

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2015-0032-EXEC

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In the Matter of the Petition for Reconsideration of the  
**SAN JOAQUIN TRIBUTARIES AUTHORITY**  
Regarding Order WR 2015-0002-DWR  
Order for Additional Information in the Matter of Diversion of Water from  
Sacramento and San Joaquin River Watershed and Delta

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**ORDER DENYING RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR<sup>1</sup>

**1.0 INTRODUCTION**

The San Joaquin Tributaries Authority (SJTA or Petitioner) has petitioned the State Water Resources Control Board (State Water Board or Board) for reconsideration of State Water Board Order WR 2015-0002-DWR (Order 2015-0002 or Information Order), a February 4, 2015 Order requiring certain riparian and pre-1914 water right claimants along the Sacramento and San Joaquin River Watershed and Delta to submit specified information to the Board.

Petitioner states that, with respect to Petitioner, the State Water Board did not satisfy the provisions of California Code of Regulations, title 23, section 879 when it issued the Information Order.<sup>2</sup> Specifically, Petitioner argues that Board did not receive a "complaint" or "information," as required to trigger the Board's information order authority under the regulation. Petitioner also argues that application of the Information Order to Petitioner is improper because its members' points of diversion are located upstream of the Delta. For these reasons, Petitioners request that the Board revise the Information Order so that it no longer requires SJTA members to provide the required information.

Petitioner's Petition for Reconsideration is denied because it fails on the merits, as explained below. Order 2015-0002 is based on sufficient information available to the Deputy Director for the Division of Water Rights (Division) to indicate unlawful diversions of stored water by some members of a group of riparian and pre-1914 appropriative water right holders that includes Petitioner.

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<sup>1</sup> The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order WQ 98-05-UST at pp. 3-4.)

<sup>2</sup> Unless otherwise noted, all further references are to title 23 of the California Code of Regulations.

## **2.0            GROUNDS FOR RECONSIDERATION**

Any interested person may petition the State Water Board for reconsideration of a water rights decision or order within 30 days on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) [e]rror in law.

(§ 768.)

A petition must specify the specific Board action for which the petitioner requests reconsideration, "the reason the action was inappropriate or improper," "the specific action which petitioner requests," and must contain "a statement that copies of the petition and accompanying materials have been sent to all interested parties." (§ 769, subdivision (a)(2), (4)-(6).) Additionally, "a petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition." (*Id.*, subd. (c).)

A petition for reconsideration must be timely filed within 30 days of the decision or order at issue. (§ 768.) The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).) The State Water Board may elect whether or not to hold a hearing on the Petition for Reconsideration.

Here, the order in question was appropriate and proper. The Petition for Reconsideration is denied.

## **3.0            BACKGROUND**

On April 25, 2014, Governor Edmund G. Brown, Jr. issued an Executive Order to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the continuous severe drought conditions present urgent challenges across the state including water shortages for municipal water use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue into 2015.

The Executive Order refers to the Governor's Proclamation No. 1-17-2014, issued on January 17, 2014 (January Proclamation), declaring a drought State of Emergency to exist in California due to severe drought conditions. The January Proclamation notes that the state is experiencing record dry conditions, with 2014 projected to become the driest year on record. These conditions also threaten the survival and recovery of fish, wildlife, and plants that rely on California's rivers, including many species in danger of, or threatened with, extinction. The January Proclamation also calls on all Californians to reduce their water usage by 20 percent.

On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a Post-1914 Appropriative Right." Based upon the reservoir storage and inflow projections, along with forecasts for precipitation events, the Division determined the existing water supply in the Sacramento and San Joaquin River Watershed was insufficient to meet the needs of all water rights holders. With the notice, the State Water Board notified all holders of post-1914 appropriative water rights in the Sacramento and San Joaquin River Watershed of the need to immediately stop diverting under their post-1914 rights water rights, with some minor exceptions for non-consumptive use diversions. Approximately 5,435 junior water-rights in the Sacramento River watershed and 3,116 water rights in the San Joaquin River Watershed received curtailment notices. The condition of curtailment continued until water conditions improved and curtailment could be lifted.

On July 2, 2014, the State Water Board adopted an Emergency Regulation for Curtailment of Water Diversions to Protect Senior Water Rights. (State Water Board Resolution 2014-0031 (adding sections 875 and 878.3 and amending sections 878.1 and 879 [Drought Regulations]).) The Drought Regulations were reviewed by the Office of Administrative Law and went into effect July 16, 2014. The Drought Regulations establish a drought emergency curtailment method for post-1914 water rights holders and requirements for riparian and pre-1914 rights holders to provide additional information in specific circumstances.

Pursuant to section 879, subdivision (c) of the Drought Regulations, the Division's Deputy Director has delegated authority to issue an order requiring riparian or pre-1914 water rights holders to provide additional information. Section 879, subdivision (c), as it read at the time Order 2015-0002 was issued, stated:

Upon receipt of a complaint alleging interference with a water right by a riparian or pre-1914 appropriative water right holder or upon receipt of information that indicates unlawful diversions of stored water by riparians or pre-1914 appropriative water right holders, the Deputy Director may issue an order under this article requiring such water right holders to provide additional information regarding the property patent date, the date of initial appropriation, and diversions made or anticipated during the current drought year. Any water right holder receiving an order under this subdivision shall provide the requested information within five (5) days.

On July 23, 2014, the California Department of Water Resources (DWR) and the United States Bureau of Reclamation (Reclamation) (collectively, Project Agencies) alleged that southern and central Delta riparian and pre-1914 diverters were illegally diverting water stored and released

by the State Water Project and the Central Valley Project (collectively, Projects) and water acquired by their contractors through transfer and exchange agreements. The Project Agencies requested that the State Water Board exercise its statutory authority to require Delta water users to provide the State Water Board with information that: 1) supports the basis of any asserted right or rights; and 2) reflects the quantity of water diverted and expected to be diverted. On August 5 and 7, 2014, the State Water Contractors and Westlands Water District submitted letters in support of the Project Agencies' request.

On August 13, 2014, the Division received a complaint filed by the California Sportfishing Protection Alliance (CSPA) alleging: 1) illegal diversion of water from the San Joaquin, Mokelumne, Cosumnes, and Calaveras Rivers and Delta agricultural return flow by the Project Agencies at their Delta pumping facilities; and 2) illegal diversion of San Joaquin River riparian flow by Reclamation at its Friant Project. The letter states that it is a complaint against Reclamation and other unnamed diverters.

Stored water released by the Projects may be affected in two ways. As asserted in the July 23 letter, where water quality standards are controlling Project operations, any diversion by riparian and pre-1914 diverters of water the Projects release from storage to meet water quality standards necessitates additional releases of stored water, or reductions in Projects deliveries, to make up for the water diverted by those holders of riparian or pre-1914 rights. In addition, the Division notes that unauthorized diversions anywhere within the Sacramento and San Joaquin River Watershed and Delta may reduce instream flows in such that the Projects would need to increase reservoir releases to meet Delta water quality standards.

On September 24, 2014, the State Water Board convened a workshop on central and southern Delta water availability and use. The workshop's purpose was to receive comments and discuss the process that the State Water Board should use to address allegations and legal theories regarding the sources and quantity of water supplies available for diversion and use within the central and southern Delta. Representatives for the Project Agencies, CSPA, SJTA, Local Agencies of the North Delta, Kern County Water Agency, the State Water Contractors, and others presented information.

On November 23, 2014, the Division requested that Statement of Water Diversion and Use holders claiming riparian and pre-1914 rights in the Sacramento and San Joaquin River watershed and Delta who had not previously identified their year of first use do so. On February 4, 2015, the Division's Deputy Director signed Order 2015-0002. The order finds that the Deputy Director has information that indicates there may be unlawful diversions of stored water by riparian and pre-1914 appropriative water rights claimants in the Sacramento and San Joaquin River watershed and Delta. The order requires riparian and pre-1914 water right claimants along the Sacramento and San Joaquin River watershed and Delta to submit certain information to the Board. Specifically, claimants must provide their monthly diversion and the basis of right allowing such diversions for each month in 2014, projected diversions for 2015, the primary use of the water, the location of the point of diversion, the location of the place of use, and the purpose of use. Order 2015-0002 requires submission of supporting

documentation for the claimed right, including the property patent date and the date of initial appropriation. Information was required to be provided no later than March 6, 2015.

On March 6, 2015, the State Water Board received a Petition for Reconsideration submitted by SJTA within the 30 day deadline for petitions for reconsideration.

#### **4.0            ANALYSIS**

##### **4.1            *Legal Standard***

The State Water Board has “authority to prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis under which the right is held.” (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1487 [quoting *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 429 {internal quotation marks omitted}].) Section 879, subdivision (c) of the Drought Regulations authorized the Division’s Deputy Director to issue information orders to riparian and pre-1914 appropriative water right claimants when either of two conditions is met. The Deputy Director may act “[u]pon receipt of a complaint alleging interference with a water right by a riparian or pre-1914 water right holder,” or “upon receipt of information that indicates unlawful diversions of stored water by riparian or pre-1914 appropriative water right holders.” (§ 879, subd. (c) [as in effect when Order 2015-0002 was issued<sup>3</sup>].) An information order may require such water rights holders to provide additional information regarding the property patent date, date of initial appropriation, and diversions made or anticipated during the current drought year. (*Ibid.*)

To sustain an information order, information received by the Deputy Director must indicate unlawful diversion of stored water and indicate that riparian or pre-1914 appropriative water right holders are responsible. However, qualifying information need not identify or propose a particular culprit of unlawful diversion. This is clear from the text of the regulation, which uses the plural, “water right holders,” in describing the person or persons who commit the unlawful diversion that must be indicated. (§ 879, subd. (c).) This language contrasts with the regulatory text for complaints, which must allege interference with a water right by a singular “riparian or pre-1914 water right holder.” (*Ibid.*) If information received by the Division indicates unlawful diversions of stored water by riparian or pre-1914 water rights holders, the Division’s Deputy Director may use an information order to investigate whether such unlawful diversion is in fact occurring, identify which diverters are engaged in the unlawful diversion, and support such further corrective action as may be necessary.

The purpose of an information order as an investigation tool confirms this understanding of section 879, subdivision (c) of the Drought Regulations. Under the regulation, information orders serve to “provide certain information necessary for determining issues of relative priority” of riparian and pre-1914 water rights. (State Water Board Resolution 2014-0031, Finding No. 21.) Gathering this information is necessary “[g]iven complexities surrounding the relative priority of individual pre-1914 appropriative water rights and riparian water rights” (*ibid.*), which

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<sup>3</sup> The State Water Board amended and readopted section 879 on March 27, 2015. As amended, the circumstances under which the Deputy Director may issue information order under subdivision (c) have been broadened, but include all of the circumstances under which an information order could be issued previously.

prevented the State Water Board from issuing curtailment notices notwithstanding water scarcity due to the extraordinary drought. Information obtained from these orders assists Board staff “to investigate whether curtailment notices and potential enforcement under the Board’s existing processes should be pursued for these diverters based on the information received.”(*Ibid.*)

#### **4.2 Order WR 2015-0002-DWR is Proper Under the Drought Regulations**

The Project Agencies’ July 23, 2014 letter, testimony received during the State Water Board’s September 24, 2014 workshop, and general information concerning the Sacramento and San Joaquin River Watershed and Delta’s hydrology provide sufficient information as required by section 879, subdivision (c).

In their July 24, letter, the Project Agencies indicated that stored water is being unlawfully diverted in the Delta, based on a comparison of San Joaquin tributary inflows, Delta outflows measured at Vernalis, and the known water diversion requirements of central and southern Delta riparian and pre-1914 water users. “Current project flows at Vernalis, as well as natural inflow on upstream San Joaquin River tributaries, [were] considerably less than half of the Southern Delta diversion requirement.” (Letter from Director Mark Corwin, Department of Water Resources, and Regional Director David Murillo, U.S. Bureau of Reclamation, to Barbara Evoy (July 23, 2014), at p. 4.) Given these in-Delta diversion requirements, the shortage of natural flow on the lower San Joaquin River and the low readings at Vernalis indicated “that stored water is being diverted from other sources, presumably the Projects’ stored water or water contracted through transfer and/or exchange agreements.” (*Ibid.*)

Information received through the State Water Board’s September 24, 2014 workshop further supports the issuance of Order 2015-0002 and supports broadening the order’s scope to include not just those diverters that can physically divert stored water, but also to those that divert water anywhere in the watershed. For example, Curtis Creel, Assistant General Manager for Kern County Water Agency presented a chart depicting available water and projected diversions in the southern and central Delta. (Fig. 1)

Based on these figures, Creel argued that riparian and pre-1914 appropriative water rights holders in the southern Delta were diverting stored water illegally. The blue line represents an estimate of the unimpaired flows contributed by all tributaries to the San Joaquin River. (DVD of State Water Board Workshop on Central and Southern Delta Water Use (Sept. 24, 2014), Disc 2 [hereinafter Disc 2], 0:34:34 to 0:34:54.) The black line represents water flowing into the southern Delta, per measured flows recorded at the Vernalis gauge, combining natural flow and upstream reservoir operations. (*Id.* at 0:34:55 – 0:35:10) The red line represents an estimate of consumptive use in the southern Delta. (*Id.* at 0:35:42). The difference, the hashed area, “is an estimate of the impact to the state and federal projects. It represents water that would have been previously stored by those projects, and so therefore would represent project water.” (*Id.* at 0:36:10 to 30:36:30)

Based on the information presented, Creel concludes that riparian or pre-1914 appropriative water rights holders in the Delta are illegally diverting stored water. Key to Creel’s analysis, however, is the assumption that riparian and pre-1914 water rights holders further upstream on

the San Joaquin are not themselves illegally diverting stored water. “[T]he estimates of the unimpaired runoff, the blue line, does not factor in any of the upstream impairments that would occur by those diverters that are along the San Joaquin River and would have, presumably, rights to divert those flows.” (Disc 2 at 0:35:20 to 0:35:39)

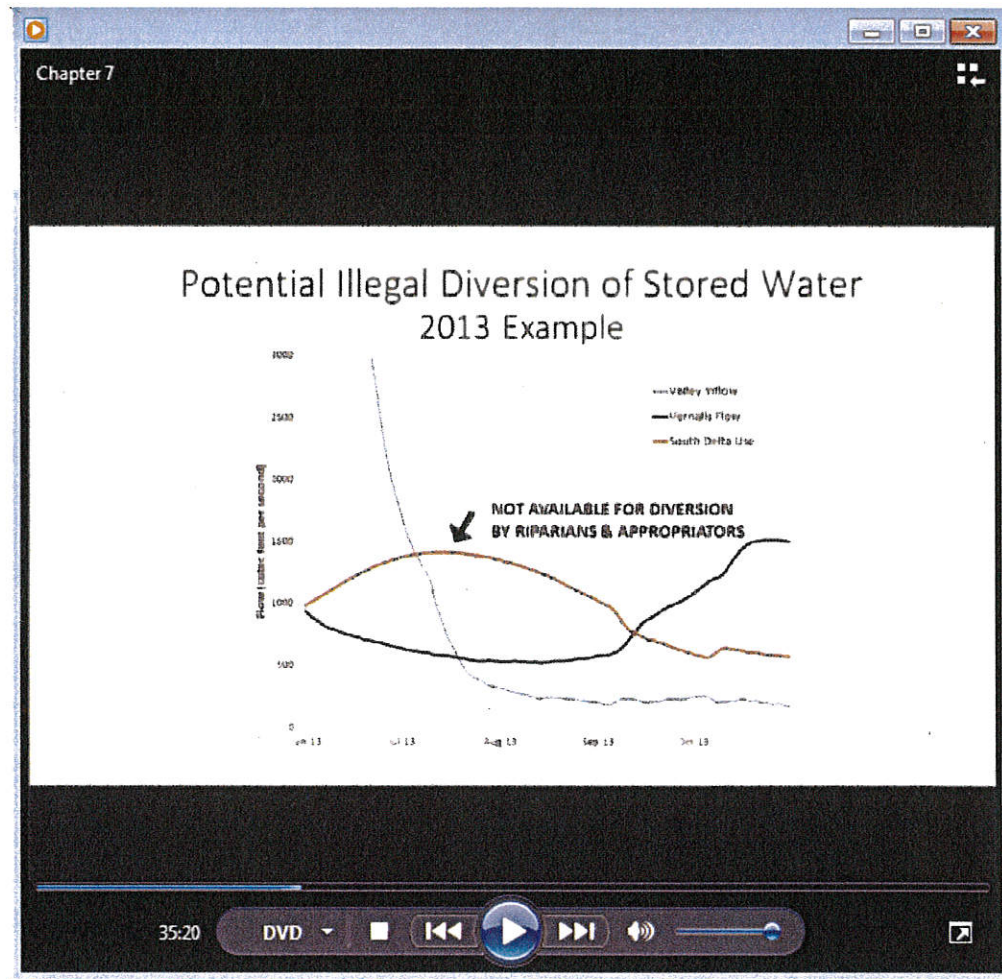


Figure 1: Screen capture from Curtis Creel's recorded testimony, *Public Workshop: Central and Southern Delta Water Availability and Use, September 24, 2014*

Creel's analysis helps illustrate a larger point about the possible diversion of stored water in the Sacramento and San Joaquin Rivers and Delta. The Sacramento and San Joaquin River Watershed and Delta are a complex network of waterways and flowing water. The Delta receives natural flows from its tributaries. It receives stored water from the Projects. It receives return flows from in-Delta water use. Many inputs and diversions are not well quantified. This creates "complexities surrounding the relative priority of individual pre-1914 appropriative water rights and riparian water rights." (State Water Board Resolution 2014-0031, Finding No. 21.) It also creates an opportunity for water users to continue to divert water under the fog of uncertainty created by lack of information on what water is being diverted under various rights, and also to attribute any unavailability of water at their point of diversion to illegal diversions by other water users.

The information included within the Project Agencies' July 23, 2014 letter and the testimony provided during the Board's September 24, 2014 workshop is sufficient to indicate unlawful diversions of stored water, but this conclusion comes with significant limitations. Importantly, this conclusion concerns the sufficiency of the information for purposes of issuing an information order under section 879, subdivision (c). Not surprisingly, the threshold for supporting an information order is necessarily less than the evidentiary burden that would be necessary to establish whether a particular water right holder is unlawfully diverting water. Nothing in the Deputy Director's order or this order on reconsideration constitutes a final determination that the water availability analysis conducted by the Division is sufficient for purposes of proving an unauthorized diversion by an individual water right holder.

#### **4.3            *Including Petitioner Within the Information Order's Scope Was Proper***

Petitioner argues that the State Water Board should have limited Order 2015-0002 solely to riparian and pre-1914 appropriative water rights holders in the central and southern Delta. Yet had the Board done so, water users in the central and southern Delta could have claimed to divert only natural flow and object that others, perhaps water users on the San Joaquin, were responsible for diverting water to which they were legally entitled. Had the Board limited Order 2015-0002 to the southern Delta and San Joaquin River water users, those users could cite "the lack of information currently existing in the Delta," as Valerie Kincaid did for SJTA (Disc 2, 1:39:25 to 1:39:27), and allege that Sacramento River or northern Delta water users were diverting stored water. North Delta water users, in turn, could have argued, as Eric Ringelberg did for Local Agencies of the North Delta, that "I feel we lack the substantive information to make the assertion that the water they [the Project Agencies] are claiming is theirs is really theirs." (Disc 2, 0:26:35 to 0:26:45). In the meantime, illegal diversions of stored water would continue, and water rights holders denied delivery of water due to illegal diversion of stored water would continue to suffer through California's record-breaking drought.

Information received by the Division indicates that some quantity of stored water is being illegally diverted by riparian or pre-1914 appropriative water rights holders in the Sacramento and San Joaquin Rivers and Delta. Without a comprehensive investigation and accounting of water diversions by riparian and pre-1914 appropriative water right holders, any water user in the Delta could unlawfully divert stored water and attribute lack of availability of water under its own right to use of its water by other diverters. A comprehensive information order, such as that issued by the Deputy Director, is the best tool for the Division to assess whether the illegal diversion of stored water is occurring and "investigate whether curtailment notices and potential enforcement under the Board's existing processes should be pursued for these diverters based on the information received." (State Water Board Resolution 2014-0031, Finding No. 21.)

#### **5.0            CONCLUSION**

The San Joaquin Tributaries Authority's Petition for Reconsideration is denied because it fails on the merits, as explained above. Order 2015-0002 is based on sufficient information to indicate unlawful diversions of stored water by some members of a group of riparian and pre-1914 appropriative water right holders, which includes Petitioner. Moreover, the Deputy

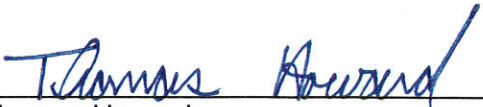


Director properly issued the Information Order, and the information requested is within the authority conveyed by the Drought Regulations.

**ORDER**

The State Water Board finds that the challenged actions were appropriate and proper. Accordingly, Petitioner's Petition for Reconsideration is denied.

Dated: 10/7/15

  
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Thomas Howard  
Executive Director