



State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100



October 15, 2014

Members of the Board:

On behalf of Trout Unlimited, the nation's oldest and largest non-profit organization dedicated to conserving, protecting, and restoring trout and salmon fisheries, I am writing to convey the following comments in response to your September 10 Notice of Solicitation Regarding Improvements to the Implementation and Enforcement of Water Rights During Drought Conditions. Trout Unlimited has 150,000 members across the country, including 10,000 in California. We have offices in Emeryville, Sacramento, Carmel Valley, Fort Bragg, Fresno, Truckee, Sonora, and San Juan Bautista.

I will begin with the simple observation that it is difficult to manage water when we don't know how much there is, how much is being used, who owns it, or where it is coming from. Even in normal times, California's water rights system is marked by knowledge gaps, resource limitations, and uncertain jurisdictional boundaries that make it difficult to administer the water rights system in a manner that protects private rights and public resources. Times of drought serve to highlight these inadequacies, and to raise the stakes for both water users and the environment. As the State Water Resources Control Board (Board) looks for ways to improve its allocation and enforcement of water rights in future drought years, its primary focus should be on finding ways to address the existing limitations in California water law and policy that prevent more effective management in times of shortage.

On a related note, we urge the Board to approach water right administration under drought conditions through the lens of preparedness rather than short-term crisis response. Drought occurs frequently in California, and the scientific consensus is that it will occur even more frequently in the future. The Board should look to establish enforcement mechanisms that can be sustained over a series of dry years (or more accurately, what we currently think of as "dry years" in light of historically wet conditions), rather than ones that work only as emergency responses to what are assumed to be short-term crisis conditions. We appreciate the Board's willingness to solicit feedback and consider public input on this topic. Again, the most important step toward creating a durable system of dry-year enforcement is to address the physical and legal uncertainties that stand as barriers to more comprehensive water management in California under all conditions.

More-detailed comments on specific issues are provided below.

1. The Board must obtain timely and accurate information about current water uses and flows necessary to protect public trust resources during times of shortage.

It is difficult to manage water in the absence of complete information on how much is being used, where, and by whom. Consistent with the points below, the Board should take steps now to ensure that it has the information necessary to effectively manage water during times of shortage and to adequately protect public trust resources.

a. Better information is needed on the location and amount of riparian pre-1914 rights.

California's patchwork scheme of riparian, pre-1914, and post-1914 water rights – together with the jurisdictional uncertainties that come with it – pose a major challenge to acquiring a clear understanding of current water use. It is still difficult or impossible to get an accurate picture of water use in many watersheds using the information that is publicly-available, even with more rigorous penalties pertaining to filing Statements of Diversion and Use. To further address this challenge, the Board should:

- Address the current backlog in processing Statements of Diversion and Use into e-WRIMS.
- Step up enforcement against diverters who fail to file Statements of Diversion and Use, prioritizing basins where non-compliance is most severe.

b. The Board should explore options for obtaining better real-time information to support enforcement activities.

As discussed further below, many opportunities exist for obtaining better general information on surface and groundwater diversions that affect streamflows. But while this information is essential, in the context of enforcement there is often no substitute for direct measurement of streamflows and diversions in real time. To obtain better real-time information, the Board should:

- Provide resources to ensure existing streamflow gauges are maintained.
- Explore options for encouraging the installation of additional streamflow gauges, either through funding or incentives.
- Explore ways to acquire/require more real-time information from diverters, especially during critically dry years.
- Explore ways to obtain additional real-time data through direct means such as remote sensing.

c. The Board should plan for managing instream flows during drought.

Like uses protected by individual water rights, public trust uses are under greatest threat during times of drought. Although the Board's legal authority to protect streamflows for fisheries and other public trust

uses is well established, its ability to do so via enforcement measures depends on having solid information about the quantity and timing of streamflow necessary to preserve these uses. Because obtaining such information can be time consuming, and because of the need to make water users aware of minimum streamflow requirements in advance, it is critical to do as much data gathering and analysis up front, before conditions become critical. The Board should:

- Work with the Department of Fish and Wildlife (DFW) to proactively determine defensible flow requirements for watercourses that are important for species survival, with particular focus on watercourses that have been identified as drought “refugia” for sensitive fish species.
- Work with DFW to develop protocols that can be used to develop defensible minimum streamflow thresholds in streams where PHABSIM and related methods may not be best suited (e.g., coastal streams).
- Encourage timely completion of Phase 4 of the Board’s Comprehensive Bay-Delta Effort.
- Use the monitoring results provided by diverters who were granted flow variances by the Board in response to drought conditions to thoroughly assess how fish responded to the altered flow conditions.

2. The Board should devote substantial resources to better delineating the extent of its subterranean stream jurisdiction.

Another major challenge for effective enforcement of surface water rights comes from the lack of knowledge of how and where groundwater withdrawals affect surface water streamflows, and which groundwater diversions are subject to the Board’s subterranean stream jurisdiction. These knowledge gaps complicate water rights enforcement in a number of ways. First and most obviously, in many basins there are groundwater diverters who are having a direct impact on streamflows, but over whom the Board has no direct control because the diversions have not been found to come from subterranean streams. Second, even where the Board has direct jurisdiction over surface water diverters, it is not known how many of these diverters have access to wells, whether any such wells are connected to surface water, and whether they draw from subterranean streams. Thus, in many cases where the Board issues a curtailment order to address streamflow shortages, the effect may be simply to switch many users to hydrologically-connected groundwater that still depletes surface flow.

The uncertainty over the extent of subterranean stream jurisdiction is likewise bad for well owners. Thousands of wells operate in an uncertain regulatory climate, with no knowledge of whether they may be subject to Board jurisdiction and the associated costs and restrictions that would come with an assertion of such jurisdiction. Such uncertainty also makes it difficult for landowners to take proactive steps to mitigate their impact on streams.

To address these issues, the Board should:

- Make an effort to delineate the extent of its subterranean stream jurisdiction on a watershed-wide basis in key watersheds. Even where such delineations may be based on less than perfect information, and may not be definitive for regulatory purposes – as in the Russian River watershed – they have proven very helpful for water management and planning decisions.
- Provide guidance to well owners to assist them in determining whether or not they are pumping from a subterranean stream. This will help them determine their regulatory status, for example, whether they are required to obtain water rights permits or file Statements of Diversion and Use that will further aid water management.

3. *The Board should, as necessary and appropriate, use its authority over pre-1914 and riparian rights in support of its enforcement activities.*

Recent appellate court decisions have gone a long way toward clearing up jurisdictional uncertainties by clarifying the extent of the Board’s jurisdiction with regard to pre-1914 and riparian rights. While the Board does not have direct jurisdiction over these rights, it does have the authority to make determinations regarding them that are essential to carrying out its statutory and constitutional duties to provide for management of the state’s water. This includes defining what activities constitute “reasonable use.”¹ The Board should make use of these authorities, as necessary and appropriate, in support of its enforcement efforts particularly during times of drought. For instance, it should:

- Provide guidance to riparian and pre-1914 diverters regarding the definition of reasonable use and what types of use qualify as a reasonable use (i.e., irrigation of crops) and what is not a reasonable use (i.e., irrigation of ornamental or decorative landscaping) during times of water shortage.
- Consider, where necessary to protect public trust resources, extending curtailment orders to pre-1914 and riparian rights as well as licensed/ permitted rights.

4. *The Board should continue to encourage water users to develop alternatives to the curtailment process and assist them in securing the resources to implement such alternatives.*

One of the most promising aspects of the curtailment rules adopted by the Board in July 2014 is section 878.3, which encourages water users to propose regional alternatives to the curtailment process based on measures such as water sharing agreements and other forms of collaborative water management. In our experience, the best information about water needs, infrastructure, and diversion practices often

¹ See *Light v. State Water Resources Control Bd.*, Cal.App.4th [No. A138440. First Dist., Div. One. June 16, 2014]. It also includes determining the validity and face value of pre-1914 rights. See *Millview County Water Dist. v. State Water Resources Control Bd.*, Cal.App.4th [No. A139481. First Dist., Div. One. Sept. 11, 2014].

resides at the local level, and collaborative solutions in which all users have buy-in are often more effective than mandatory orders imposed from above. But while collaborative management offers the potential for more effective and durable streamflow protection than can be obtained via direct enforcement, it is a solution that takes time to develop. Therefore, it is essential that such measures be encouraged before a crisis develops. The Board should:

- Take steps to encourage water users to develop alternative measures to enforcement pursuant to § 878.3, through outreach measures such as public workshops, before the next drought emergency.
- Consider, where appropriate, how Water Board funding can be linked with areas and communities likely to face curtailment down the road (e.g., small water systems in disadvantaged communities with a high likelihood of curtailment in another drought).
- Consider streamlining permitting processes to facilitate the timely implementation of proposed regional alternatives; for example, where processing small irrigation registrations on an expedited basis might help certain water users construct storage to reduce or eliminate dry season diversion.
- Work with DFW to continue the existing program to expedite the processing of small domestic use registrations (SDUs), and consider steps to make the program even more user-friendly and publicize it to potential registrants.
- Help users develop projects that reduce impacts to resources during the dry season (e.g., small agricultural ponds that shift the timing of diversion to winter and leave flow instream during the dry season; rotation of diversions to reduce the number of users diverting at the same time).

Examples of programs that have successfully implemented alternative measures to reduce streamflow impacts while meeting water needs include the Coho Partnership (<http://www.cohopartnership.org/>) and the Sanctuary Forest Residential Storage and Forbearance Program (<http://sanctuaryforest.org/water-stewardship/>). Information on examples of individual projects can be found at:

- Whitethorn School Forbearance Project:
http://www.redwoodtimes.com/ci_24362917/whitethorn-school-and-sanctuary-forest-complete-water-tank
- Salmon Creek Rainwater Harvesting Program:
http://www.salmoncreekwater.org/cs/Roofwater_Harvesting.pdf
- Cal Poly Rainwater Harvesting: <http://health.keyt.com/story/19473349/cal-poly-unveils-large-scale-rainwater-harvesting-project>
- Grape Creek Streamflow Improvement Projects:
<http://online.qmags.com/TU0613S#pg1&mode2>

Information on the expedited SDU registration program can be found at:

<http://cdfgnews.wordpress.com/2014/03/13/state-streamlines-domestic-water-tank-storage-process-in-response-to-drought/>

Thank you for the opportunity to provide input on this issue. We look forward to continuing to work with the Board and staff to better manage California's water for the benefit of public resources and the people who rely on them.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt Clifford", with a stylized flourish at the end.

Matt Clifford
Staff Attorney, Trout Unlimited