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BBID / curtailment
req for recon (2)



EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIGUEZ
SECRETARY FOR ENVIRONMENTAL PROTECTION

State Water Resources Control Board

July 24, 2015

VIA EMAIL AND U.S. MAIL

Daniel Kelly & Lauren Bernadett
Somach, Simmons & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
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Dear Mr. Kelly and Ms. Bernadett:

PETITION FOR RECONSIDERATION: BYRON-BETHANY IRRIGATION DISTRICT

The State Water Resources Control Board (State Water Board) has received your petition for reconsideration, submitted on behalf of Byron-Bethany Irrigation District (BBID) and dated June 25, 2015. In your petition, you asked the State Water Board to reconsider issuance of its June 12, 2015 curtailment notice to BBID. The notice serves to inform BBID that based on the Division of Water Rights staff's review of existing water supply and demand in the Sacramento-San Joaquin River watersheds and Delta watershed, natural flow is insufficient to meet the needs of some pre-1914 claims of right, specifically those with priority dates of 1903 and later.

Pursuant to Water Code section 1122, the State Water Board may order reconsideration of all or part of a decision or order on the filing of a petition by any interested person or entity not later than 30 days from the date on which the Board adopts the decision or order at issue. However, a curtailment notice is not an order or a decision of the Board or the Board's staff acting under delegated authority. A curtailment notice notifies water right holders that, due to water shortage conditions, the information available to the State Water Board's staff indicates that water is not available under the notified diverters' priority of right. The notice provides the affected water right holders with the staff's supply and demand assessment, informs them that the unavailability of water at the specified priority date would require them to cease diversion in order to satisfy demands to natural flow of more senior water right holders, and provides an opportunity to respond to this information.

To the extent that the June 12, 2015 curtailment notice could have been interpreted as a decision or order, the revised notice sent by the State Water Board on July 15, 2015, which clarified the June 12, 2015 notice, resolves and moots that issue. The revised notice specifies that the June 12, 2015 notice is not an order requiring curtailment of diversions and does not require submission of certification forms. Non-compliance with the notice shall not constitute a basis for the State Water Board's initiation of any enforcement action.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

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A diverter who continues to divert after receiving a notice of curtailment is not subject to penalties for violation of the curtailment notice, and the notice does not constitute a binding determination. However, the information underlying the notice may form the basis for allegations in a subsequent adjudicative proceeding before the State Water Board or in court. For example, the unauthorized diversion of water is a trespass. (Wat. Code, § 1052, subd. (a).) A person or entity committing a trespass may be subject to civil liability of up to \$1,000 per day and \$2,500 per acre-foot of water unlawfully diverted in a drought year. (*Id.*, subd. (c)(1).) The civil liability may be assessed by either the State Water Board or a court. (*Id.*, subd. (d).) The State Water Board may also issue an administrative cease and desist order and pursue court injunctions to require that diversions cease. (Wat. Code, §§ 1831, 1052, subd. (b).)

Before issuing a final enforcement order, the State Water Board must first provide notice to the party, including a draft cease and desist order or an administrative civil liability complaint. (Wat. Code, §§ 1055, 1831, subd. (c).) If such enforcement action is proposed, a water right holder is entitled to, upon written request within 20 days of receipt of the draft enforcement action, an evidentiary hearing before the order takes effect. (*Id.*, §§ 1055, subd. (b), 1834.) Final cease and desist and administrative civil liability orders are orders and decisions of the Board eligible for reconsideration under section 1122 of the Water Code.

If you have any questions about this letter, you may contact me at (916) 341-5183.

Sincerely,



Michael A.M. Lauffer
Chief Counsel