



tel: 916.455.7300 · fax: 916.244.7300  
1010 F Street, Suite 100 · Sacramento, CA 95814

March 16, 2015

**SENT VIA EMAIL (commentletters@waterboards.ca.gov)**



Jeannie Townsend  
Clerk of the Board  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

**RE: Comments 3/17-18/15 BOARD MEETING Item 9  
Proposed Rulemaking for Emergency Drought Informational Orders  
Title 23 Cal. Code Regs., § 879, subd. (c)**

Dear Ms. Townsend:

This letter is submitted on behalf of Local Agencies of the North Delta (“LAND”). LAND is a coalition comprised of reclamation and water districts in the northern geographic area of the Delta.<sup>1</sup> Having just been subject to the State Water Resources Control Board’s (“Board”) February 4, 2015 Order for Additional Information, LAND members are concerned that title 23 of the California Code of Regulations, section 879, subdivision (c) (“23 CCR, § 879, subd. (c)”) as proposed still does not provide a reasonable approach to fulfilling the Board’s need for information to manage scarce water supplies in a drought year.

First, we appreciate that 30 days’ time is now provided in the regulation to obtain the information. We found that much of the information requested in the February 4th Order and the subsequent Online Reporting Form was not readily available, especially to laypeople. We would still request, however, that at least 60 days be provided if historic documents are needed. Many of these documents are not readily available online and take additional time to review and analyze.

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<sup>1</sup> LAND member agencies cover an approximately 110,000 acre area of the Delta; current LAND participants include Reclamation Districts 3, 150, 307, 317, 349, 407, 501, 551, 554, 556, 744, 755, 813, 999, 1002, 2111, 2067 and the Brannan-Andrus Levee Maintenance District. Some of these agencies provide both water delivery and drainage services, while others only provide drainage services. These districts also assist in the maintenance of the levees that provide flood protection to homes and farms. This general area is also guaranteed adequate water supplies under the 1981 North Delta Water Agency Contract.

Second, in terms of the broader policy context, we continue to be concerned about the lack of any standard for what constitutes a “complaint” under 23 CCR, § 879, subd. (c). As described in the LAND letter dated February 12, 2015 regarding the Order for Additional Information and Online Reporting Form, no allegation of unlawful use was made with respect to the north Delta, and only a generic allegation was made with respect to Central and South Delta diversions.

While the State Water Project and Central Valley Project (“SWP/CVP”) have alleged diversion of stored water generally, they have never provided any accounting of what commingled water they believe is available for their own junior diversions once the water enters the Delta. Moreover, there is no evidence whatsoever that the flow of the Sacramento River in particular is entirely made up of stored water in the summer months. The legal basis for the current storage of natural flow by the projects has also not been provided. Yet the Board’s approach to water diversions in the Delta appears to assume stored water, as opposed to natural flow, is being diverted by in-Delta users. At the same time, the Department of Water Resources and the Bureau of Reclamation appear to want to transfer their projects’ clear responsibility to provide adequate outflow to other water users. This is an obligation of the SWP/CVP projects (see D1641), however, not in-Delta diverters.

Section 879, subdivision (c), if adopted, must for the public interest be modified to include some minimum standard of evidence to support a claim of unlawful diversion to justify an Order for Additional Information. With no standard, the regulation opens the door to what constitutes harassment of some of the most senior water rights in the state. Since compliance with California Administrative Procedures Act requirements to disclose costs of new regulations on California businesses is not required for emergency regulations, the negative impact on California businesses from these serially adopted emergency regulations is also not being disclosed.

As a recent example, without any shred of evidence of any unlawful diversion had occurred, the February 4, 2015 Order caused a massive financial burden on water diverters. The Board’s cost analysis for calculating costs for local and state agencies to comply with the Order for Additional Information under Government Code section 11346.5, subdivision (a)(6) concluded that it may cost approximately \$1,000 for each report. (Informational Order Emergency Regulations Digest, Appendix 10.)<sup>2</sup>

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<sup>2</sup> Available at:  
[http://www.waterboards.ca.gov/board\\_info/agendas/2015/mar/031715\\_8\\_emergency\\_reg\\_pkg\\_with\\_attach11.pdf](http://www.waterboards.ca.gov/board_info/agendas/2015/mar/031715_8_emergency_reg_pkg_with_attach11.pdf).

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If that estimate is correct, then the cumulative cost on all 1,064 diverters subject to the February 4th Order was over \$1,000,000. Before such major costs are levied on any water users (public or private), there should be some supporting evidence that unlawful diversion has occurred. The short time frame, combined with the requirements for historic supporting documents, was both an unexpected financial drain and a social crisis for the Delta family farming community.

The Board should also be aware by now that even if some diverters in the Delta were eventually curtailed from irrigating their crops, additional water would not be available for diversion. Both the 2009 Board Order regarding the Delta Wetlands Project (WRO 2009-0003) and recent technical analysis of a proposed water transfer from Webb Tract and Bouldin Island recognize this fact. When farmland is fallowed, weed growth typically requires more water than crops. Moreover, island reclamation systems (pumping water off of the Delta lowlands) returns water to the system for others to use that would otherwise remain on the islands. The Board should revisit the erroneous assumption that curtailment of Delta water diversions will make more water available to other more junior diverters.

### **Conclusion**

Thank you for considering LAND's concerns regarding the proposed emergency regulation. We respectfully request that section 879, subdivision (c) be modified to address the concerns expressed in this letter.

Very truly yours,

**SOLURI MESERVE**  
A Law Corporation

By: 

Osha R. Meserve

cc (sent via email):

Katherine Mrowka, Kathy.Mrowka@waterboards.ca.gov  
John O'Hagan, John.O'Hagan@waterboards.ca.gov  
Andrew Tauriainen, Andrew.Tauriainen@waterboards.ca.gov  
Michael George, Michael.George@Waterboards.ca.gov  
Melinda Terry, melinda@northdeltawater.net

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Dante Nomellini, Sr., [ngmplcs@pacbell.net](mailto:ngmplcs@pacbell.net)  
John Herrick, [jherrlaw@aol.com](mailto:jherrlaw@aol.com)  
Jennifer Spaletta, [jennifer@spalettalaw.com](mailto:jennifer@spalettalaw.com)