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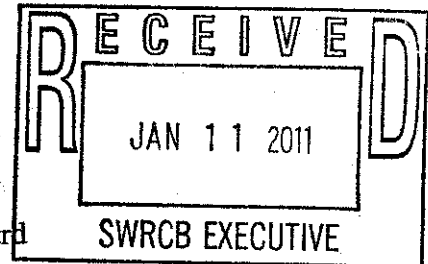
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January 11, 2011

Via E-Mail to [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov) and  
U.S. Mail to Jeanine Townsend, Clerk of the Board

Chair Charlie Hoppin and Members of the State Water Board  
c/o Jeanine Townsend, Clerk of the Board  
Executive Office  
State Water Resources Control Board  
Cal/EPA Headquarters  
1001 "I" Street, 24th Floor  
Sacramento, CA 95814



**Re: Comment Letter - 01/18/11 Board Workshop: Woods CDO**

Dear Chair Hoppin and Members of the State Water Board:

On behalf of the County of San Joaquin and the San Joaquin County Flood Control and Water Conservation District (collectively hereinafter the "County"), we submit the following comments to the Draft Cease and Desist Order Against Unauthorized Diversions by Woods Irrigation District ("CDO" or "Draft Order"). The current Draft Order is not supportable by the facts nor California law and the County requests that the State Water Resources Control Board ("Board") not issue the proposed Draft Order against Woods Irrigation Company ("Woods").

Public Policy Considerations Do Not Support CDO

Public policy considerations do not support the Board's issuance of the Draft Order. The Board is thrusting itself into a dispute between private water right users. A position that the Board should not embrace. Disputes between water right holders are properly determined by the courts and the validity of riparian and pre-1914 water rights can only be determined by a court. The current enforcement proceedings directed at the Delta farmers involve water rights which are outside of the Board's jurisdiction and attack property rights which have been relied upon for generations. In the end, the cease and desist orders will not have any overall impact on water use within the Delta, as diverters within the Delta enjoy area of origin and delta protections, and may obtain a water right with priority over any federal or state contractor, such as Interveners, the State Water Contractors and San Luis and Delta-Mendota Water Authority. Although



temporarily water use may be curtailed, the overall lasting impacts will remain unchanged. The only impacts the cease and desist proceedings will have are that enormous amounts of money will be spent by all parties, including the State Water Board, at a time of fiscal constraints. Proper public policy and logic supports expending all parties' valuable resources on other current, important efforts, which have the potential of having lasting impacts on the available water supply and legal rights of users. This is not such a proceeding and the Board should refrain from engaging in further cease and desist proceedings regarding alleged riparian and pre-1914 water rights within the Delta.

CDO Violates Due Process.

In addition, the County is gravely concerned that the property owners within the County are deprived their due process rights by this proceeding and the Draft Order. The Draft Order makes a determination about pre-1914 water rights delivered by Woods to property within the County. It also indicates that riparian water rights "likely maintained riparian rights to Middle River" as identified Parcel 2, (CDO at p. 21) but other claimed riparian water rights were severed from the property (CDO at p. 22). Those individual property owners were not parties to this proceeding, did not receive notice of this proceeding, and many of whom are not aware of this proceeding or that their water rights are being impacted, and determined by this proceeding. This is a blatant violation of their due process rights and a significant infringement on their property rights. The Draft CDO potentially interferes with these property owners contractual rights with Woods. Any order curtailing or affecting the delivery of water by Woods to property which enjoys a riparian or pre-1914 water right held by the individual property owners is completely beyond the scope of this proceeding. The Draft Order affects the delivery of these water rights to those property owners by Woods and specifically prohibits or enjoins Woods from making such deliveries, until additional information is provided by Woods to the satisfaction of Board staff. This violates due process of those property owners.

The Board lacks the authority to issue a cease and desist order against pre-1914 and riparian water rights

In response to Woods and the County's argument that the Board lacks the specific authority to issue a CDO against riparian and pre-1914 water right, the CDO states: "The State Water Board's authority to evaluate the validity of a riparian or pre-1914 appropriative claim of right is inherent to the State Water Board's statutory authority to investigate and take enforcement action in response to the actual or threatened unauthorized diversion or use of water." CDO p. 10, Underlining added. The ability to issue a cease and desist order, cannot be based on any "inherent" authority by the State Board, but must be based on specific

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statutory authority. Specific statutory authority to support the Draft CDO is lacking.

The County and Woods do not challenge the State Board's authority to "investigate" riparian and pre-1914 water rights pursuant to the Board's authority specified in Water Code section 1051 and this includes the ability to "ascertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this State." However, this investigative authority does not include the power to issue a cease and desist order. A cease and desist order is issued by the Board pursuant to the authority specifically provided to the Board by the Legislature pursuant to Water Code section 1831. Water Code section 1831 does not grant the Board authority over riparian and pre-1914 water rights in the situation at issue in the pending proceeding.<sup>1</sup>

Water Code section 1831 includes two provisions, subsections (d)(1) and (e), which are important in evaluating the proper, authorized, power of the Board to issue a cease and desist order in this proceeding. Careful evaluation of the specific authority granted to the Board in subsection (d)(1) together with the limitation expressed in subsection (e) supports the County and Woods argument that the Board lacks authority to issue a cease and desist order against Woods who the Board has always recognized held a pre-1914 water right (The Prosecution Team's case in chief acknowledged and recognized that Woods held a pre-1914 water right and recognized Woods could be delivering riparian water rights and the Draft Order finds Woods holds a valid water right.). The power to issue a cease and desist order by the Board cannot be an "inherent power" but must be a statutorily authorized power. Such power simply does not exist in this proceeding.

The Board's cease and desist authority was statutorily enlarged and streamlined in 2002 pursuant to AB 2267. However, this legislative enlargement of the Board's cease and desist authority specifically did not enlarge the Board's authority over riparian and pre-1914 water rights.

To understand the Board's limited cease and desist authority and the extent of the legislative enactment in 2002 it is important to understand the Board's historical authority over riparian and pre-1914 water rights. The Draft Order does not

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<sup>1</sup> The County and Woods acknowledge that the Board does have authority over riparian and pre-1914 water rights in certain situations not at issue in this proceeding, such as situations that involve waste or unreasonable use or a violation of the public trust doctrine ( Wat. Code § 275). In addition, the Board plays a limited role in assisting a court of law regarding the existence and validity of riparian and pre-1914 water rights in a statutory adjudication (Wat. Code §§ 2500-2900) or in a court referral to the Board (Wat. Code § 2000-2076). These specific statutory delegations are not at issue in this proceeding.

dispute the Board's past limitation of authority and the County and Woods presentation of historic Board decisions. Rather the Draft Order indicates that these historical State Board decisions, including the dicta in the 1986 court decision *United States of America v. State Water Resources Control Board* ("*Racanelli*") 182 Cal. App. 3d 82, are not relevant because it was not until 2002 that Water Code section 1831 was amended to provide the Board the authority to "issue a cease and desist order in response to an unauthorized diversion or use of water." CDO p. 14 and p. 16.

These past decisions are still relevant and are valid representations of the Board's authority over riparian and pre-1914 water rights. This is made clear due to the specific legislative changes to the Board's cease and desist order authority as enumerated in subsection (e) of section 1831 which was added by the Legislature in 2002 by AB 2267. Subsection (e), enacted in 2002, states in full as follows: "This article shall not authorize the board to regulate in any manner, the diversion or use of water not otherwise subject to regulation of the board under this part." Stats. 2002, ch. 652, §6. Subsection (e) was added on the Senate Floor on August 12, 2002 and that was the only amendment made to the bill on that date. See Attachment A to County's comments located at [http://leginfo.ca.gov/pub/01-02/bill/asm/ab\\_2251-2300/ab\\_2267\\_bill\\_20020812\\_amended\\_sen.html](http://leginfo.ca.gov/pub/01-02/bill/asm/ab_2251-2300/ab_2267_bill_20020812_amended_sen.html). The Senate Rules Committee Bill Analyses dated August 19, 2002, clearly states that these 2002 amendment to the cease and desist order procedures do not expand the powers of the Board stating:

Senate Floor Amendments of 8/12/02 clarify that by streamlining the administrative process for issuing cease and desist orders the bill does not also expand the powers of the SWRCB.

See Attachment B to County's comments located at [http://leginfo.ca.gov/pub/01-02/bill/asm/ab\\_2251-2300/ab\\_2267\\_cfa\\_20020820\\_153745\\_sen\\_floor.html](http://leginfo.ca.gov/pub/01-02/bill/asm/ab_2251-2300/ab_2267_cfa_20020820_153745_sen_floor.html). The Board's powers prior to 2002 did not include the ability to determine riparian or pre-1914 water rights and the Board did not then gain such powers in 2002 over such riparian and pre-1914 water rights.

The dicta in *Racanelli* continues to accurately describe the Board's authority, and lack of authority, over pre-1914 and riparian water rights. The Board's historic decisions and orders characterizing the Board's limited authority over pre-1914 and riparian water rights are still relevant.

The CDO also argues that the Board does have the authority over riparian and pre-1914 water rights because it has taken certain action regarding riparian and pre-1914 water rights in recent Board decisions including Order WR 2001-22, Order WRO 2004-0004, Order WR 2006-0001, and Order WR 2009-0060.

However, these recent past decisions by the Board in which the Board may have exceeded its cease and desist authority does not preclude Woods from challenging such authority nor does it enlarge the Board's statutory authority. If the Board has acted outside its jurisdiction in the past, Woods may still challenge such authority in this proceeding.

The Draft CDO does not address nor refute the County and Woods careful review of Part 2 of Division 2 of the Water Code for purposes of interpreting subsection (e) of Water Code section 1831 nor the careful review of the entire Division 2 for purposes of interpreting subsection (a) of Water Code section 1052 which is referenced in subsection (a) of Section 1831 authorizing the Board to issue cease and desist orders. A careful review of the specific authority of the Board clearly indicates that the Board has no authority to issue this cease and desist order regarding pre-1914 and riparian water rights and the Board has no authority to determine the existence or validity of claimed riparian or pre-1914 water rights in a cease and desist proceeding.

Remember subsection (e) specifically limits the Board's ability to "regulate in any manner" water not otherwise subject to regulation by the Board. Riparian and pre-1914 water rights, absent waste or unreasonable use and outside the public trust doctrine, are not subject to regulation by the Board. Thus, even after 2002 and the legislative changes to the Board's cease and desist authority, the provisions of section 1831 do not authorize the Board to regulate riparian and pre-1914 water rights.

Prior to 2002 the Board's authority to issue a cease and desist order was limited to a "person holding a permit or license to appropriate water pursuant to this division." Stats. 1980, ch. 933, § 13. In 2002, AB 2267 amended this provision of section 1831 to allow a cease and desist order against the "unauthorized diversion of use of water subject to this division." Water subject to the referenced division 2 of the Water Code does not include riparian and pre-1914 water rights. *People v. Shirokow* (1980) 26 Cal.3d 301, 309. Thus, the legislative changes in 2002 enlarged the power of the Board to issue a cease and desist order beyond only those persons "holding" valid water rights permits and licenses to include those persons who do not have a valid water right; however, this did not expand the Board's authority over riparian and pre-1914 water rights. It expanded the Board's authority to users such as in the *Shirokow* case who were not claiming riparian or pre-1914 water rights.

The CDO asserts that the County and Woods interpretation of the Board's authority to issue a cease and desist order pursuant to section 1831 begs the question whether a claimed authorized riparian or pre-1914 appropriative right is in fact authorized by a valid riparian or pre-1914 appropriative right. CDO p. 11.

It is a circular argument. The Board needs the authority to determine if a use is authorized; however, such authority is limited when riparian and pre-1914 water rights are at issue given the specific language and limitation of 1831(e) and the Board's lack of regulation of riparian and pre-19014 water rights. If after 2002 the Board can now determine the existence, validity and nature of a pre-1914 or riparian water right in a cease and desist proceeding, then the authority of the Board to regulate riparian and pre-1914 water rights has been expanded. The Board couldn't do such prior to 2002. This outcome would be a direct conflict with the limitations enumerated in subsection (e) of Water Code section 1831 which prohibits the Board from regulating in any particular manner the use of water "not otherwise subject to regulation" by the Board. A cease and desist proceeding determining the scope of Woods' pre-1914 water rights and determining the extent of riparian water rights allows the Board to control and "regulate" those pre-1914 and riparian water rights. That the Board cannot do.

It is recognized that a mere claim of a riparian or pre-1914 water right should not be adequate to preclude the Board from an investigation of the validity of such claim. The Board clearly has the authority to investigate such pursuant to Water Code section 1051. This authority includes the authority to investigate riparian and pre-1914 water rights. However, the Board's authority to issue a cease and desist order is more limited. A mere assertion of a riparian or pre-1914 water right certainly should not stop the Board's investigation; however a cease and desist order is not necessarily the authorized proceeding. Other enforcement tools and legal proceedings exist. A more appropriate delineation would be where there is substantial evidence which could arguably support a claim of pre-1914 or riparian water rights the Board should withhold the extraordinary measure of a cease and desist order until such time as a court has ruled on the existence of such riparian and pre-1914 water rights. Courts, not the State Board, have the authority and jurisdiction to determine riparian and pre-1914 water rights. Once the courts have adjudicated such rights the Board's cease and desist authority could then be applied.

In this proceeding, the Prosecution Team recognized Woods enjoyed a pre-1914 water right and the Draft Order also recognizes a pre-1914 water right and some riparian water rights enjoyed by lands served by Woods. CDO p. 4. The Board's cease and desist order authority does not include the power to define or regulate such valid rights. The Board should properly defer any further determination regarding the existence, validity, extent and nature of these claimed, and recognized water rights, which are property rights, not administrative permits or licenses, to a court of law with proper jurisdiction to determine the nature and extent of these property rights. This is not a situation where riparian and pre-1914 water rights are merely alleged as a sham. Real facts, evidence and disputes exist regarding the validity, nature and extent of these claimed riparian and pre-1914

water rights. The courts, not the Board, has jurisdiction to determine these property rights.

The Draft Order extends into the adjudication of the pre-1914 and riparian water rights. This determination extends well beyond settled law to the point of advocacy of new legal interpretations. These interpretations and this dispute disparage or destroy the pre-1914 and riparian rights in the Delta. The State Board should not be extending its authority into the adjudication of pre-1914 and riparian water rights. In addition, the Board should not cast itself in such an anti-Delta advocacy role. If there are disputes between water right holders beyond Board authorized permit terms and conditions, such disputes among property owners, must be determined by a court of law. The Board should not thrust itself into such disputes, and it is improper for the Board to do so. The CDO is improper.

In addition the role of the Board in determining the availability of water for appropriation is not justification for adjudicating pre-1914 and riparian rights. As *Racanelli* indicates such determination by the Board does extend to some extent over riparian and pre-1914 water rights and is proper in the Board's exercise of its statutory authority to determine the availability of water to administer its water right permit system. Such water availability determination by the Board is a general rough determination as to whether or not there might be unappropriated water to grant an applicant a permit to seek a supply of water. The permit does not grant the right to divert such water but merely provides the applicant the opportunity to divert such water if the actual available water so allows. Such a permit or license is subject to the senior water rights which when adjudicated could result in no water being available to said applicant. The appropriative right authority of the Board is to establish a priority date, control the reasonableness of requested rates of diversion and quantities and monitor diligence in putting such water to use. The Board's determination of water availability does not support the Board's authority to issue the Draft Order against Woods.

Monitoring and reporting use of a pre-1914 water right is in excess of Board's authority.

Even if the Board had the authority to issue a cease and desist order against Woods, the Draft Order still goes too far. The Draft Order recognizes a valid pre-1914 water right for diversions up to 77.7 cfs and that some of the water is diverted under the riparian rights of landholders. CDO p. 4. Despite the recognition of valid pre-1914 and riparian water rights, the CDO regulates such recognized and valid water rights. Such regulation of recognized pre-1914 and riparian water rights is clearly beyond the Board's authority. There is no



authority to regulate these rights and any attempt to do so is beyond the Board's cease and desist authority.

The Draft Order indicates that such measures regulating Wood's recognized pre-1914 and riparian rights is necessary to "ensure Woods complies with the cease and desist order." (CDO p. 18) Such regulation of pre-1914 and riparian water rights is simply not authorized regardless of the justification. Requiring monitoring and reporting of the use by Woods of its recognized valid pre-1914 and riparian water right is outside the scope of the Board's cease and desist order authority.

Remember subsection (e) of Water Code section 1831 specifically states that the cease and desist order cannot "regulate in any manner" the diversion and use of water based on riparian or pre-1914 water right. Current reporting of riparian and pre-1914 water rights is controlled by Water Code sections 5100 *et seq.* These provisions do not grant the Board additional authority to expand these reporting requirements. At this time reports of usage may be estimates and are required to be submitted on an initial and then triennial basis. Actual measured monthly reports are not required until 2012. See Wat. Code § 5103(e)(1). The Board has no authority to enlarge the scope of reporting for riparian and pre-1914 water right holders, which the CDO recognizes that Woods and its users enjoy. The Board has no authority to require a recognized riparian or pre-1914 water right holder to monitor or report such usage beyond the statutory requirements of Water Code section 5100 *et seq.* Furthermore the Draft Order requires detailed information on who Woods delivers its valid pre-1914 water right including specific users and acreage served. Such regulation of and control over existing, valid, recognized riparian and pre-1914 water rights is beyond the authority of the Board and greatly exceeds the Board's cease and desist authority in this instance.

The Board's lack of authority to place any regulation on the Board recognized pre-1914 and riparian water rights at issue in this proceeding, demonstrates the logic of and supports the proper interpretation of the Board's limited cease and desist authority over pre-1914 and riparian water rights advanced by Woods and the County. By engaging in this proceeding regarding a water right holder alleging and presenting evidence supporting a pre-1914 and riparian water right, the Board is faced with trying to craft a cease and desist enforcement order against this riparian and pre-1914 water right holder to enforce the Board's delineation of the validity, nature and extent of such rights. But the Board can't regulate those valid, recognized rights, so it is impossible for the Board to regulate the use of water by these valid riparian and pre-1914 water right holders in a manner that determines any unauthorized diversions. The unauthorized diversions, if any, are unknown and unregulated by the Board, because the Board can't regulate and control the authorized diversions and use which are supported



by riparian and pre-1914 water rights. When water use involves riparian and pre-1914 water rights, such disputes, enforcement and determination can't be made by the Board and necessarily must be made by the courts.

Refusal to consider available, relevant evidence is inappropriate

It is arbitrary and capricious for the Draft Order to deny Woods Request for Official Notice to incorporate into the Woods record certain evidence from the pending Mussi, Pak & Young, and Dunkel matters. The goal of this proceeding is to determine if Woods diversions are authorized or not. Evidence exists in the other pending proceedings that directly contradict a Board determination in this proceeding concluding as follows: "As a whole, the evidence that Duck Slough never extended to Middle River is more convincing than the evidence that it did." CDO p. 54. However, the Board and the parties are aware of other existing evidence that was presented in the Mussi, Pak & Young and Dunkel proceedings. Such known, available evidence should and must be considered in this proceeding in order for the Board to make a decision which is not arbitrary and capricious.

The Board's own rules allow for a party to file a Petition for Reconsideration and present evidence that diligently wasn't available during the pending proceeding. Cal Code of Regs. Tit. 23, § 768. Some documents introduced as rebuttal testimony in the other proceedings was not presented, known or available until the close of the Woods hearing. The Board's own rules would allow for the presentation of such evidence in a Petition for Reconsideration, it is arbitrary and capricious for the Board to not consider such evidence at this time.

Furthermore, in the Mussi, Pak & Young and Dunkel proceedings the Board, through its Hearing Officer, accepted by reference and incorporation evidence and testimony from this Woods proceeding. It is arbitrary and capricious to allow incorporation by reference of evidence in one ongoing, similarly situated proceeding, but not in both ongoing, pending similarly situated proceedings.

Unique water right characteristics of divisions from the Delta

It is improper and arbitrary and capricious for the Board to exclude the Delta Pool testimony. In addition, the Draft Order mischaracterizes the diversion of water from Delta channels and its associated water rights impacts due to the Delta Pool. Furthermore, moving a point of diversion of water by a riparian or pre-1914 water right holder has unique factual and legal implications due to the natural conditions of the Delta Pool. The County supports and incorporates these legal issues and arguments submitted by (1) Woods and (2) Jennifer Spaletta of Herum Crabtree on behalf of her individual property owners and water right holders within the Delta. These unique geographic and legal characterizes must be recognized by



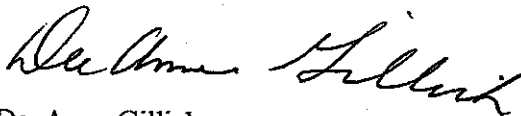
the Board or the Board's own water supply policy and past water right decisions regarding supply within the Delta will be greatly impacted.

Riparian water rights interpretations

The CDO improperly interprets provisions of riparian water right law. Particularly, it mischaracterizes California law regarding the intent of the parties and the severance of riparian water rights. Remember that *Lux v. Hagin* was the very case that established the "California" doctrine that established a dual system of water rights in California recognizing both riparian and pre-1914 water rights. *Lux v. Hagin* was decided in 1886. Deeds in this proceeding in 1889 through 1892 were prepared in this very infant stage of water right law in California. Today's assumptions and rules did not exist in the 1880s, and deeds from 1889 through 1892 must be interpreted now based on the knowledge and state of the law that existed then. The later decided 1907 case of *Anaheim v. Fuller* 150 Cal. 327 and the 1972 case of *Murphy Slough Assn. v. Avila* 27 Cal. App.3d 649, must be applied and interpreted based on the state of the law that existed in 1889-1892. At that time, there was no California law determining whether in California riparian land enjoyed a presumption of the preservation of a riparian water right which is severed from a watercourse or the contrary. In addition riparian water rights may be reestablished when the unity of title is obtained. (In the United States there is a current split in authority among riparian jurisdictions which all follow the common law of riparian water rights. Some have adopted the source of title rule and others the unity of title rule. See *Law of Water Rights and Resources, Common Law of Riparian Rights L. of Water Rights and Resources* § 3:47.) Ultimately, California follows the source of title rule and requires specific intent to preserve a riparian water right to a severed parcel. However, as asserted by Woods, in 1889-1892, and even perhaps today, the deeds at issue in Woods did demonstrate an intent to preserve any severed water rights. The County supports and incorporates these riparian water rights arguments submitted by Woods.

The County respectfully requests that the Board not issue the pending CDO against Woods.

Very truly yours,



DeeAnne Gillick  
Attorney at Law

DMG/

(See next page for courtesy copies)

cc: David Wooten, County Counsel  
C. Mel Lytle, Ph.D., Water Resources Coordinator  
Thomas J. Shephard, Sr.  
Hearing Service List

BILL NUMBER: AB 2267 AMENDED  
BILL TEXT

ATTACHMENT "A"

AMENDED IN SENATE AUGUST 12, 2002  
AMENDED IN ASSEMBLY APRIL 8, 2002

INTRODUCED BY Assembly Member Kelley

FEBRUARY 20, 2002

An act to amend Sections 1055, 1055.2, 1536, 1825, 1831, 1832, 1834, 1845, and 1850 of, and to repeal Sections 1003.5 and 1833 of, the Water Code, relating to water.

LEGISLATIVE COUNSEL'S DIGEST

AB 2267, as amended, Kelley. Water rights.

(1) Existing law authorizes the executive director of the State Water Resources Control Board to issue a complaint to any person on whom civil liability may be imposed for an unauthorized water diversion or certain misstatements relating to water diversions. Existing law provides that no person may be subject to both administrative civil liability and civil liability imposed by the superior court for unauthorized water diversions pursuant to statute.

This bill would extend the authority of the state board to issue a complaint to any person on whom civil liability may be imposed for failure to pay an application fee for a permit to appropriate water and for the violation of a cease and desist order, and would provide that no person may be subject to both administrative civil liability and civil liability imposed by the superior court for those violations.

(2) Existing law requires the State Water Resources Control Board to cancel an application for a permit to appropriate water if an application fee is not received by the board within 30 days after notice by the board.

This bill, instead, would authorize the board to cancel the application and specify that civil liability may be imposed both administratively and by the superior court. The bill would provide that the applicant may be liable in an amount not to exceed \$500 for each day until the application fee is received, or the application is otherwise canceled or withdrawn.

(3) Existing law authorizes the board to issue a preliminary cease and desist order to any person holding a permit or license to appropriate water if the board determines that person is violating a term or condition of that permit or license and provides for the issue of a final cease and desist order. Existing law requires the Attorney General, upon the failure of any person to comply with a final cease and desist order and, if so requested by the board, to petition the superior court for the issuance of relief.

This bill would delete references to a preliminary or final cease and desist order and, instead, would authorize the board to issue a cease and desist order to any person who the board determines is violating, or threatening to violate, a prohibition against unauthorized diversion or use of water, any term or condition of a permit, license, certification or registration issued by the board, or prescribed orders or decisions of the board. The bill would revise provisions relating to notification by the board in the event

of a violation or a threatened violation. The bill would specify that civil liability may be imposed by the superior court.

(4) Existing law makes a statement of legislative intent regarding the need for the state to take action to enforce the terms and conditions of permits and licenses to appropriate water.

This bill, in addition, would declare that it is the intent of the Legislature that the state take action to enforce certifications and registrations to appropriate water and to enforce the orders and decisions of the board.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1003.5 of the Water Code is repealed.

SEC. 2. Section 1055 of the Water Code is amended to read:

1055. (a) The executive director of the board may issue a complaint to any person or entity on which administrative civil liability may be imposed pursuant to Section 1052, Section 1536, Section 1845, or Section 5107. The complaint shall allege the act or failure to act that constitutes a trespass or violation, the provision of law authorizing civil liability to be imposed, and the proposed civil liability.

(b) The complaint shall be served by personal notice or certified mail, and shall inform the party served that the party may request a hearing not later than 20 days from the date the party was served. The hearing shall be before a member of the board as it may specify.

(c) After any hearing, the member shall report a proposed decision and order to the board and shall supply a copy to the party served with the complaint, the board's executive director, and any other person requesting a copy. The member of the board acting as hearing officer may sit as a member of the board in deciding the matter. The board, after making an independent review of the record and taking any additional evidence as may be necessary that could not reasonably have been offered before the hearing officer, may adopt, with or without revision, the proposed decision and order.

(d) Orders setting administrative civil liability shall become effective and final upon issuance thereof and payment shall be made.

SEC. 3. Section 1055.2 of the Water Code is amended to read:

1055.2. No person or entity shall be subject to both civil liability imposed under Section 1055 and civil liability imposed by the superior court under subdivision (d) of Section 1052, Section 1536, or Section 1845 for the same act or failure to act.

SEC. 4. Section 1536 of the Water Code is amended to read:

1536. (a) If an annual application fee is not paid when due the board shall notify the applicant by registered mail of the amount due, and of the provisions of this section.

(b) If the fee is not received by the board within 30 days after the notice has been mailed, the application may be canceled.

(c) (1) If the fee is not received by the board within 30 days after the notice has been mailed, the applicant may be liable civilly for a sum not to exceed five hundred dollars (\$500) for each day until the fee is received, the application is canceled, or the application is withdrawn, whichever occurs first.

(2) Civil liability may be imposed by the superior court. The Attorney General, upon request of the board, shall petition the

superior court to impose, assess, and recover those sums.

(3) Civil liability may be imposed administratively by the board pursuant to Section 1055.

SEC. 5. Section 1825 of the Water Code is amended to read:

1825. It is the intent of the Legislature that the state should take vigorous action to enforce the terms and conditions of permits licenses, certifications, and registrations to appropriate water, to enforce state board orders and decisions, and to prevent the unlawful diversion of water.

SEC. 6. Section 1831 of the Water Code is amended to read:

1831. (a) When the board determines that any person is violating, or threatening to violate, any requirement described in subdivision (d), the board may issue an order to that person to cease and desist from that violation.

(b) The cease and desist order shall require that person to comply forthwith or in accordance with a time schedule set by the board.

(c) The board may issue a cease and desist order only after notice and an opportunity for hearing pursuant to Section 1834.

(d) The board may issue a cease and desist order in response to a violation or threatened violation of any of the following:

(1) The prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division.

(2) Any term or condition of a permit, license, certification, or registration issued under this division.

(3) Any decision or order of the board issued under this part, Section 275, or Article 7 (commencing with Section 13550) of Chapter 7 of Division 7, in which decision or order the person to whom the cease and desist order will be issued, or a predecessor in interest to that person, was named as a party directly affected by the decision or order.

(e) *This article shall not authorize the board to regulate in any manner, the diversion or use of water not otherwise subject to regulation of the board under this division.*

SEC. 7. Section 1832 of the Water Code is amended to read:

1832. Cease and desist orders of the board shall be effective upon the issuance thereof. The board may, after notice and opportunity for hearing, upon its own motion or upon receipt of an application from an aggrieved person, modify, revoke, or stay in whole or in part any cease and desist order issued pursuant to this chapter.

SEC. 8. Section 1833 of the Water Code is repealed.

SEC. 9. Section 1834 of the Water Code is amended to read:

1834. (a) In the event that a violation of a requirement described in subdivision (d) of Section 1831 is occurring or threatening to occur, the board shall give notice by personal notice or certified mail, pursuant to which the party shall be informed that he or she may request a hearing not later than 20 days from the date on which the notice is received, to the person allegedly engaged in the violation. The notice shall contain a statement of facts and information that would tend to show the proscribed action, and notification of the requirements of subdivision (b).

(b) Unless a written request for a hearing signed by or on behalf of the notified party is delivered to or received by mail by the board within 20 days after receipt of the notice, the board may adopt a cease and desist order, based on the statement of facts and information set forth in the notice, without a hearing.

SEC. 10. Section 1845 of the Water Code is amended to read:

1845. (a) Upon the failure of any person to comply with a cease and desist order issued by the board pursuant to this chapter, the Attorney General, upon the request of the board, shall petition the

superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction.

(b) (1) Any person or entity who violates a cease and desist order issued pursuant to this chapter may be liable for a sum not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

(2) Civil liability may be imposed by the superior court. The Attorney General, upon the request of the board, shall petition the superior court to impose, assess, and recover those sums.

(3) Civil liability may be imposed administratively by the board pursuant to Section 1055.

(c) In determining the appropriate amount, the court, or the board, as the case may be, shall take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator.

(d) All funds recovered pursuant to this section shall be transferred to the General Fund of the state.

SEC. 11. Section 1850 of the Water Code is amended to read:

1850. Any factual or legal determinations made pursuant to a cease and desist order shall be conclusive and shall preclude any party to the order from raising those issues in any subsequent administrative proceeding.

BILL ANALYSIS

**ATTACHMENT "B"**

SENATE RULES COMMITTEE Office of Senate Floor Analyses 1020 N Street, Suite 524 (916) 445-6614 Fax: (916) 1327-4478	AB 2267
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THIRD READING

Bill No: AB 2267  
Author: Kelley (R)  
Amended: 8/19/02 in Senate  
Vote: 21

SENATE AG. & WATER RESOURCES COMMITTEE : 7-2, 6/24/02  
AYES: Costa, Alpert, Bowen, Kuehl, Machado, Perata,  
Torlakson  
NOES: Monteith, Poochigian

SENATE APPROPRIATIONS COMMITTEE : Senate Rule 28.8

ASSEMBLY FLOOR : 52-17, 5/23/02 - See last page for vote

SUBJECT : Water rights

SOURCE : State Water Resources Control Board

DIGEST : This bill expands the State Water Resources Control Boards (SWRCBs) enforcement authority by authorizing the SWRCB to issue cease and desist orders, not only when a permit holder is in violation of a water right permit, but also in the case of illegal diversions and other violations of SWRCB orders and decisions. The bill also specifies that civil liability will be imposed by the superior court or by the failure to pay a permit application fee.

Senate Floor Amendments of 8/19/02 correct a technical drafting error in a previous amendment of the bill.

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Senate Floor Amendments of 8/12/02 clarify that by streamlining the administrative process for issuing cease and desist orders the bill does not also expand the powers of the SWRCB.

ANALYSIS : The SWRCB was established by the Legislature on January 1, 1914, and has jurisdiction over all appropriative water rights granted after that date. One of the most significant duties assigned to the Board is administration of the state's water rights system. The SWRCB has established a system to administer water rights that is based on an application, permit, and license model. To gain a perfected appropriative water right, a petitioner must first apply to the SWRCB a water right. The SWRCB reviews the application and approves or denies it. If the application is approved, a permit is issued. The permit holder has a specified period of time within which to put the water to "reasonable and beneficial use" as required by Article X of the state constitution. If the permit's conditions are satisfied, the permit may mature into a license.

The SWRCB enforcement authority to ensure that those holding water rights are using water within the terms of their application, permit, or license. The SWRCB may issue a preliminary cease and desist order (CDO) to any person that is violating the terms of their application, permit, or license. If the infraction is not corrected, the preliminary CDO may mature into a final CDO. The Attorney General, at the request of the Board, may seek a court order for temporary restraining order, preliminary injunction, or permanent injunction. The Attorney General may also seek imposition of a fine not to exceed \$1,000 per day for each day the infraction occurs. Water right holders who receive a CDO may appeal to the superior court for review.



This bill:

1. Deletes the definition of the SWRCB for the purposes of Division 2 of the Water Code.
2. Adds Section 1845 (failure to comply with a cease and desist order) to the list of violations for which the

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executive director may issue a complaint for any unauthorized diversion of water. The complaint is the operative legal ground on which a civil or administrative penalty would rest.

3. Clarifies that persons who violate Section 1845 will not be subject to both civil and administrative liability.
4. Strengthens the annual fee for a water rights permit application by allowing the SWRCB to impose a civil liability of up to \$500 per day until the fee is received, or the application withdrawn. This bill allows the court to impose the civil liability and the Attorney General, on the request of the SWRCB, to ask the court to impose the liability (\$500/day) and recover the fee. Alternatively, the bill allows the SWRCB to impose civil liability.
5. Expands the areas over which the SWRCB may issue cease and desist orders to include prospective unauthorized diversion of water, violations of valid permit terms or conditions, or any decision or order of the SWRCB.
6. Eliminates the step of issuing a preliminary cease and desist order. The bill requires the SWRCB to give notice to any person to whom a cease and desist order will be issued.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes  
Local: No

SUPPORT : (Verified 8/12/02)

State Water Resources Control Board (source)  
Attorney General's Office  
Sierra Club of California

ARGUMENTS IN SUPPORT : The SWRCB, the sponsor of this bill, seeks to correct identified deficiencies in its water right enforcement authority. Streamlining the process by eliminating the issuance of a preliminary CDO and holding a hearing prior to the issuance of a final CDO will allow for prompt enforcement. The ability to force compliance with the threat of a fine is an important regulatory tool, as is

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the ability to be pre-emptive by issuing a CDO to prevent a violation.

ASSEMBLY FLOOR :

AYES: Alquist, Aroner, Calderon, Canciamilla, Cardenas, Cardoza, Chan, Chavez, Chu, Cohn, Corbett, Correa, Diaz, Dickerson, Dutra, Firebaugh, Florez, Frommer, Goldberg, Harman, Havice, Hertzberg, Horton, Jackson, Keeley, Kehoe, Kelley, Koretz, Liu, Longville, Lowenthal, Maddox, Matthews, Migden, Nakano, Nation, Negrete McLeod, Oropeza, Papan, Pavley, Reyes, Salinas, Shelley, Simitian, Steinberg, Strom-Martin, Thomson, Vargas, Wayne, Wiggins, Wright, Wesson  
NOES: Anestad, Ashburn, Bates, Bill Campbell, John Campbell, Cogdill, Cox, Daucher, Hollingsworth, Leach, Leslie, Mountjoy, Rod Pacheco, Pescetti, Runner, Strickland, Wyman

TSM:cm 8/20/02 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

\*\*\*\* END \*\*\*\*

