

LATE COMMENT



October 15, 2014

Ms. Felicia Marcus
Chair
State Water Resources Control Board
PO Box 100
Sacramento CA 95812-0100

Re: Comments on Water Rights Curtailments

Dear Chair Marcus and members of the Board:

The State Water Resources Control Board has solicited comments from stakeholders regarding its curtailment of post-1914 water rights under emergency regulations adopted on July 2, 2014. The California Waterfowl Association appreciates the opportunity to submit comments. The California Waterfowl Association is a statewide nonprofit organization whose principal objective is the conservation of the state's waterfowl, wetlands, and hunting heritage. CWA believes hunters have been the most important force in conserving waterfowl and wetlands.

California Waterfowl represents numerous landowners whose water rights were curtailed under the emergency regulations. In particular, California Waterfowl has addressed two letters to the State Water Board since the adoption of the emergency regulation, pointing out the effect of the curtailment on waterfowl, a public trust resource, and requesting the suspension of the curtailment with respect to certain water rights.

In response to questions posed by the State Water Board in its Notice of Solicitation, California Waterfowl submits the following comments:

- 1) What actions, if any, should the State Water Board take to improve the Board's information and analyses to support determinations on water availability relative to water right priority, including, but not limited to, improvements to supply, demand and watershed specific information and water right priority information?**

The State Water Board based its curtailment of water rights under emergency regulations on the following factual determination:

"Pursuant to the State's water right priority system, the State Water Board needs to curtail water diversions when sufficient flows in a watershed are not available for 1) a water user's needs, based on their priority of right, because available flows are instead needed to satisfy senior rights or to provide a correlative share to equally senior rights (i.e. riparian rights); or 2) when water in the stream is from water imports or previously stored water released for downstream delivery or use, including meeting public trust and water quality requirements, to which certain diverters do not have any right."

In at least one specific instance, the Board's blanket curtailment did not meet these conditions of unavailability and failed to meet public trust requirements. This instance involved the curtailment of water rights to drainage water in the Colusa Drain (also known as the Colusa Trough or Canal 2047). The affected water rights allowed the use of water drained off of rice fields before and after harvest, that have been used to flood up waterfowl habitat for birds migrating along the Pacific Flyway. The water is of poor quality, and is too warm to meet the necessary requirements of migrating fish. By diverting the water to flood wetlands, water quality is improved before the water is returned to the Sacramento River or to groundwater.

Furthermore, in determining the amount of water available for settlement contractors and for refuges under the CVPIA, the Department of Water Resources made a miscalculation that led to 45 percent allocations at first. When the miscalculation was corrected the allocations were increased to 75 percent, as required by the applicable settlement contracts and CVPIA. The Board needs to determine whether DWR's calculations are correct, before acting under emergency regulations.

Before curtailing water rights in a subsequent dry year, the Board needs to develop information as to precisely what water is actually available, and what senior rights or storage water rights are affected. Blanket curtailment can have adverse effects on water rights that the Board may not mean to cause. Traditionally, the Board responded to complaints based on water rights priorities and reasonable use, and provided adjudicatory services to determine the actual availability of water. This meant that the Board resolved conflicts over water rights on an evidentiary basis, rather than on the expediency provided by a blanket curtailment.

By ordering a blanket curtailment, the Board avoided having to "support determinations on water availability relative to water right priority, including, but not limited to, improvements to supply, demand and watershed specific information and water right priority information." If the Board had available the information to make such determinations, it could have avoided making a blanket curtailment and could have more effectively carried out its purposes and duties. Much of this information could be determined using a calendar and a map. For instance, water flows that are considered unavailable because they consist of water being held in storage, are not actually unavailable if they are upstream from the storage facility or reservoir. Also, water flows that have already been used by senior water rights holders, such the water in the Colusa Drain, can improve water use efficiency and meet public trust needs by being reused for flooding waterfowl habitat.

2) What actions should the Board take to better communicate information about limited water availability relative to water right priorities, including the need and basis for curtailments of water diversions?

California Waterfowl heard complaints from some rural areas that the Board's webpage was difficult to use and used language that was difficult to understand. Perhaps the Board could try to explain the need, basis, and consequences of curtailments in simple laypersons' terms. Public meetings and communications through the mail might also provide better communications to rural stakeholders.

3) What, if any, changes should be made to enhance the effectiveness of the State Water Board's curtailment process, including measures to protect the public interest, health and safety and public trust resources?

The Board can best protect the public interest, health and safety, and public trust resources by avoiding blanket curtailments under emergency regulations in all but the most absolutely extreme circumstances. Wetlands and habitat for migratory waterfowl are scarce public trust resources.

Local water users are usually acutely aware of their water right priorities and are usually able to resolve conflicts locally through negotiation. In fact, local water users can be very creative in their ability to negotiate comprehensive solutions locally that deliver the greatest benefit to all water users. Blanket curtailment by the Board confuses and frustrates these local efforts.

4) What, if any changes should be made to enhance the effectiveness of the State Water Board's complaint process?

California Waterfowl does not have a comment on this question.

5) Should the State Water Board pursue any additional authorities or policies to more effectively implement and enforce the water rights priority system?

The State Water Board would do best to adhere to its traditional role of resolving complaints and conflicts under the traditional system of water rights priorities and reasonable use. Too much top-down control of water use and allocations from Sacramento frustrates the efforts of local water users to achieve the most efficient use of the resource for the area.

6) How can the Board better assist water users in planning for upcoming dry periods?

The State Water Board has an extensive database and knowledge of the water rights held by water users. Much of the distribution of water in the state, however, operates to some extent outside of the water rights priority system. For instance, water exports from the State Water Project and Central Valley Project are not based on any water rights held by the ultimate users. Also, the Endangered Species Act and water quality considerations have a very considerable impact on the allocation and distribution of water in the state

The State Water Board could better assist water users in planning for upcoming dry periods by using the information it has available to compile maps and other means of showing the interactions between water rights, the state and federal water projects, and Endangered Species Act and water quality considerations.

7) What additional actions, if any, should the Board take to prepare for the next dry year or series of dry years?

It is likely the Board will take some time to understand and resolve all the ramifications of its action in ordering curtailment of post-1914 water rights under emergency regulations. Enforcement actions, appeals, and legislative action are sure to occur. The Board should review these ramifications as they are revealed with open minds. The Board should also review its duties, powers,

and responsibilities as set forth in state law, in order to determine whether its actions under emergency regulations are the most effective way to carry out those duties, powers, and responsibilities. Finally, the Board should use the information it has on hand as to California's water rights system, together with the information it obtains from its review of the past year's drought, to develop a narrative for the benefit of water users in planning for upcoming dry periods.

Thank you for your consideration of California Waterfowl's comments. If you have any questions about the comments, please contact Jeffrey Volberg at (916) 217-5117, or jvolberg@cawaterfowl.org.

Yours truly,

Jeffrey A Volberg
Director of Water Law & Policy
California Waterfowl Association