



PACIFIC LEGAL FOUNDATION

May 20, 2014

Chair, Members, and Water Rights Division Staff
California State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: May 20, 2014 Hearing, Agenda Item 12 (as amended)
Proposed Emergency Water Right Curtailments on Deer, Mill, and Antelope Creeks

Dear Chair, Members, and staff of the Board:

Pacific Legal Foundation (PLF) is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues in state and federal courts, representing thousands of supporters nationwide, including landowners throughout California, who believe in limited government, property rights, and free enterprise. For 40 years PLF has been litigating in support of individuals' rights to make reasonable use of their private property, free from unwarranted government interference. *Sackett v. E.P.A.*, 566 U.S. ___, 132 S. Ct. 1367 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

These comments are in response to the Board's proposed emergency regulations curtailing water rights on Deer, Mill, and Antelope Creeks. The Board has not provided sufficient time for water right holders and other interested parties to comments on the proposed emergency regulations, and PLF reserves the right to submit additional comments.

At least some of the water rights that are subject to the emergency regulations are adjudicated, and among the issues resolved in the adjudication of those rights is that the decreed water rights are reasonable uses of water and do not constitute waste or unreasonable use of water. Many others are valid pre-1914 or riparian water rights that are vested under California law and are reasonable uses and not wasteful as a matter of law. Finally, there are likely a large number of licensed or permitted rights which the Water Board has already determined consist of reasonable and nonwasteful uses.

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As to those rights which are adjudicated and the subject of permanent injunctions, the only venue for curtailment of those rights is the decree court. The regulations would violate these permanent injunctions as to those adjudicated water rights insofar as their provisions purport to reverse the adjudication of the reasonable use of the water rights, and insofar as their provisions authorize Water Board staff to curtail diversions without recourse to the decree court(s). Since the regulations infringe on both the continuing jurisdiction and the substantive decrees of the adjudication court(s), the regulations are subject to temporary and permanent injunction by such court(s).

The regulations do not appear to provide any right to a hearing before the Deputy Director prior to any decision made thereunder, nor any right of appeal to the Water Board from decisions of the Deputy Director, and no provision for stay of any decision of the Deputy Director pending any such appeal. The regulations do not appear to establish any evidentiary standard for the decisions to be made by the Deputy Director.

Section 877 purports to find that the exercise of existing vested water rights is a waste and unreasonable use of water to the extent they would infringe on minimum instream flows established in section 877(c). Under section 877(a), these purported minimum flows are established to protect fisheries. This finding violates the meaning of the terms “waste” and “unreasonable use” as those terms have been used in California and western water law. This finding also violates Water Code section 106 to the extent that it elevates the use of water for fisheries above existing water rights for domestic and irrigation uses.

Section 877(b) provides the Deputy Director for the Division of Water Rights with broad summary authority to curtail diversions under specific water rights without affording the owners of those water rights with due process under the state or Federal Constitutions. The notice of proposed emergency regulation recites the various statutory due process protections which the Water Code affords water rights holders, and the regulation simply dispenses with these protections in order to pursue the expedient of rapid action.

Section 877(c) establishes purported minimum instream flows for various fish species, and thereby purports to modify existing water rights, including pre-1914, riparian and licensed water rights, some of which are adjudicated by the courts, without due process of law, in that existing water rights, of whatever legal basis, are real property interests whose owners may not be deprived of them without due process. Due process requires that the Water Board provide these owners with reasonable notice of these proceedings against their water rights, and a fair opportunity to be heard on the matter. Due process also requires that the Water Board make its underlying evidence related to the purported flows and curtailment provisions available to the water right holders, and to take testimony and other evidence on the record from the water rights holders. Part of the reception of testimony and other evidence must include subjecting the Water Board’s witnesses and evidence to cross examination by the water right holders. *See generally* Bernard Schwartz, *Administrative Law* § 5.1, p. 203 (2d

ed. 1984). All of these protections would also apply to decisions made by the Deputy Director under the regulations.

Due process is not a luxury privilege that government affords citizens when it doesn't interfere with the government's objectives. It exists precisely to protect the people from deprivations of their liberty and property when the government acts, whether in response to emergency or not. The framers of these constitutional protections, particularly of the Fourteenth Amendment, were not strangers to the concept of emergency, and there is no general footnote to the Bill of Rights reading: "except in case of drought emergency."

Section 878.1 establishes a broad authority for the Deputy Director to ignore the seniority system based upon a wide range of factors and input from several government agencies and other entities. These provisions make the Deputy Director the *de facto* watermaster for all diversions of any nature in the three watersheds, again in derogation of existing adjudications and in derogation of the substantive and procedural rights of the water rights permits issued by the Water Board. The regulations fail to provide adequate due process safeguards to senior water rights holders who would be "subordinated" through the decision making process set forth in section 877.1(d).

Section 878.1 also violates Water Code section 106 to the extent that it re-prioritizes various municipal, power, and many other uses (depending on how broadly the Deputy Director reads the vague list of eligible exceptions in section 877.1(d)) above existing rights for irrigation uses.

The regulations subordinate senior irrigation and other rights to junior municipal and other rights, for the purported purpose of ensuring that a wide range of municipal and other uses are not impaired by the regulations. Maintaining these junior uses does not require violation of the priority system. The counties in which both uses occur have the power of eminent domain (including "quick take" provisions) as necessary to ensure that critical junior municipal needs can be met by acquiring temporary use of senior rights. This power can only be exercised where the taken water rights are paid for. Section 878.1 excuses these public agencies from the need to employ eminent domain, and deprives the water rights holders of the due process protections and compensation to which they are entitled when their water rights are taken for a public purpose.

The reporting provisions of section 879 violate the existing reporting provisions of the Water Code, and may subject water right holders to enforcement actions for failure to comply with reporting regulations of which they are not fairly apprised.

Section 879.1 purports to amend existing permits, licenses, and registrations without due process of law or compliance with the existing Water Code and implementing regulations. Section 879.2 purports to subject holders of vested water rights to enforcement penalties without due process of law or compliance with the existing Water Code and implementing regulations.

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Conclusion

The adoption of the proposed emergency regulations will violate the Water Code and the due process rights of water right owners. Thank you for taking the time to consider our views. If you have any questions regarding this analysis, please feel free to contact Tony François at Pacific Legal Foundation, by telephone at (916) 419-7111, or by email at tfrancois@pacificlegal.org.

Sincerely,

A handwritten signature in black ink that reads "A. L. François". The signature is written in a cursive style with a large initial "A" and a stylized "L".

ANTHONY L. FRANÇOIS
Attorney