



O'Laughlin & Paris LLP

Public Comment
Dry Year Report
Deadline: 10/15/14 by 12:00 noon

Attorneys at Law

October 15, 2014

Felicia Marcus, Chair
State Water Resources Control Board
P.O. Box 2815
Sacramento, CA 95812-2815



Re: **San Joaquin Tributaries Authority Dry Year Report Comments**

Dear Chair Marcus and Board Members,

Droughts are difficult for water users, water managers and the communities, economies and environments they serve. The State Water Resources Control Board (State Water Board) should be commended for its effort in managing the many requests to change water rights, protecting senior water right holders, and processing information regarding water supply and demand. The San Joaquin Tributaries Authority (SJTA) appreciates the hard work and dedication of the State Water Board and State Water Board staff. However, if next year continues to be dry, there are specific areas in which State Water Board action and leadership could be improved. In response to the State Water Board's solicitation for recommendations to improve drought planning, the SJTA respectfully provides the recommendations below. The SJTA provides several general recommendations upfront; these themes also underlie the specific recommendations provided in response to the questions posed by the State Water Board.

Develop Policy Guidance Through Planning Processes

The SJTA recommends the State Water Board develop policies and regulations to guide drought action through non-emergency processes. During the 2014 drought, the State Water Board relied on emergency drought regulations, instead of using thorough planning processes. Several tools used by the State Water Board, including public trust and unreasonable use, are not appropriate in an emergency context, but rather require significant collection and balancing of factual and scientific information. The State Water Board should begin the planning process for drought earlier, using non-emergency planning whenever possible.

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In addition, during the 2014 drought process the State Water Board created reactionary policy and changed policy direction in the middle of an ongoing process. For example, the State Water Board directed staff to prioritize the enforcement of diverters that appeared to be violating curtailment after realizing there were ongoing investigations of diverters who had complied with State Water Board direction. It would be helpful for the State Water Board to develop policy that guides curtailment, enforcement, and investigation before curtailment processes are underway. This guidance would help to ensure stakeholders and State Water Board staff better understand the process and the policy underlying State Water Board action.

The State Water Board must also take the lessons of drought into future planning processes. During the 2014 drought, the State Water Board invested significant time and resources in processing Temporary Urgency Change Petitions. As the State Water Board reviews the water quality objectives in the future, it must develop and adopt more realistic water quality objectives that are actually implementable in sequential dry years given the resources available. All water users, including urban uses, agriculture uses, fish and wildlife, riparian and riverine ecosystems, and refuges will benefit from objectives that provide certainty and do not need to be changed in dry years.

Jurisdiction

The SJTA recommends the State Water Board focus any potential future curtailment on post-1914 water right holders and provide pre-1914 and riparian water right holders with reliable availability information. The State Water Board does not have the jurisdiction to curtail the diversion of water pursuant to pre-1914 and riparian water rights outside an enforcement action. Thus, the focus of curtailment should be on providing post-1914 water right holders with curtailment notices and providing riparian and pre-1914 water right holders with information regarding water availability to minimize enforcement actions.

Improve Transparency, Communication and Trust

The SJTA recommends the State Water Board improve transparency. During the 2014 drought, there were several areas in which it was difficult for stakeholders to obtain information. For example, it was difficult to obtain information regarding drought complaints, purpose of site visits and/or investigations, definition of watershed boundaries, and action on the Temporary Urgency Change Petitions. The State Water Board should work on making information readily available by immediately posting actions or pending complaints on a webpage. In addition, the State Water Board should convene a large stakeholder group that includes senior water right holders to address drought issues and provide drought updates. The stakeholder group could both advise the State Water Board as well as act as a conduit for two-way communications between the water community and the Board. Improved communications will improve the necessary trust to effectively and efficiently manage the system during drought.

Improve Uncertainty

During the 2014 drought process, the State Water Board was limited in taking several drought and curtailment actions due to the lack of certainty of demand in the Delta region. This lack of certainty

will continue to limit the State Water Board's ability to properly allocate water resources. For example, it will be difficult for the State Water Board to justify any water quality objective amendment without understanding how regulated water will protect beneficial uses. In order to allow the State Water Board to properly respond to drought periods and conduct future water quality control planning, the SJTA recommends the State Water Board address the lack of certainty regarding valid demand of water in the Delta region.

Answers to Questions:

- 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?*

Near-Term Recommendations:

- (a) Define Watersheds:** The State Water Board must define watersheds and disclose the defined watershed to stakeholders. During the 2014 curtailment process, the definition and boundary lines of watersheds were not well-defined. Many of the availability analyses were based on supplies from partial watersheds. For example, State Water Board staff created separate availability analyses for the San Joaquin River watershed and the Delta watershed, but reserved the possibility that downstream Delta demand may curtail the right to divert water upstream in the San Joaquin River watershed. In addition, it was unclear whether diverters in the Sacramento River watershed could also be curtailed based on downstream water rights in the Delta. Therefore, it was not clear to the water right holders in the San Joaquin and Sacramento watersheds whether their rights would be curtailed based on all, part, or none of the claimed water right demand in the Delta. Clearly and consistently defining watersheds and developing availability analyses based on the defined watersheds would greatly improve the understanding of the curtailment process, the potential curtailment exposure and the implications to water rights holders within each watershed.
- (b) Regional Specialization of Staff:** The State Water Board should assign staff to specific regional watersheds. During the 2014 curtailment process, the enforcement section of the division of water rights under John O'Hagan covered all the watersheds statewide and developed water availability analyses for these watersheds. Availability analyses are complicated by local facts on the ground, including, but not limited to, reservoir operations, location of riparian and pre-1914 demand, irrigation district demand and operations, upstream senior demands, system accretions and depletions, contracts, legislation, and local restrictions. It would be helpful if the staff developing and updating the water availability analyses were able to fully understand specific regional water systems and how these systems operate. Additionally, assigning specific staff to specific (regional) watershed systems will improve the

ability to carry out timely and effective communications thereby enhancing transparency and creating improved trust between SWRCB staff and water managers.

- (c) **Focus Curtailment on Trouble Spots:** The State Water Board should focus drought activity on regions in senior water right holders are claiming injury. During the 2014 curtailment process, the State Water Board spent significant time and staff resources on regions in which water users had already agreed curtailment action would not be requested or beneficial. It does not seem prudent to focus scarce drought resources on a region that neither wants nor needs intervention. The State Water Board should prioritize its investment of time and resources in regions that actually require curtailment resolution.
- (d) **Jurisdiction:** The State Water Board has limited jurisdiction over riparian and pre-1914 water right holders. The State Water Board may make findings regarding the amount of water available for riparian and pre-1914 water right holders. In addition, the State Water Board may take enforcement action if it believes a riparian or pre-1914 water right holder is diverting water without a valid basis of right. However, the State Water Board may not curtail or otherwise regulate the diversion of water by riparian and pre-1914 water right holders. During the 2014 curtailment process, the State Water Board proposed an emergency curtailment regulation that included the curtailment and regulation of pre-1914 and riparian rights. After significant stakeholder resistance, the State Water Board decided to limit the regulation to post-1914 appropriative right holders. The SJTA recommends the State Water Board not invest similar time and resources into the curtailment of pre-1914 and riparian rights in future years. Instead, the State Water Board should focus on making findings of availability, updating these findings, communicating the findings to stakeholders and taking enforcement action against unlawful diversions.
- (e) **Account for All Consumptive Depletions:** State Water Board staff must consider all system depletions when developing availability analyses. In dry years, consumptive depletions, such as demand from natural vegetation and groundwater extractions, increase significantly. The State Water Board must consider these increased depletions in any dry year supply and demand analyses.
- (f) **Separate Availability Analyses for Appropriative and Riparian Demand:** The State Water Board should develop separate availability analyses for each watershed's riparian and appropriative water right holders. Riparian water right holders are only entitled to divert the natural flow of water and may not divert previously appropriated water, previously stored water, or return flows from water that was previously appropriated or stored. For this reason, the water available to satisfy riparian demand will be different than that available to satisfy appropriative demands. During the 2014 curtailment process, the State Water Board staff accounted for the difference in riparian and appropriative supplies generally by conceding riparian water right holders were limited to natural flow. However, no separate availability

analyses were developed and the State Water Board failed to send out notices to putting riparian water right holders on notice that natural flow was not sufficient to meet the total riparian demand.

- (g) **Separate Availability Analyses for Each Tributary:** The State Water Board must develop availability and demand analysis for each tributary based on hydrologic connectivity. For example, a pre-1914 water right holder on the Tuolumne River may be subject to senior riparian demands downstream on the Tuolumne, the San Joaquin River and even further into the Delta (depending on hydrologic connectivity and the validity and seniority of the water right). However, this same water right holder would not be subject to riparian demand on the Stanislaus River. Basin-wide availability analyses have limited utility due to the lack of connectivity of upstream watersheds. For this reasons, the State Water Board should provide availability analyses specific to each tributary.
- (h) **Verify Projected Inflow with Gauge Data:** The State Water Board's estimate of water availability is based on the amount of unimpaired inflow projected by the Department of Water Resources (DWR). Although this estimate generally accounts for water coming into the system, it does not account for accretions, return flows, or other upstream operational impacts. To the extent that the State Water Board plans to curtail the diversion of water based on availability analyses, these analyses must be verified by gauge data, to ensure that curtailment action is not taken unnecessarily.
- (i) **Define Reliance on Statements of Diversion and Use:** The State Water Board should be clear regarding its reliance on Statements of Diversion and Use in future curtailment processes. Statements of Diversion and Use represent claims to divert water right and do not amount to valid water rights. The State Water Board cannot curtail a valid legal water rights holder based on a claim to divert water. To the extent the State Water Board plans to use or otherwise rely on Statements of Diversion and Use, it must define how it plans to use the information. Specifically, the State Water Board should disclose to legal water users whether it plans to treat the claim to divert water the same as a valid right to divert water in the post-1914 curtailment process. The development and disclosure of this policy is critical to establish an atmosphere of collaborative trust between the Board and water users.
- (j) **Determine Protection of Water Released to Meet Water Quality Objectives:** The State Water Board should make or seek a legal determination on the issue of the extent to which stored water released to meet water quality objectives is protected. It is unclear whether the State Water Board believes water released by the Projects to meet water quality objectives may be diverted, or is protected from diversion in order to meet the water quality objective at a specific location. This question underlies the on-going conflict between the exporters and the Delta water users. The export community believes water released for water quality objectives should be protected from diversions, so that the Project operators do not have to release

additional water from storage to meet water quality objectives. On the other hand, downstream diverters believe water released from storage is available for diversion. Uncertainty on this key point compromise the transparency of State Water Board action pursuant to achieving water quality objectives.

- (k) **Plan Project Operations in Advance:** The State Water Board should require DWR and Reclamation provide operations plans that consider a range of exceedance forecasts, with particular focus on exceedances in the upper 90 percentage range. To the extent that DWR and Reclamation are seeking relief from D-1641 requirements, the State Water Board should require the Projects provide specific information to enable the State Water Board to properly weigh and balance the relief sought with impacts to other beneficial uses. For example, the operations plans should include projected planning for contract deliveries, carryover storage, inflows, exports, X-2 releases, water transfers, and water accounting that reflects where Project water is delivered. In addition, the State Water Board should coordinate with the fishery agencies to determine whether the proposed operations plans and any relief from water quality objectives comply with the Endangered Species Act and other fishery requirements.

Long-Term Recommendation:

- (a) **Improve Certainty of Delta Demand:** There is significant uncertainty regarding the quantity, season, and extent to which in-Delta landowners hold valid rights to divert water. This uncertainty fundamentally limits the State Water Board's ability to allocate water rights and adopt water quality control objectives. In addition, this uncertainty reduces the reliability of water delivery for other valid water right holders. The State Water Board should begin a stakeholder-led process to resolve these claims and define water rights held in the Delta.

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?*

Near-Term Recommendations:

- (a) **Notice:** The State Water Board should provide notice to all water right holders that curtailment is likely early in the season, starting with the initial DWR forecast.
- (b) **Continuous Updates:** The State Water Board should provide continuous updates on its website and through the mail, providing water users continuous information regarding riparian and appropriative supply data. During the 2014 curtailment process, the State Water Board issued a notice in January 2014 and then provided very few updates until late July, when it took curtailment action. The SJTA recommends the State Water Board provide more frequent

updates regarding the availability of water specific to each riparian and appropriative water right holder. Posting updated availability information on the Board's web page could also improve the transparency of the process and keep water users and community leaders informed regarding current and projected future conditions.

- (c) **Provide Purpose and Agenda for Site Visits Prior to Visit:** The State Water Board should more clearly communicate the purpose and expectations for site visits. During the 2014, several SJTA members hosted site visits with State Water Board staff. Prior to and during the visit, the purpose of the visit and information sought by the State Water Board was not clear. The SJTA requested information from the State Water Board regarding the purpose of site visits, but did not receive a response. Prior to making site visits, State Water Board staff should provide the visiting entity with purpose of the visit, the information the State Water Board is hoping to receive, and a draft agenda of the visit; this information would be helpful to both water operators and would greatly improve the efficiency and efficacy of site visits.
- (d) **Convene Broad Stakeholder Group:** The State Water Board should convene stakeholder groups by region to improve communication and input. Each group should include participants that represent most of the water users in the region; the State Water Board should avoid assembling groups that do not include senior water right holders. These stakeholder groups should be configured to both receive and provide communication with the State Water Board.
- (e) **Distinguish Trespass and Curtailment:** The State Water Board should not mistake taking enforcement action to prevent the illegal diversion of water with curtailment. The unlawful or illegal diversion of water is prohibited by section 1052 of the Water Code. The process of curtailing a legal right to divert water is different than enforcing the illegal diversion of water. During the 2014 curtailment process, the State Water Board addressed allegations that Delta diverters were unlawfully diverting stored water. The allegation of unlawful diversions was made in an attempt to protect the release of stored water in times of water shortage. Because of the drought context, the State Water Board treated the allegations of illegal diversions as a curtailment issue and attempted to use its powers to curtail legal water users to address an allegation of unlawful water use. This is incorrect and a misuse of the curtailment process; curtailment is a process that can only be applied to lawful water users. If there is an allegation of illegal water use, even if the allegation is limited to an allegation that a use is only unlawful during periods of shortage, the issue is one of trespass and the State Water Board cannot curtail water users as a means to address trespass.

Long-Term Recommendations:

- (a) **Develop Water Quality Objectives that Account for Sequential Dry Years:** The State Water Board must develop water quality objectives that account for sequential dry years. The existing water quality objectives in the Water Quality Control Plan for the Sacramento San Joaquin Bay

Delta Estuary are not achievable in sequential dry years. As demonstrated by the recent Temporary Urgency Change Petition process, seeking relief from objectives in an emergency context is far from an ideal venue. Providing emergency relief is controversial, time and resource consuming; it fails to provide certainty for water users and may not protect beneficial uses of water. For these reasons, in all phases of its review of the Bay Delta Plan, the State Water Board must adopt water quality objectives that protect beneficial uses during drought and provide sequential dry year relief.

- (b) **Improve Certainty of Delta Demand:** There is significant uncertainty regarding the quantity, season, and extent to which in-Delta landowners hold valid rights to divert water. This uncertainty fundamentally limits the State Water Board's ability to properly allocate water rights and adopt water quality control objectives. In addition, this uncertainty reduces the reliability of water delivery for other valid water right holders. The State Water Board should begin a stakeholder-led process to resolve these claims and define water rights held in the Delta.

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?

Near-Term Recommendation:

- (a) **Understand the Duties and Responsibilities of the State Water Board in Times of Drought:** The State Water Board must understand its requirements during times of drought. It is not the duty of the State Water Board to protect public health and safety. Rather, the duty of the State Water Board is to properly allocate the system of water rights and priorities. To the extent this allocation creates emergency circumstances and public health challenges, the State Water Board should work closely with the other State agencies responsible to address and remedy public health and safety issues. However, the State Water Board must respect the authority and jurisdiction of its fellow state agencies and refrain from infringing on matters that are within the purview of its fellow agencies.
- (b) **Protect Public Trust Resources Through Water Quality Control Planning:** The balancing of public trust resources is a process that is time and resource intense, i.e. not particularly well suited for use in drought and emergency conditions. Instead, protection of public trust resources must be performed through water quality control planning – the process developed specifically to protect beneficial uses, including public trust uses. The State Water Board must protect public trust uses by adopting water quality objectives that will remain in place during drought and sequential dry years. This will provide public trust resources with certainty and planned protection in times of drought. In addition, the transparency and balancing required by

the process of reviewing and revising water quality objectives will also improve trust between the regulators and the regulated community.

Long-Term Recommendation:

- (a) **Develop Drought Planning Guides with Other State Agencies:** The State Water Board should work with the Office of Emergency Services to develop a planning document that will guide how the agencies work together to ensure sufficient water supplies are provided to communities with public health and safety emergencies due to lack of water supply. This plan should be treated as a manual that defines the position and policies of each agency and tested periodically through inter-agency simulations to assure it functions as intended.
 - (b) **Develop Water Quality Objectives that Account for Sequential Dry Years:** The State Water Board must develop water quality objectives that account for sequential dry years. The existing water quality objectives in the Water Quality Control Plan for the Sacramento San Joaquin Bay Delta Estuary are not achievable in sequential dry years. As demonstrated by the Temporary Urgency Change Petition process in 2014, seeking relief from objectives in an emergency context is far from an ideal venue. Providing emergency relief is controversial, time and resource consuming, and it fails to the planning certainty for water users and potentially fails to provide necessary protection for beneficial uses of water. For these reasons, the State Water Board must adopt water quality objectives that provide sequential dry year relief.
4. *What, if any changes should be made to enhance the effectiveness of the State Water Board's complaint process?*

Near-Term Recommendations:

- (a) **Separate and Prioritize Drought Complaints:** The State Water Board should separate drought-related complaints from complaints that are not related to the drought. Given the potential immediacy of drought-related complaints, it may be appropriate for the State Water Board to prioritize processing drought complaints, unless non-drought complaints are found to require emergency action.
- (b) **Disclose Drought Complaints:** The State Water Board should post drought-related complaints on a specific web page that is accessible to the public. During the 2014 drought process, the State Water Board made confusing and often conflicting statements regarding drought complaints it received. In order to understand whether the State Water Board received complaints from senior water right holders on the San Joaquin River, the SJTA and other San Joaquin River water users filed Public Records Act requests. The State Water Board responses to these Public Records Act requests were not consistent, further complicating and confusing the issue of whether senior water right holders on the San Joaquin River were being injured

and/or requesting the State Water Board take curtailment action. This exercise was not conducive to creating a transparent or trustful process.

- (c) **Define the Role of the Attorney General:** The State Water Board should develop a policy regarding the reference of matters and complaints to the Attorney General. The 1977 Dry Year Report developed such a policy and it facilitated and focused the duties of State Water Board staff. The Dry Year Report reflects that State Water Board staff would conduct site visits, investigate complaints, make findings, and suggest solutions. If these actions did not resolve the dispute, the State Water Board referred the action to the Attorney General. (Dry Year Report, at V.) The State Water Board may wish to develop a similar policy to allow the State Water Board to more efficiently resolve complaints.

Long-Term Recommendations:

- (a) **Specialize Water Enforcement Staff:** Enforcement staff should be assigned by region, so that full-time enforcement staff persons are familiar with the water rights holders and operations within their specified region.

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 should not pursue any additional authorities to implement the water right priority system. The system of water right priority should not and cannot be subject to changing authorities and policies. This system provides the rules that define individual rights to divert water, which constitute a property right. Water users have relied and continue to rely on this system as the foundation for investments in infrastructure, including storage, conveyance, and treatment facilities, as well as long-term investments in agriculture, urban development, and refuges. For this reason, it would be ill-advised to apply new authorities or policies to the existing and relied upon water right priority system.

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

The State Water Board must develop water quality objectives that account for sequential dry years. The existing water quality objectives in the Water Quality Control Plan for the Sacramento San Joaquin Bay Delta Estuary are not achievable in sequential dry years. As demonstrated by the Temporary Urgency Change Petition process in 2014, seeking relief from objectives in an emergency context is far from an ideal venue. Providing emergency relief is controversial, time and resource consuming, and it fails to provide the planning certainty for water users and potentially fails to provide necessary protection for beneficial uses of water. For these reasons, the State Water Board must adopt water quality objectives that provide sequential dry year relief.

In addition, implementing water quality objectives that provide for realistic dry year relief will allow water users and operators to plan for drought. To the extent water quality objectives account

for necessary dry year relief, the uncertainty that comes with petitioning for emergency relief will be resolved and water supply reliability will be improved.

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

See above responses.

Very truly yours,
O'LAUGHLIN & PARIS LLP

A handwritten signature in blue ink, appearing to read "Valerie C. Kincaid", written over a horizontal line.

VALERIE C. KINCAID

VCK