



Linda S. Adams
*Secretary for
Environmental Protection*

Tam M. Doduc, Board Chair
1001 I Street • Sacramento, California 95814 • (916) 341-5615
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100
Fax (916) 341-5621 • <http://www.waterboards.ca.gov>



Arnold Schwarzenegger
Governor

July 31, 2008

Mr. Phil Isenberg, Chair
Delta Vision Blue Ribbon Task Force
650 Capitol Mall, 5th Floor
Sacramento, CA 95814

Dear Mr. Isenberg

STATE WATER RESOURCES CONTROL BOARD COMMENTS ON INTERIM RELIEF

Thank you for the recent opportunity for the State Water Resources Control Board (State Water Board or Board) to contribute information to the development of the Delta Vision strategic plan. At its July 17, 2008, meeting, the Delta Vision Task Force asked the State Water Board to provide additional information as to why interim relief authority would be helpful to the Board in water right matters and why the Board believes that its existing water right authority is insufficient to impose interim relief. For purposes of this discussion, interim relief refers to expedited procedures, similar to those followed by a court in issuing a preliminary injunction, for issuance of an order providing protection on an interim basis pending completion of administrative proceedings applying and enforcing water right law. This letter provides our response.

Interim Relief

The State Water Board is responsible for establishing and maintaining a stable system of water rights in California to best develop, conserve and utilize in the public interest the water resources of the State, while protecting vested rights, water quality and the public trust. Effective water right administration depends, in part, on adequate and timely enforcement.

The State Water Board and the courts have concurrent jurisdiction over actions to enforce water right law, including proceedings brought in response to violations of water right permits and licenses, violations of the public trust doctrine, or waste or unreasonable use of water. But only the courts can take immediate relief action, typically in the form of a temporary restraining order or a preliminary injunction, without opportunity for a full evidentiary hearing.¹ In addition, unlike the Board, the courts are not required to comply with the California Environmental Quality Act (CEQA) before taking action.²

¹ It merits noting that a grant of interim relief is not automatic. Among other things, a court must consider whether it appears the person seeking relief is entitled to the relief requested and whether great or irreparable injury would occur if a party's actions are not restrained. (See, e.g., Code Civ. Proc., § 526 [governing injunctions].)

² Most water right proceedings, however, are conducted administratively, not in court. If a party seeks immediate relief in connection with a matter already pending before the State Water Board, it may be necessary to initiate a

In some cases it is necessary to take prompt action to prevent irreparable harm to water right holders or instream uses. Without the capacity to impose interim relief, activities that damage the environment can continue during the length of an adjudicative proceeding, without any requirement that the violator take steps to avoid or reduce the damage. The ability to provide for interim relief pending the completion of an evidentiary hearing would allow urgent decisions to be made in a timely manner, eliminate the need for duplicative proceedings in court, and better protect the state's water resources.

Existing Law

Under the public trust doctrine and the reasonableness requirement of article X, section 2 of the California Constitution, the State Water Board has the authority to require changes in diversions that are unreasonably affecting fish or other public trust uses or are wasting water. The Board also may take enforcement action against unauthorized diversions or violations of water right permits and licenses. The Board, however, often is unable to take swift action for several reasons. First, the Board can only impose requirements after providing an opportunity for an evidentiary hearing. Second, the Board must comply with CEQA or rely on an exemption from CEQA before taking action.

The Water Code does not include any specific authority or administrative procedures to provide for interim relief during the pendency of an enforcement action. To the contrary, the Water Code establishes procedural requirements with particular timeframes that must be met before the State Water Board can take a final action. Pursuant to the Water Code, the Board has the authority to issue a cease and desist order (CDO) for the violation, or threatened violation, of (i) the prohibition against the unauthorized diversion or use of water; (ii) a term of condition of a permit, license, certification, or registration, or (iii) certain decision or orders of the Board. (Wat. Code, § 1831, subd. (d).) By statute, the Board must provide notice and an opportunity for a hearing *before* issuing a CDO.³ (Wat. Code, § 1831, subd. (c).) The party served has 20 days to request a hearing after receiving a notice of the proposed enforcement action. (*Id.*, § 1834, subd. (a).) Thus, at a minimum, the Board may have to wait 20 days to take final action even if the party served ultimately does not request a hearing.

duplicative proceeding in court. Where a party cannot afford to bring a separate action in court, it may suffer irreparable harm during the period required for the Board to reach a final decision.

³ The Porter-Cologne Water Quality Control Act provides authority for the State Water Board and the nine regional water quality control boards to issue cleanup and abatement orders in response to water quality violations *before* any necessary hearing. (Wat. Code, § 13304; *Machado v. State Water Resources Control Bd.* (2001) 90 Cal.App.4th 720.) The Water Code does not provide any comparable authority for the State Water Board to require remedial action in response to a water right violation before a hearing.

In fact, the limitations on the State Water Board's ability to require interim relief have long been noted. For example, in 1989, Assemblyman Costa introduced legislation, AB 1846, to require that all cases involving the public trust or waste and unreasonable use be decided by the Board. Opponents of the bill cited the absence of specific procedures for interim relief as one of the reasons why the availability of Board review was inadequate. In 1992, the Board sponsored SB 1900 (McCorquodale) providing the Board with the authority to grant interim relief on water rights proceedings. Unfortunately, the bill was not enacted.

In addition, the State Water Board must comply with CEQA or rely on an exemption from CEQA before taking final action. Parties routinely allege that environmental documentation such as an environmental impact report (EIR) is required, even though the action being considered by the Board would help protect the environment and allegations of environmental impacts are remote or speculative. For example, although in some cases the Board has proceeded in reliance on the CEQA categorical exemption for enforcement, the applicability of the enforcement exemption is often subject to dispute by the parties. Other CEQA exemptions, such as the exemptions for the protection of the environment and protection of natural resources, are also likely to be disputed. Preparation of an EIR, when necessary, is a lengthy process that can take years. Thus, absent an exemption, compliance with CEQA limits the Board's ability to act quickly in response to an urgent matter.

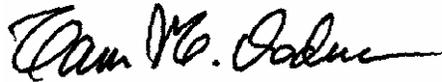
Moreover, regardless of any statutory or constitutional requirements, adjudicative proceedings are often protracted. Due to the complexity of water right issues and the adversarial nature of enforcement proceedings, an adjudicative proceeding can be quite lengthy and it can take months or years before a final decision is issued. Parties alleged to be misusing water often invoke procedural requirements in an effort to delay or obstruct action by the State Water Board. While the Board can take steps to avoid unnecessary delays during the adjudicative proceeding, it must take care to afford the parties adequate due process throughout the proceeding.

Of course, any legislation providing interim relief authority should include procedures to assure due process. The expedited procedures would be similar to those followed by the courts, and any interim relief should be just that—interim—pending the completion of water right proceedings. Similarly, interim relief legislation should include procedures to avoid adverse environmental impacts, on an interim basis pending completion of those water right proceedings and any EIR required as part of those proceedings.

Interim relief authority would not avoid the need for the State Water Board to conduct complex water right proceedings to address Delta issues. But the ability to provide prompt, interim relief would help to prevent damage to public trust resources or loss of water resources in the Delta watershed during the often lengthy periods necessary to complete those proceedings.

I hope this information assists the Delta Vision Task Force. If you have any questions, please contact Erin K.L. Mahaney, Senior Staff Counsel, at (916) 341-5187 or emahaney@waterboards.ca.gov.

Sincerely,



Tam M. Doduc
Board Chair

cc: Mr. John Kirlin
Executive Director
Delta Vision Blue Ribbon Task Force
650 Capitol Mall, 5th Floor
Sacramento, CA 95814

Ms. Dorothy Rice
Executive Director
State Water Resources Control Board
1001 I Street, 25th Floor
Sacramento, CA 95812

Mr. Thomas Howard
Chief Deputy Director
State Water Resources Control Board
1001 I Street, 25th Floor
Sacramento, CA 95812

Gary Wolff, P.E., Ph.D.
Vice Chair
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95812

Mr. Arthur G. Baggett, Jr.
Board Member
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95812

Mr. Charles R. Hoppin
Board Member
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95812

Ms. Victoria Whitney
Deputy Director for Water Rights
State Water Resources Control Board
1001 I Street, 14th Floor
Sacramento, CA 95812

Ms. Frances Spivy-Weber
Board Member
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95812

Delta Vision Public Comments
dv_context@calwater.ca.gov