

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2015-0034-EXEC**

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In the Matter of the Petition for Reconsideration of the  
**BANTA CARBONA IRRIGATION DISTRICT and PATTERSON IRRIGATION DISTRICT**  
Regarding Order WR 2015-0002-DWR

Order for Additional Information in the Matter of Diversion of Water from Sacramento and San  
Joaquin River Watershed and Delta

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**ORDER DENYING RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR<sup>1</sup>

**1.0 INTRODUCTION**

Banta Carbona Irrigation District and Patterson Irrigation District (respectively Banta Carbona and Patterson, and jointly Petitioners) petitioned the State Water Resources Control Board (State Water Board or Board) for reconsideration of State Water Board Order WR 2015-0002-DWR (Order 2015-0002 or Information Order), a February 4, 2015 Order requiring certain riparian and pre-1914 water right claimants along the Sacramento and San Joaquin River Watershed and Delta to submit specified information to the Board.

Petitioners state that, with respect to Petitioners, the State Water Board did not satisfy the provisions of California Code of Regulations, title 23, section 879 when it issued the Information Order.<sup>2</sup> Specifically, they argue that Board did not receive a "complaint" or "information," as required to trigger the Board's information order authority. They also argue that application of the information order to Petitioners is improper because their point of diversion is located upstream of the Delta. For these reasons, Petitioners request that the Board revise the Information Order so that it no longer requires Banta Carbona and Patterson to provide the required information.

The petition was not filed within the 30 day deadline, and it is therefore denied.

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<sup>1</sup> The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n v. State Personnel Board* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order WQ 98-05-UST at pp. 3-4.)

<sup>2</sup> Unless otherwise noted, all further references are to title 23 of the California Code of Regulations.

## **2.0 GROUNDS FOR RECONSIDERATION**

Any interested person may petition the State Water Board for reconsideration of a water rights decision or order within 30 days on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) [e]rror in law.

(§ 768.)

A petition must specify the specific board action for which the petitioner requests reconsideration, "the reason the action was inappropriate or improper," "the specific action which petitioner requests," and must contain "a statement that copies of the petition and accompanying materials have been sent to all interested parties." (§ 769, subd. (a)(2), (4)-(6).) Additionally, "a petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition." (*Id.*, subd. (c).)

A petition for reconsideration must be timely filed within 30 days of the decision or order at issue. (§ 768.) The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).) The State Water Board may elect whether or not to hold a hearing on the petition for reconsideration.

Here, the Petition is not timely filed.

## **3.0 BACKGROUND**

On April 25, 2014, Governor Edmund G. Brown, Jr. issued an Executive Order to strengthen the state's ability to manage water and habitat effectively in drought conditions, and called on all Californians to redouble their efforts to conserve water. The Executive Order declares a continuing State of Emergency and finds that the continuous severe drought conditions present urgent challenges across the state including water shortages for municipal water use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue into 2015.

The Executive Order refers to the Governor's Proclamation No. 1-17-2014, issued on January 17, 2014 (January Proclamation), declaring a drought State of Emergency to exist in California due to severe drought conditions. The January Proclamation notes that the state is experiencing record dry conditions, with 2014 projected to become the driest year on record. These conditions also threaten the survival and recovery of fish, wildlife, and plants that rely on California's rivers, including many species in danger of, or threatened with, extinction. The January Proclamation also calls on all Californians to reduce their water usage by 20 percent.

On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a Post-1914 Appropriative Right." Based upon the reservoir storage and inflow projections, along with forecasts for precipitation events, the Division determined the existing water supply in the Sacramento and San Joaquin River watershed was insufficient to meet the needs of all water rights holders. With the notice, the State Water Board notified all holders of post-1914 appropriative water rights in the Sacramento and San Joaquin River Watershed of the need to immediately stop diverting under their post-1914 rights water rights, with some minor exceptions for non-consumptive use diversions. Approximately 5,435 junior water-rights in the Sacramento River Watershed and 3,116 water rights in the San Joaquin River Watershed received curtailment notices. The condition of curtailment continued until water conditions improved and curtailment could be lifted.

On July 2, 2014, the State Water Board adopted an emergency regulation for Curtailment of Water diversions to Protect Senior Water Rights. (State Water Board Resolution 2014-0031 (adding sections 875 and 878.3 and amending sections 878.1 and 879 [Drought Regulations]).) The Drought Regulations were reviewed by the Office of Administrative Law and went into effect July 16, 2014. The Drought Regulations establish a drought emergency curtailment method for post-1914 water rights holders and requirements for riparian and pre-1914 rights holders to provide additional information in specific circumstances.

Pursuant to section 879, subdivision (c) of the Drought Regulations, the Division's Deputy Director has delegated authority to issue an order requiring riparian or pre-1914 water rights holders to provide additional information. Section 879, subdivision (c), as it read at the time Order 2015-0002 was issued, stated:

Upon receipt of a complaint alleging interference with a water right by a riparian or pre-1914 appropriative water right holder or upon receipt of information that indicates unlawful diversions of stored water by riparians or pre-1914 appropriative water right holders, the Deputy Director may issue an order under this article requiring such water right holders to provide additional information regarding the property patent date, the date of initial appropriation, and diversions made or anticipated during the current drought year. Any water right holder receiving an order under this subdivision shall provide the requested information within five (5) days.

On July 23, 2014, DWR and the United States Bureau of Reclamation (Reclamation) (collectively, Project Agencies) alleged that riparian and pre-1914 diverters in the southern and central Delta were illegally diverting water stored and released by the State Water Project and

the Central Valley Project (collectively, Projects) and water acquired by their contractors through transfer and exchange agreements. The Project Agencies requested that the State Water Board exercise its statutory authority to require Delta water users to provide the State Water Board with information that: 1) supports the basis of any asserted right or rights; and 2) reflects the quantity of water diverted and expected to be diverted. On August 5 and 7, 2014, the State Water Contractors and Westlands Water District submitted letters in support of the Project Agencies' request.

On August 13, 2014, the Division received a complaint filed by the California Sportfishing Protection Alliance (CSPA) alleging: 1) illegal diversion of water from the San Joaquin, Mokelumne, Cosumnes, and Calaveras Rivers and Delta agricultural return flow by the Project Agencies at their Delta pumping facilities; and 2) illegal diversion of San Joaquin River riparian flow by Reclamation and other unnamed diverters.

Stored water released by the Projects may be affected in two ways. As asserted in the July 23 letter, where water quality standards are controlling Project operations, any diversion by riparian and pre-1914 diverters of water the projects release from storage to meet water quality standards necessitates additional releases of stored water, or reductions in Project deliveries, to make up for the water diverted by those holders of riparian or pre-1914 rights. In addition, the Division notes that unauthorized diversions anywhere within the Sacramento and San Joaquin River Watershed and Delta may reduce instream flows such that the Projects would need to increase reservoir releases to meet Delta water quality standards.

On September 24, 2014, the State Water Board convened a workshop on central and southern Delta water availability and use. The workshop's purpose was to receive comments and discuss the process that the State Water Board should use to address allegations and legal theories regarding the sources and quantity of water supplies available for diversion and use within the central and southern Delta. Representatives for the Project Agencies, CSPA, the San Joaquin Tributaries Authority (SJTA), LAND, Kern County Water Agency, the State Water Contractors, and others presented information.

On November 23, 2014, the Division requested that Statement of Water Diversion and Use holders claiming riparian and pre-1914 rights in the Sacramento and San Joaquin River Watershed and Delta who had not previously identified their year of first use do so. On February 4, 2015, the Division's Deputy Director signed Order 2015-0002. The order finds that the Deputy Director has information that indicates there may be unlawful diversions of stored water by riparian and pre-1914 appropriative water rights claimants in the Sacramento and San Joaquin River Watershed and Delta. The order requires riparian and pre-1914 water right claimants along the Sacramento and San Joaquin River Watershed and Delta to submit certain information to the Board. Specifically, claimants must provide their monthly diversion and the basis of right allowing such diversions for each month in 2014, projected diversions for 2015, the primary use of the water, the location of the point of diversion, the location of the place of use, and the purpose of use. Order 2015-0015 requires submission of supporting documentation for the claimed right, including the property patent date and the date of initial appropriation. Information was required to be provided no later than March 6, 2015.

On March 6, 2015, the State Water Board received a petition for reconsideration submitted by the San Joaquin Tributaries Authority.

On March 16, 2015, the State Water Board received Banta Carbona and Patterson's petition for reconsideration in Order 2015-0002.<sup>3</sup> The letter is dated March 13.

#### **4.0 ANALYSIS**

##### **4.1 *The Petition for Reconsideration was Not Timely Filed, and Need Not be Considered***

To be timely filed, a petition for reconsideration must be received by the State Water Board "[n]o later than 30 days after adoption by the Board of a decision or order" for which reconsideration is sought. (§ 768.) Petitioners seek reconsideration of Order 2015-0002, which the Board adopted on February 4, 2015. Therefore, to be timely filed, the Petition would need to be received by the Board no later than March 6. However, Banta Carbona and Patterson's Petition was not received by the Board until March 16, ten days late. The Petition was not even postmarked until March 13, a week past the deadline. Petitioner's Petition for Reconsideration is not timely filed, and need not be considered by the Board.

##### **4.2 *Notwithstanding the Fact That the Petition was Not Timely Filed, the Merits Arguments Raised Therein are Adequately Addressed in Order WR 2015-0032-EXEC***

Petitioners' arguments on the merits are adequately addressed in State Water Board Order WR 2015-0032-EXEC.

#### **5.0 CONCLUSION**


Banta Carbona and Patterson's Petition for Reconsideration is denied because it was not timely filed. Had Petitioners met the deadline, their arguments would fail on the merits for the same reasons specified in Order WR 2015-0032-EXEC. The State Water Board finds that the challenged actions were appropriate and proper.

#### **ORDER**

The State Water Board finds that Petitioners' Petition to reconsider Order WR 2015-0002-DWR was not timely filed. Accordingly, Petitioners' Petition for Reconsideration is denied.

Dated: \_\_\_\_\_

10/8/15

  
Thomas Howard  
Executive Director

<sup>3</sup> Banta Carbona and Patterson's petition is styled as a joinder to a separate petition for reconsideration submitted by the San Joaquin Tributaries Authority, which the State Water Board received on March 6, 2015. However, joinder procedures do not exist for petitions to reconsider a water rights decision. (See Water Code § 1122; Cal. Code Regs., tit. 23, § 879.) Petitioners' invocation of joinder appears to be an attempt to circumvent the statute of limitations.