a significant portion of the information the Board collects through this process will be important not just for today's drought but for managing water demand generally in California's future.

The Board could begin eliminating "paper water" from Central Valley water ways. Paper water is the practical reality in California that there are far more water rights claims to use water than there is actual water available to allocate—especially during droughts. More users chase less water, which can have serious consequences for water users and the environment.

The Board's draft resolution at Article 6 connects paper water to curtailment as an accounting problem.

6. In 2014, the State Water Board conducted nearly 950 field inspections to determine compliance with curtailment notices. The field inspection program, and the submittal of responses to curtailment notices, found that many persons who received curtailment notices for a post-1914 right claimed a riparian or pre-1914 right for continued diversions. *In many instances, the claimed right had never been reported to the Division, even though riparian and pre-1914 diversions must typically be reported under Water Code section 5100 et seq. Because a diversion made by the holder of more than one right is made first under any applicable senior right, with diversion occurring under a more junior right only after the senior right has been satisfied, the large number of such claims suggests accounting problems, failure to file claims, and/or falsification. The Division will use informational orders, authorized under the emergency regulation, to obtain information on previously unclaimed rights and also regarding certain*

¹ According to Ms. Meserve, "A Certificate of Compliance was not filed with OAL for 23 CCR section 789 and the other regulations adopted on June 2, 2014. The Certificate of Compliance was required to be filed with OAL by February 27, 2015 showing how normal rulemaking procedures were complied with during the initial (extended) 270-day "emergency" period. (Gov. Code, § 11346.1, subd. (e).) Thus, section 879 was repealed by operation of law on February 27, 2015 and is no longer in effect. As a result, the Order is also invalid, as it was based upon the authority provided in section 879." Email from Osha Meserve to John O'Hagan and Kathy Mrowka of the State Water Resources Control Board, March 10, 2015. Restore the Delta understands that most people to whom the drought information order applied continued to comply in good faith with the order, if they had not already.

*known claims. This information will include diversion amounts and the basis and extent of claims.*²

The tasks and analyses emphasized in this paragraph are precisely those needed to eliminate claims to use water that are invalid or problematic. It is important to get these investigations as accurate as possible because, as the Board states in its draft Information Digest on the proposed regulation:

This information will be used to issue, lift or refine curtailments. Refinement could result either in: 1) releasing some water right holders from curtailment because the additional information demonstrates that there is sufficient water in the system to support the demand of additional water right holders; or 2) adding additional water right holders to the curtailment because the initial curtailment does not result in protection of senior water rights. Although adjustments could also be made to curtailments issued under the Board's current authorities, any such adjustment, absent the proposed regulation, will be less accurate and take longer to implement because stale or inaccurate information on current diversions means that curtailments may not be promptly fine-tuned to provide diverters with the best information regarding whether water is available for diversion under their priority of right at any given time. Therefore, in the absence of the proposed regulation, senior water right holders are likely to be injured.³

Many water users in the Delta have senior water rights. Many from the south Delta have been challenged in other contexts before the State Water Board in recent years and their rights have been found by the Delta Watermaster to have a sound basis in law and practice.⁴ It remains to be seen how many valid water right claims of all types and ages exist in the Sacramento and San Joaquin Valley watershed of the Bay-Delta estuary, and what these regions' compliance rates will be with Board requirements.

Drought emergency regulations may come and go, but much of the information the Board collects from this drought information order should be useful beyond just constructing this year's drought demand curtailment curves. We encourage the State Water Board to address the paper water issue for the benefit of all water right holders and the California public that cares about the state's rivers and streams and the natural heritage of the Delta. Since eight of the last nine years

² State Water Resources Control Board, Draft Resolution, Item 9, *Amending and Readopting a Drought Emergency Regulation Regarding Informational Orders*, March 17, 2015, p. 2. Accessible via meeting agenda online at http://www.waterboards.ca.gov/board_info/agendas/2015/mar/031715_revised_%20agenda_links.pdf. Emphasis added.

³ State Water Resources Control Board, Draft Informational Order Emergency Regulations Digest, March 11, 2015, p. 15. Accessible online at http://www.waterboards.ca.gov/board_info/agendas/2015/mar/031715_9_reg_pkg_with_appendices.pdf.

⁴ Craig M. Wilson, Delta Watermaster, *Water Right Compliance and Enforcement in the Delta: A Report to the State Water Resources Control Board and the Delta Stewardship Council*, 2012. Accessible online at http://www.swrcb.ca.gov/board_info/agendas/2012/feb/020712_9_with%20report.pdf.

have been below normal water years, it may be that in the era of climate change, California is embarking on a “new normal.” We urge the Board to ask, and hopefully answer questions like:

- If water right holders have riparian or pre-1914 rights and also post-1914 rights, do they really need redundant rights?
- What is the status of claims against which enforcement actions are applied? Are those claims to divert water extinguished permanently by Board action under emergency drought regulations or are enforcement actions merely in effect while the emergency regulations are in effect?
- What due process and equal protections must the Board apply to permanently eliminate redundant water rights once they are identified?
- If the State Water Board believes it obtains meaningful information on demand and supply, could and should the Board encourage the Department of Water Resources and the Bureau of Reclamation to plan their operations to fit that “new normal” better than they do now? By doing so, the multiple objectives of reservoir operation for water supply, temperature control, and salinity and water quality control in the Delta could be planned *before* exports are prioritized?

Answers to such questions (and other such questions may yet emerge) may reduce confusion and increase reliability of water rights found by the Board to be valid. By reducing confusion, it seems likely the Board can help reduce the claims of so many chasing so little water during California’s droughts—today’s and tomorrow’s. Reduced water demand would benefit public trust resources, including listed species in the Delta.

Delta exports are not the first priority in state law for use of Delta water, contrary to past practice. Determining the quantities of these other water needs in the Delta watershed—salinity and water quality control chief among them—come first. If the State Water Board can reduce water right claims, the Delta Protection Act of 1959 states that, “the Legislature finds that the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta area...and to provide a common source of fresh water for export to areas of water deficiency is necessary to the peace health, safety, and welfare of the people of the State, *except that the delivery of such water shall be” subject to area of origins requirements in state law.*

Moreover, the Act states that it is state policy that “no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled.” Finally, the Act states that “[i]n determining the availability of water for export from the Sacramento-San

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Joaquin Delta no water shall be exported which is necessary to meet the requirements” of the Act.⁵

Thank you for extending the time period for allowing public comment on Item 9. If you have questions or concerns about these comments, please feel free to contact Tim Stroshane (510.524.6313, or tim@restorethedelta.org) or Barbara Barrigan-Parrilla (barbara@restorethedelta.org).

Sincerely,



Tim Stroshane
Policy Analyst



Barbara Barrigan-Parrilla
Executive Director

cc: Members of the State Water Resources Control Board
John O'Hagan
Kathy Mrowka
Barbara Evoy
Rich Satkowski
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⁵ California Water Code Sections 12202, 12203, and 12204.