

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

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| DATE: | August 3, 2015 | DEPT. NO.: | 24 |
| JUDGE: | HON. SHELLEYANNE W. L. CHANG | CLERK: | E. HIGGINBOTHAM |
| <p>THE WEST SIDE IRRIGATION DISTRICT; CENTRAL DELTA WATER AGENCY; SOUTH DELTA WATER AGENCY; WOODS IRRIGATION COMPANY,</p> <p style="text-align: center;">Petitioners and Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; THOMAS HOWARD, EXECUTIVE DIRECTOR OF CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; and DOES 1 THROUGH 100, INCLUSIVE,</p> <p style="text-align: center;">Respondents and Defendants.</p> | | <p>Case No.: 34-2015-80002121</p> | |
| Nature of Proceedings: | | ORDER AFTER HEARING ON ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION | |

This matter came before the Court pursuant to an ex parte application by the West Side Irrigation District, Central Delta Water Agency, and South Delta Water Agency on July 10, 2015. The ex parte application sought a stay or a temporary restraining order/order to show cause concerning the May 1, 2015 and June 12, 2015, “NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT...”¹ (hereinafter referred to as the “May Curtailment Letter” and the “June Curtailment Letter”, jointly referred to as the “Curtailment Letters”) issued by the State Water Resources Control Board through its Executive Director Thomas Howard.

In its ruling granting the Temporary Restraining Order against Respondents, the Court determined that the 2015 Curtailment Letters were coercive in nature and went beyond the “informational” purpose the Board claimed prevented a stay. As in *Duarte*, even though the Curtailment Letters were not enforceable on their own and there were no separate penalties for violating them, the language used in the Curtailment Letters resulted in a “comman[d] by the...[g]overnment to stop [water diverting] activities.” (*Duarte Nursery, Inc. v. United States Army Corps of Engineers* (2014) 17 F.Supp.3d 1013, 1018.) It was not a suggestion for “voluntary cessation of activities,” but instead required Petitioners to “immediately stop diverting water.” (*Id.* at 1019; Pet. exh. B.)

¹ This language is from the heading of the June 1, 2015 letter. The May 1, 2015 letter is titled, “NOTICE OF UNAVAILABILITY OF WATER AND IMMEDIATE CURTAILMENT...”

The Curtailment Letters also required recipients to “document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms your cessation of diversion under the specific pre-1914 claim of right. Completion of the Form is mandatory...” Nowhere in this language did the Curtailment Letters assert that Petitioners were free to ignore the directive that they cease diverting water or that it is merely a suggestion.²

The Court granted the ex parte application for a temporary restraining order and issued an order to show cause as to why a preliminary injunction should not issue requiring the Board to issue a revised letter/notice that was informational in nature. The matter was set for an order to show cause on July 30, 2015 at 9:00 a.m. in Department 24.

On July 15, 2015, after the Temporary Restraining Order issued, Respondents issued a “PARTIAL RESCISSION OF APRIL, MAY AND JUNE 2015 CURTAILMENT NOTICES AND CLARIFICATION OF STATE BOARD POSITION RE: NOTICE OF UNAVAILABILITY OF WATER FOR THOSE DIVERTING WATER IN THE SACRAMENTO RIVER WATERSHED, SAN JOAQUIN RIVER WATERSHED AND DELTA, AND SCOTT RIVER.” (RJN, Exh. A.) (“July Letter”). All Petitioners acknowledge that they received a copy of this letter, which provides that it applies to, among others, both the May Curtailment Letter and the June Curtailment Letter.

On July 16, 2015, Respondents filed a supplemental opposition, request for judicial notice, and evidentiary objections. On July 23, 2015, Petitioners filed a reply to Respondents’ opposition and opposition to evidentiary objections. The hearing on the order to show cause was held on July 30, 2015.

Petitioners did not file any opposition to Respondents’ request for judicial notice. The Court has reviewed the request and **GRANTS** it with respect to Exhibit A. A copy of Exhibit B was not provided to the Court, merely a link to a website. The Court declines to take judicial notice of this document.

In its Supplemental Opposition, respondents argued that the matter was now moot in light of the July Letter and that no preliminary injunction should issue. Petitioners asserted that the coercive language was still present in the July Letter and that respondents had not corrected the offending language. The Court has reviewed the July Letter and finds that Respondent has removed the coercive language that was in the Curtailment Letters. The July Letter specifies that, “[t]his notice does not establish or impose any compliance responsibilities. Non-compliance with this notice shall not constitute a basis for the State Water Board’s initiation of any enforcement action.” Further, “you are not required to complete and file the Curtailment Certification Form (Form) attached to the prior notices.”

² This is similar to *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, where the Court held plaintiffs were aggrieved by a curtailment notice within the meaning of section 1126(b) because it “required plaintiffs to immediately discontinue diversion of water under their licenses.” Although *Phelps* involved only one notice, the implication of the language of the letters was the same as in this case.

The Court finds the July Letter is now akin to the notice of violation sent by the Central Valley Regional Water Quality Control Board in *Duarte*. There, the notice informed plaintiffs of the Board's view that they were in violation of the law, but did not require them to stop engaging in any activity. (*Duarte*, 17 F.Supp.3d at 1025.) The notice did command the plaintiffs to submit a plan to mitigate the impacts of the alleged improper discharges, but did not threaten any consequences for failure to submit such a plan. (*Id.*) The Court in *Duarte* found this was a purely informational notice, and consequently no taking had occurred in violation of due process so as to make necessary a lawsuit against the Board ripe for adjudication. (*Id.*)

Here, the July Letter no longer requires recipients to cease diverting water or requires them to sign a curtailment certification form under penalty of perjury. While the July Letter does notify the recipient that the Board has information indicating that there is insufficient water available for their water right priority, such a determination, in and of itself, does not violate Due Process principles, as the July Letter makes no assessment of the recipient's legal status in light of such a determination and no longer commands the recipient to take any action. As in *Duarte*, this assessment is not sufficient to violate Due Process principles. While the Court agrees with Petitioner that it would have been more prudent to rescind the Curtailment Letters in full and issue a new informational notice (instead of a "partial rescission"), it is not for the Court to dictate how the Board should exercise its discretion.

At oral argument, Petitioners asserted that the language contained in the last paragraph on the first page of the July Letter still contained the offending language and a coercive element. Petitioners asserted that no recipient argued or understood the Curtailment Letters to be orders and because of this, the language stating "to the extent that any of the notices described above contain language that may be construed as an order requiring you to stop diversions under your affected water right, that language is hereby rescinded" was a nullity and that the July letter rescinded nothing as there was no order. But the basis for the Court's granting the TRO was that, in fact, a recipient of the Curtailment Letters *could* reasonably interpret them as an order from the Government compelling them to stop their curtailment activities. ["...the language used in the Curtailment Letters results in a command by the government to stop water diverting activities...It is not a suggestion for voluntary cessation of activities but instead requires Petitioners to immediately stop diverting water." [Internal quotes and citations omitted.] "Through the inclusion of this specific information, the Curtailment Letters appear not to be generalized notices, but instead a specific adjudication and command with respect to the particular rights holder." "...The focus is not on whether the Petitioners' legal exposure remains unchanged or not, but whether the Curtailment Letters could reasonably be interpreted to be an order or command by the government, not merely a suggestion or request for voluntary cessation of activities." (Order After Hearing on Ex Parte Application For Temporary Stay.)]

The July Letter now rescinds this language of command that the Court found violated Petitioners' Due Process Rights. Again, it is not for this Court to second guess the Board and decide exactly how it should have rescinded the Curtailment Letters.

Petitioner West Side Irrigation District further asserts that Respondents have initiated a retaliatory action against them in the form of a draft Cease and Desist Order and Information Order. (Declaration of Karna E. Harrigfeld (hereinafter "Harrigfeld Decl."), Exh. C.) West Side Irrigation District contends the Cease and Desist Order improperly relies on the May Curtailment Letter, and the information provided by West Side in response to the Curtailment Certification Form, in contravention of this Court's ruling.

The issue of whether issuance of the Cease and Desist Order and Information Order violated the Court's Temporary Restraining Order or is in retaliation for this lawsuit is not properly before the Court at this time. The only issue before the Court at the Order To Show Cause hearing was whether a preliminary injunction should issue requiring the Board to issue a revised letter/notice that is informational in nature. Further, to the extent Petitioners urge the Court to exceed this scope, the Court declines to do so. A full administrative hearing with the opportunity for both sides to present evidence challenging the propriety of the Cease and Desist Order and Information Order and whether the Curtailment Certificates were improperly used as a basis for Respondents' enforcement actions against these Petitioners and subsequent judicial review of a fully developed record and the administrative determination is the appropriate procedure.

Respondents have acknowledged that Petitioners may challenge the use of the subject information as part of the administrative process, should they request a hearing. The Court thereby exercises its discretion to allow the issue of the propriety of the Cease and Desist Order and Information Order to be adjudicated through the administrative process prior to any judicial review by this Court.

Having considered the evidence and arguments presented by the parties, the Court determines there is no cause to issue a preliminary injunction.³ Consequently, the application for preliminary injunction is **DENIED**.

Counsel for Respondents to submit a formal order for the Court's signature pursuant to CRC 3.1312.

³ In light of this determination, the evidentiary objections filed by Respondents are moot, and the Court declines to rule on them.