



O'Laughlin & Paris LLP

(3/17-18/15) Board Meeting- Item 9  
Emergency Regs Informational Orders  
Deadline: 3/16/15 by 12:00 noon

Attorneys at Law

March 12, 2015



*Via Email:* [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Jeanine Townsend, Clerk of the Board  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

***Re: 3/17-18/15 BOARD MEETING: Item #9:  
Adoption of Emergency Regulations Regarding Information Orders***

To State Water Resources Control Board:

The San Joaquin Tributaries Authority (STJA) reviewed the State Water Resources Control Board's (State Water Board) proposed Resolution "Amending and Readopting a Drought Emergency Regulation Regarding Informational Orders" (Resolution) and proposed changes to California Code of Regulations, title 24, section 879(c) (Section 879(c)) as documented in Item No. 9 for the State Water Board meeting on March 17, 2015 (Proposed Regulation). The SJTA opposes the adoption of the Resolution and/or the Proposed Regulation. The State Water Board has not made the necessary findings to support the Resolution or the Proposed Regulation. In addition, the SJTA is concerned with the significant expansion of the Proposed Regulation, which challenges existing jurisdictional limitations of the State Water Board. The proposed amendments compromise or otherwise erode the State Water Board's lack of jurisdiction over pre-1914 and riparian rights, and thereby attempt to extend the Board's authority over those rights absent any separate authority to do so.

### **BACKGROUND**

The State Water Board adopted a series of emergency regulations in 2014 pursuant to authority provided in Water Code section 1058.5. One of these emergency regulations was 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.

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Pursuant to the terms of emergency regulations, Section 879(c) expired after a maximum of 270 days. (Water Code, § 1058.5) Thus, Section 879(c) was no longer in effect as of February 28, 2015. On March 6, 2015, the State Water Board released the Resolution and Proposed Regulation. The State Water Board did not provide any findings in support of the Resolution or the Proposed Revisions.

The proposed revisions to Section 879(c) are significant. The original two triggering actions described above have been substantially expanded to propose the following changes:

- (1) Expand triggering complaints to include complaints submitted by water right holders, diverters, or water users.
- (2) Remove the trigger of receiving information that indicates unlawful diversion of stored water.
- (3) Add the trigger of receiving information that indicates actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversion by any water right holder, diverter, or water user.
- (4) Add the trigger of claimed pre-1914 or riparian rights in response to investigation or curtailment, without claiming such rights before January 17, 2014.
- (5) Add the trigger of claimed contract or transfer deliveries not previously approved by the State Water Board in response to investigation or curtailment.
- (6) Add “compliance with transfer law” to information the Deputy Director may require in an order.

## **REASONS FOR OPPOSITION**

### **I. Findings Are Required to Adopt Emergency Regulations**

In order to adopt emergency regulations pursuant to Water Code section 1058.5, the State Water Board must make findings that (a) an emergency exists; (b) the emergency could not be addressed through non-emergency regulations; and (c) the proposed regulation addresses the emergency. (Water Code, § 1058.5; Govt. Code, § 11346.1.) When adopting emergency regulations in 2014, the State Water Board drafted findings that sought to comply with the above requirements.

Section 879(c) expired on February 28, 2015. Therefore, the State Water Board is proposing to adopt and significantly amend Section 879(c). The adoption of Section 879(c) is subject to the same finding requirements as any other emergency regulation. Before considering the proposed resolution and adoption of the proposed Section 879(c), the State Water Board must make findings that satisfy the Water Code and Government Code requirements above. The State Water Board has not made these findings and therefore cannot lawfully adopt the Proposed Regulations.

## **II. Due Process Violation**

Section 879(c), as originally drafted, provided the Deputy Director with the narrow authority to order pre-1914 and riparian diverters provide her information in response to specific complaints or information alleging unlawful water use. The parties subject to information orders under the original Section 879(c) understood that an allegation of unlawful use had been made against their water diversion. The parties were allowed to review the complaint and/or information provided to the State Water Board. The parties knew, or should have known, that the State Water Board was requesting the information in order to determine whether to take an enforcement action pursuant to the complaint.

The Proposed Resolution makes significant changes, allowing the Deputy Director to order information not related to complaints or specific allegations. The expansion makes it unclear whether information orders pursuant to Section 879(c) is sought pursuant to a complaint or enforcement action. A water right holder has the right to know whether the information they are providing is in response or in defense of a complaint or allegation of unlawful diversion. (*Casitas Municipal Water District v. United States* (Fed. Cir. 2013) 708 F.3d 1340, 1353-1354; *State Water Resources Control Board Cases*, 182 Cal.App.3d at 100; *Ivanhoe Irr. Dist. v. All Parties* (1957) 47 Cal.2d 597, 623.) To the extent it is not clear that information is being collected in an enforcement context or in defense against a complaint or allegation, this lack of clarity may not provide sufficient notice that a property right is at issue and result in a violation of due process rights.

In addition to being unlawful, the Proposed Regulations may result in stakeholder resistance. Stakeholders' cautious responses are due, in part, to the failure of the State Water Board to explain how the information will be used. The State Water Board has failed to explain whether it will collate the information to initiate a watershed adjudication, review each parcel's data and take enforcement action as necessary, review the data to affect curtailment action, or some other method or approach, as yet unknown. Without understanding how the information will be used moving forward, it is difficult for stakeholders to feel comfortable providing the information.

## **III. State Water Board Jurisdiction**

The State Water Board does not have the authority to regulate pre-1914 and riparian rights. (*Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, 404; *People v. Shirokow* (1980) 26 Cal.3d 301, 307-308; *Nevada County & Sacramento Canal Co. v. Kidd* (1869) 37 Cal. 282, 311; Order WR-86-2; Order WR 84-14; Decision 81-1575, fn. 4; Decision 1324; Decision 1290; Decision 1242.) 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 State Water Board with regard to pre-1914 transfers.

The State Water 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 State Water Board. To the extent a water right holder claims injury from

the transfer of a pre-1914 water right, the injured party has the ability to challenge the transfer in court. The State Water 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 State Water Board has the authority to make a determination regarding the validity of a transfer of pre-1914 water.

#### **IV. Standing and Injury**

The proposed changes to Section 879(c) significantly expand the persons who may provide information or complaint that would trigger the Deputy Director's authority to order disclosure of information. The original Section 879(c) allowed the Deputy Director to act if a water right holder provided information or a complaint. The Proposed Regulation would allow any water right holder, diverter or water user with standing to complain, regardless of injury. Everyone uses water, which means that anyone could complain to the Deputy Director and trigger Section 879(c) action. This violates the basic principles of standing and injury which are fundamental prerequisites to filing a complaint. Section 879(c) should maintain the previous limitation, allowing complaints only from valid water right holders that can show harm.

#### **CONCLUSION**

The SJTA opposes the proposed amendments to Section 879(c) because they are not supported by necessary findings. In addition, the proposed expansion is unlawful due to due process, jurisdictional, and standing issues. For these reasons, the SJTA requests the State Water Board decline to adopt the Resolution and Proposed Regulations.

Very truly yours,

**O'LAUGHLIN & PARIS LLP**



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