

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2015-0041-EXEC

In the Matter of the Petition for Reconsideration of the

West Side Irrigation District

Regarding Order WR 2015-0024-DWR

Order for Additional Information in the Matter of Diversion of Water by West Side
Irrigation District License 1381

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:

1.0 INTRODUCTION

The West Side Irrigation District (WSID or Petitioner) has petitioned the State Water Resources Control Board (State Water Board or Board) for reconsideration of State Water Board Order WR 2015-0024-DWR (Order 2015-0024 or Informational Order), a July 17, 2015 Order that, as revised on August 7, 2015, requires WSID to submit certain information to the Division of Water Rights (Division). The Deputy Director for the Division of Water Rights (Deputy Director) signed the Informational Order pursuant to her authority under title 23, section 879, subdivision (c) of the California Code of Regulations.¹

WSID presents various arguments that the Informational Order denied WSID a fair hearing, is not supported by substantial evidence, and commits error in law. More specifically, Petitioner alleges that the Informational Order is "based solely on the State Water Board's conclusions of law and fact that there is no water available for WSID to divert," a conclusion allegedly made in violation of WSID's right to procedural due process. (Petitioner's Memorandum of Points and Authorities in Support of Petition for Reconsideration (MPA), at p. 7:4-5; see generally MPA 6:6 to 7:8.) WSID objects that the Informational Order is not based on substantial evidence because the Division "has not provided Petitioner with information supporting the Notices." (MPA 7:11-12.)

¹ Unless otherwise indicated, all future citations are to title 23 of the California Code of Regulations.

A petition must identify the specific State Water Board action for which the petitioner requests reconsideration, "the reason the action was inappropriate or improper," and "the specific action which petitioner requests," and must also contain "a statement that copies of the petition and accompanying materials have been sent to all interested parties." (Cal. Code Regs., tit. 23, § 769, subs. (a)(2), (4)–(6).) 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 filed within 30 days of the decision or order at issue. (Cal. Code Regs., tit. 23, § 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. (*Id.*, § 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board 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.*, subs. (a)(2)(A)-(C).) The Board may elect whether or not to hold a hearing on a petition for reconsideration.

3.0 BACKGROUND

California is suffering through the most severe drought in the state's recorded history. These conditions 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. Water levels in most of the state's major reservoirs have been depleted to one third or less of storage capacity as of October 18. This includes Shasta, Oroville, New Melones, Folsom, and Millerton reservoirs. (Department of Water Resources, Daily Statewide Hydrologic Update (Oct. 18, 2015) <<http://cdec.water.ca.gov/floodER/hydro>>.) Cities, farmers, and millions of Californians are contending with water scarcity.

WSID holds water right License 1381, originally issued on September 29, 1933, and amended on August 19, 2010. License 1381 has a priority date of April 17, 1916, and authorizes the direct diversion of 82.5 cubic-feet per second (cfs) from Old River in San Joaquin County from April 1 to October 31 of each year for irrigation, municipal, domestic and industrial uses. The maximum amount diverted under License 1381 shall not exceed 27,000 acre-feet per year. The District does not hold or claim any other appropriative or riparian water rights.

On January 17, 2014, Governor Edmund G. Brown, Jr. issued Proclamation No. 1-17-2014, declaring a drought State of Emergency to exist in California due to severe drought conditions. The Proclamation notes that California is experiencing record dry conditions, with 2014 projected to become the driest year on record. The Proclamation also calls on all Californians to reduce their water usage by 20 percent.

Also on January 17, 2014, the State Water Board issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice). The 2014 Shortage Notice alerts water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.

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 declares a continuing State of Emergency and finds that the ongoing 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.

On May 6, 2014, the Tracy City Council authorized the Mayor of Tracy contract with WSID for the sale of Tracy's treated wastewater. (City of Tracy Resolution 2014-065.) The City and WSID executed a Wastewater Revocable License Agreement on June 19, 2014 (2014 Contract).

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" (2014 Unavailability Notice), which notified all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds, including WSID, of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The Board subsequently notified right holders in stages, based on relative seniority of the rights, as water became available to serve their rights. By November 19, 2014, the Board had notified all right holders of availability for all diversions in the Sacramento and San Joaquin River watersheds.

On June 9, 2014, WSID submitted a curtailment certification form in response to the 2014 Unavailability Notice (2014 Curtailment Certification). The certification indicates that WSID continued to divert alternative sources of water during 2014, including contract water purchased from the City of Tracy's wastewater treatment plant and water from "Tile Drains Into District Intake [sic]."

On July 2, 2014, the State Water Board adopted an emergency regulation for curtailment of water diversions to protect senior water rights pursuant to section 1058.5 of the Water Code. (State Water Board Resolution 2014-0031 [adding sections 875 and 878.3 and amending sections 878.1 and 879].) These regulations were reviewed by the Office of Administrative Law and went into effect July 16, 2014. As it was then enacted, section 879, subdivision (c) establishes requirements for riparian and pre-1914 rights

holders to provide additional information in specific circumstances and authorizes the Deputy Director to issue Informational Orders.

On January 23, 2015, the State Water Board issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice). The 2015 Shortage Notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy some junior water right priorities.

On March 17, 2015, the State Water Board amended and re-adopted its drought emergency regulations providing informational order authority, pursuant to section 1058.5 of the Water Code. (State Water Board Resolution 2015-0015 [amending and readopting section 879, subdivision (c)] [Informational Order Regulations].) The Informational Order Regulations, as amended, went into effect on March 27, 2015 after review by the Office of Administrative Law. The regulations authorize the Deputy Director for the Division to issue orders requiring diverters to provide specific information in specific circumstances. These circumstances include the Deputy Director's receipt of "information that indicates actual or threatened unlawful diversions of water" by any water right holder, diverter, or user. (Cal. Code Regs., tit. 23, § 879, subd. (c).)

On March 3, 2015, the Tracy City Council adopted a new resolution authorizing the Mayor to execute a new contract for sale of treated wastewater to WSID. (City of Tracy Resolution 2015-033.) The City and WSID executed the new agreement on March 26, 2015 (2015 Contract).

On April 1, 2015, Governor Brown issued Executive Order B-29-15 (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 ongoing severe drought conditions present urgent challenges across the state including water shortages for municipal 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 persist. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014 Proclamation, April 25, 2015 Proclamation, and Executive Orders B-26-14 and B-28-14 remain in full force and effect.

On April 2, 2015, the State Water Board issued another general warning that, due to drought conditions, there would likely be insufficient water available to serve all water rights in the near future.

On April 23, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with Post-1914 Appropriative Rights" (April Unavailability Notice). The April Unavailability Notice notifies all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their rights, with some minor exceptions for non-consumptive diversions. This notice was mailed to all post-1914 appropriate water rights holders in the San Joaquin River watershed located upstream of the confluence of the Mossdale Bridge and the San Joaquin River. Post-1914 appropriative water right holders having rights to the San Joaquin River but located in the Delta below Mossdale Bridge did not receive this notice because the conservative analysis used for determining water availability suggested that Sacramento River flows were still available for some Delta diverters. The data and analyses supporting the April Unavailability Notice were posted on the State Water Board's drought webpage that same day.

On May 1, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento River Watershed and Sacramento-San Joaquin Delta with a Post-1914 Appropriative Right" (May Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the Sacramento River and Sacramento-San Joaquin Delta watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions.

On May 8, WSID filed a petition for reconsideration of the May Unavailability Notice. State Water Board Chief Counsel Michael Lauffer responded to the petition by letter dated July 30, 2015.

On May 14, 2015, WSID submitted a curtailment certification form (2015 Curtailment Certification).

On May 18, 2015, John Collins, Staff Environmental Scientist for the Office of the Delta Watermaster, inspected WSID's pumping station located in Tracy, California. Mr. Collins observed two of the District's pumps running. The pump station operator informed Mr. Collins that WSID was pumping tail water runoff from Bethany Drain at an estimated 8 cfs. Mr. Collins' report and photographs indicate that these pumps draw water from Old River Cut.

On June 12, 2015, the State Water Board issued a "Notice of Unavailability of Water and Need for Immediate Curtailment for Those Diverting Water in the Sacramento-San Joaquin Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After 1903" (June Unavailability Notice), which notifies all holders of pre-1914 appropriative water rights with a priority date of 1903 or later within the Sacramento and

San Joaquin River watersheds of the lack of availability of water to serve their water rights, with some minor exceptions for non-consumptive uses.

On June 29, 2015, WSID, Central Delta Water Agency, South Delta Water Agency, and Woods Irrigation Company filed an action in Sacramento County Superior Court, case number 34-2015-80002121 challenging the May Unavailability Notice and the June Unavailability Notice. On June 30, WSID and co-plaintiffs applied ex parte for a stay or temporary restraining order enjoining the Board's operation of the unavailability notices.

On July 7, Judge Shelleyanne Chang conducted an ex parte hearing in the WSID case. On July 10, Judge Chang partially granted WSID's application for a temporary restraining order and issued an order to show cause why a preliminary injunction should not issue (TRO). (*WSID, et al. v. State Water Board* (Super. Court Sacramento County, 2015, No. 2121).) The TRO restrained the Board from taking any action "on the basis of the 2015 Curtailment Letters sent by the Water Board's Executive Director, Thomas Howard, or on the basis of a failure to complete a Curtailment Certification Form." (*Id.* at p. 5.)

Also, on July 7, 2015, WSID's counsel submitted a letter to the Executive Director of the State Water Board rescinding WSID's 2015 Curtailment Certification. The July 7 letter stated that WSID reserved the right to resume pumping at some time in the future.

On July 8, 2015, Tracy City Manager Troy Brown informed WSID's Board of Directors by letter that the Tracy City Council had voted to terminate the 2015 Contract.

On July 15, 2015, the State Water Board took steps, consistent with Judge Chang's TRO, to modify the May Unavailability Notice and June Unavailability Notice. The Board issued a new notice clarifying and partially rescinding the Unavailability Notices (July Clarification Notice).² The July Clarification Notice indicated that, to the extent that any of the notices described above contain language that may be construed as an order requiring water right holders to curtail diversions under affected water rights, that language was rescinded. Language that may be construed as requiring affected water right holders to submit curtailment certification forms was also rescinded.

On July 17, 2015, the Deputy Director signed Order 2015-0024 pursuant to title 23, section 879, subdivision (c) of the California Code of Regulations. On August 7, 2015, the Division revised and re-issued Order 2015-0024. As revised, the order finds that the Deputy Director has information that indicates WSID is diverting or threatening to divert water in excess of that available to serve License 1381 without a valid basis of right. The order requires WSID to submit certain information to the Division, including monthly

² This order will refer to the April Unavailability Notice, the May Unavailability Notice, and the June Unavailability Notice collectively as the Unavailability Notices.

amounts of water diverted by WSID and the basis of right for diversions, identification of the point of diversion and place of use for water rights claimed by WSID, identification and location of all points of discharge of WSIDs tile drains, and identification the methods used to determine discharges relied upon to support corresponding diversion amounts. This information was to be provided no later than 30 days from the effective date of the revised order.

On July 30, Judge Chang heard arguments on the order to show cause why a preliminary injunction should not issue. On August 3, Judge Chang issued a minute order denying the preliminary injunction and lifting the TRO. Judge Chang concluded that the July Clarification Notice cured the court's due process concerns with the May Unavailability Notice and June Unavailability Notice.

On August 14, the Judicial Counsel assigned the WSID lawsuit and other coordinated actions to be heard in Santa Clara County Superior Court. On September 2, the court assigned Judge Peter Kirwan as the coordination trial judge.

On September 4, 2015, the Division received WSID's timely petition for reconsideration and supporting memorandum of points and authorities.

On September 8, WSID filed an "Amended and Supplemental" petition and complaint in Santa Clara, adding new causes of action that include a challenge to the Informational Order. WSID applied ex parte the following day to stay further action by the Board.

On September 24, 2015, the court issued an order after hearing denying WSID's request for stay. The order allowed the proceedings before the Board to proceed.

On October 14, 2015, WSID and the Byron-Bethany Irrigation District filed a petition for writ of mandate in the California Court of Appeal, Sixth Appellate District, to request review of Judge Kirwan's September 24 Order.

4.0 ANALYSIS

4.1 *Legal Standard*

The State Water Board has the "authority to prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis under which the right is held." (*California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 429.) Pursuant to Water Code section 1058.5, the State Water Board may adopt emergency regulations under certain drought conditions

[T]o prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, to require curtailment of diversions when water is

not available under the diverter's priority of right, or in furtherance of any of the foregoing, to require reporting of diversion or use or the preparation of monitoring reports.

(Wat. Code, § 1058.5, subd. (a)(1).) The Board adopted section 879, subdivision (c) pursuant to this authority.³ Section 879, subdivision (c) provides, in relevant part, as follows:

(c)(1) The Deputy Director may issue an informational order, as provided in paragraph (2), in any of the following circumstances:

...

(D) Upon receipt of information that indicates actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversions of water by any water right holder, diverter or user.

(2) The Deputy Director may issue an order under this article requiring a water right holder, diverter or user to provide additional information related to a diversion or use described in (c)(1), including the claim of right; property patent date; the date of initial appropriation; diversions made or anticipated during the current drought year; basis of right and amount of a water transfer not subject to approval of the Board or Department of Water Resources; or any other information relevant to authenticating the right or forecasting use and supplies in the current drought year.

(3) Any party receiving an order under this subdivision shall provide the requested information within thirty (30) days. The Deputy Director may grant additional time for submission of information supporting the claim of right upon substantial compliance with the 30-day deadline and a showing of good cause.

(4) The failure to provide the information requested within 30 days or any additional time extension granted is a violation subject to civil liability of up to \$500 per day for each day the violation continues pursuant to Water Code section 1846.

(Cal. Code Regs., tit. 23, § 879, subd. (c).)

To sustain an informational order, information received by the Division must indicate actual or threatened unlawful diversion of water and indicate that a water right holder,

³ A full description of the basis for adopting section 879, subdivision (c) and materials associated with its adoption are posted online at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/emergency_regulations.shtml.

diverter, or user is responsible. In this context, to indicate is “to point out or to point to” or “to be a sign, symptom, or index” of something. (Merriam-Webster’s Collegiate Dict. (10th ed. 2001) p. 591, col. 1.) To “threaten” is to “give signs or warning of.” (*Id.*, p. 1224, col. 2.) Thus, to sustain an informational order, the Deputy Director must have received information that points out, points to, or is a symptom of actual unlawful diversion or that indicates signs or warning of unlawful diversions by any water right holder, diverter, or user.

Section 879, subdivision (c) helps the Board effectively administer California’s water rights system during the ongoing drought emergency and “account for all diversions, project water availability, and ensure that water is used solely by persons holding valid water rights.” (State Water Board Resolution 2015-0015 (2015), Finding No. 5.) Information obtained from these orders helps Board staff “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.) The State Water Board revised and readopted the Drought Regulations in part to address situations where “diverters have responded to curtailment inspections or notices by asserting the right to divert under the right of another.” (State Water Board Resolution 2015-0015, Finding No. 7.) Where the point of diversion or place of use of another is changed to transfer water to the diverter subject to the inspection or notice, that change may not create a new water right and must not injure other legal water users. (See Wat. Code §§ 1210-11, 1702, 1727, 7075.) The Board recognized that “[c]ompliance with these requirements can be difficult to ensure, particularly in drought hydrology,” and particularly where diverters assert “claims to divert under a contract or water transfer for which the Board has not approved a change petition and for which no record has been filed with the Board.” (State Water Board Resolution 2015-0015 (2015), Finding No. 7.) The Board adopted section 879, subdivision (c) to give the Division clear authority to verify such water rights when they are asserted.

The level of proof required to support an informational order is necessarily less than the evidentiary burden to establish whether a particular water right holder is unlawfully diverting water. The Deputy Director’s issuance of an informational order does not constitute a final determination that an unlawful diversion did in fact occur or is in fact threatened to occur. Informational orders are based on indications, sufficient to justify further inquiry, that an unlawful diversion has occurred or is threatening to occur. If the available information supports enforcement, not just further investigation, a Division

prosecution team must prove unlawful diversion or the threat of unlawful diversion⁴ after the Board provides notice and the opportunity for a hearing, if a hearing is requested. (Wat. Code, §§ 1055, subd. (c), 1834; see also *id.*, § 183; *Mathews v. Eldridge* (1976) 424 U.S. 319, 332-335.)

4.2 *WSID Was Not Prevented From Having a Fair Hearing by Any Irregularity in the Proceedings or Any Ruling or Abuse of Discretion*

4.2.1 *The Board Properly Adopted Section 879, Subdivision (c)*

In arguing that section 879, subdivision (c) does not apply to WSID because of the basis of right for its diversions, WSID asserts that “[t]he Legislature could not have intended to afford the State Water Board such broad authority, and if they did, it [is] certainly not clear anywhere on the face of section 879(c).” (MPA 12:28 to 13:2.) Because the Board, and not the Legislature, enacted the Drought Regulations, it is not clear whether petitioner intended to challenge the Board’s authority to adopt section 879, subdivision (c). Regardless, the Water Code, the California Constitution, and case law give the Board ample authority.

The California Constitution forbids the waste, unreasonable use, or unreasonable method of use of California’s scarce water resources. (Cal. Const., art. X, § 2.) As the regulatory agency charged with administering water rights, 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]; accord *Young v. State Water Board* (2013) 219 Cal.App.4th 397 (*Young*)). In addition, the Board has an independent obligation to consider harm to public trust resources and to protect those resources where feasible. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 444.) The unauthorized diversion or use of water is a trespass against which the Board may bring administrative enforcement actions. (Wat. Code, §§ 1052, subds. (a), (d), 1831.) The Water Code gives the Board authority to hold any hearing and conduct any investigation necessary to carry out its vested powers. (*Id.*, § 183.) The Board may investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water for the purpose of administering the water rights system. (*Id.*, § 1051, subd. (a).)

The Legislature has given the State Water Board additional powers to conserve water and prevent waste and unreasonable use during a declared drought emergency. The

⁴ A cease and desist order may be based on either proof of unlawful diversion use or of the threat of unlawful diversion or use. (Wat. Code § 1052.) Administrative civil liability cannot be imposed based on the threat of unauthorized diversion and use alone. (See *id.*, § 1831.)

Board may enact emergency regulations to prevent waste or unreasonable use of water, promote water conservation, and require curtailment of diversions when water is not available under the diverter's priority of right. (Wat. Code, § 1058.5, subd. (a).) The Board may also require additional reporting of diversions and use through an emergency regulation. (*Ibid.*) Drought emergency regulations remain in effect for 270 days, and the Board may readopt these emergency regulations if drought emergency conditions persist. (*Id.*, subd. (c).)

The State Water Board adopted section 879, subdivision (c) in its current form at a public meeting held March 17, 2015. (State Water Board Resolution 2015-0015.) This action revised and amended previous drought regulations adopted on July 2, within the 270 day effective period of the previous regulation. (*Ibid.*; see also State Water Board Resolution 2014-0031.) The Office of Administrative Law reviewed and approved both versions of the regulation per section 1058.5 of the Water Code and applicable sections of the Government Code. WSID has not identified or even alleged any defects in these proceedings. Section 879, subdivision (c) was properly adopted, and the Deputy Director may lawfully issue informational orders when the circumstances specified in the regulation are met.

4.2.2 *WSID Was Not Denied a Fair Hearing*

WSID asserts that “[t]he requests made in the Informational Order are based solely on the State Water Board’s conclusions of law and fact that there is no water available for WSID to divert under its priority of right,” and further argues that this conclusion was made illegally. (MPA 7:4-8.) For this reason, WSID asserts that it was denied a fair hearing and requests reconsideration pursuant to section 768, subdivision (a). However, Petitioner’s argument relies on a faulty premise.

The Informational Order is not based on the Unavailability Notices. The Informational Order is based on information made available to the Deputy Director, as explained in Section 4.3, below. This information includes Mr. Collins’ inspection report, the 2014 Contract and 2015 Contract, diversion records provided by the City, maps, aerial photographs, data and analyses of water availability in the Sacramento and San Joaquin River watersheds, and statements by WSID’s counsel and staff. This information indicates actual or threatened unlawful diversions of water by WSID. This is sufficient to sustain an informational order under section 879, subdivision (c), which does not require the Deputy Director to prove that water was actually unavailable to serve Petitioner’s water right.

4.3 *Order 2015-0024 Is Supported By Substantial Evidence*

4.3.1 *Order 2015-0024 is Supported by Substantial Evidence Indicating Actual Unlawful Diversion*

WSID asserts that certain findings in the Informational Order were not based on substantial evidence. To issue an informational order, the Deputy Director must have received information that indicates actual or threatened unlawful diversion by any water right holder, diverter, or user. (§ 879, subd. (c).) Order 2015-0024 summarizes evidence received by the Deputy Director in its findings and concludes that “[t]he circumstances described above indicate that WSID is diverting, or is threatening to divert, water in excess of that available to serve License 1381, without a valid basis of right.” (Order 2015-0024, Finding No. 29.)

Division staff prepare a monthly supply and demand analysis for water rights in the Sacramento and San Joaquin River and Delta watersheds. This analysis is presented in charts available on the State Water Board Drought Year Actions webpage and updated monthly as new information becomes available. Analysis for the months of April, May, June, July, and August were available to the Deputy Director at the time that she issued the Informational Order. According to the charts, water demand to serve pre-1914 and riparian rights exceeds the calculated natural flow from the end of May through August in both the Sacramento River and the San Joaquin River. The analysis accounts for in-Delta demand.

This analysis indicates that water was generally not available to serve post-1914 water rights in the Delta, a category which includes License 1381, from May through August in 2015. Accordingly, based on that analysis, diversion under post-1914 Delta water rights could be found to be unlawful.⁵ The Division performed a similar analysis in 2014, which indicated that water was not then generally available to serve post-1914 rights in the Sacramento and San Joaquin Rivers from early May to the end of September or later.

Information available to the Deputy Director indicates that WSID actually diverted water during a period when water was not generally available to serve post-1914 rights in the Delta and that WSID did not, at that time, have other rights to divert the quantity of water it was diverting. John Collins, Staff Environmental Scientist for the Office of the Delta Watermaster, performed a site inspection on WSID’s pumping station on May 18, 2015. Mr. Collins reported that certain pumps were running on the day he visited WSID’s facility. His report indicates that he spoke with Rick Martinez, the individual responsible for operating WSID’s pumping station. Mr. Collins’ report notes that Mr. Martinez stated these pumps were “capturing tail water from Bethany Drain at an

⁵ A conclusive determination as to whether water was actually available to divert under License 1381 is not necessary to sustain Order 2015-0024. (See section 4.1, *supra*.) Nothing in this order should be construed as a final determination on the question of whether or not water was legally available to divert under License 1381 during the time period at issue or whether any particular diversions by WSID were adequately supported by alternate valid rights to divert water. This order is based on whether WSID has adequately shown cause for reconsideration of Order 2015-0024 pursuant to section 768.

estimated rate of 8 cubic feet per second” for the purpose of “re-capturing and re-diverting the tailwater to farmers within the boundaries of WSID.” However, Mr. Collins’ report and accompanying photographs indicate that these pumps draw water from Old River Cut. Mr. Collins did not independently evaluate the rate of diversion during his inspection.

Mr. Collins’ report is summarized in finding 16 of the Informational Order, to which WSID has not objected. His observations are confirmed by statements from WSID and its counsel to Division staff and counsel. On June 12, 2015, Karna Harrigfeld, counsel for WSID, sent an email to Andrew Tauriainen, an attorney with the Office of Enforcement who advises the Division prosecution team, with the subject “RE:WRO 95-09.” In her email, Ms. Harrigfeld provides legal arguments “submitted by The West Side Irrigation District and [that] should be construed solely as [WSID’s] opinion.” Ms. Harrigfeld stated that WSID “continues to divert its accretions that flow into [its] [i]ntake channel,” i.e. into Old River Cut. Her statements indicate that WSID was diverting water from Old River Cut as of June 12.

Bethany Drain discharges into the Old River Cut to the north of WSID’s pumping station and south of Old River. Based on a review of aerial photographs available to Deputy Director, it appears that any Bethany Drain discharge that is not pumped south to the WSID pumping station would flow north to Old River or remain in the Old River Cut. A map of San Joaquin County irrigation districts received by the Deputy Director indicates that lands served by WSID, Byron-Bethany Irrigation District (BBID), and Naglee-Burk Irrigation District (NBID) converge near the Old River Cut and abut a parcel not served by any irrigation district (Old River Parcel). A review of aerial photographs received by the Deputy Director further indicates that these lands border the Old River Cut or Bethany Drain. Fields that appear to be served by NBID abut channels connected to Bethany Drain. Smaller channels or pipes physically connected with Bethany Drain appear to originate within these fields. The Old River Parcel either abuts or is bisected by a large channel that also appears physically connected with the Bethany Drain channel. It is unclear whether fields served by BBID are physically connected to the Old River Cut because of a line added to the aerial photograph to indicate Bethany Road.

WSID’s attorney and staff have stated that WSID is diverting “tailwater runoff from Bethany Drain” from its pumping station on the Old River Cut. (Collins Inspection Report, June 18, 2015, p.2.) However, it is not possible, from available information, to adequately determine the quantity and source of the return flows WSID claims to be diverting. Any water in Old River Cut in excess of the volume of WSID’s return flows would have to come from Old River or from BBID, NBID, or Old River Parcel return flows discharges. Furthermore, when WSID’s return flows do not constitute the entirety of the flows in Old River Cut, those return flows would comingle with water in Old River

Cut before being diverted by WSID, potentially improving the quality of water diverted. The Informational Order seeks additional information regarding the amount of its diversions and the location and amount of discharge from its tile drains. (Order 2015-0024, ordering paragraph number 2(B).)

Moreover, because WSID is diverting from Old River Cut, not reusing tail water before it returns to a stream, lake or other body of water, WSID's argument that it is pumping return flows does not establish that its appropriation is authorized. Water returned to a stream, lake or other body of water after it is diverted and used is subject to appropriation, and WSID cannot divert and use these return flows without an appropriative right to do so. (See Wat. Code, §§ 1202, subd. (d), 1225.) Information indicates that water is not available to serve License 1381. WSID has not identified any appropriative right that would allow it divert irrigation return flows after they have flowed into the Old River Cut through Bethany Drain. Under some circumstances, an appropriator who imports water from another watershed may reclaim that water after it has been commingled with other sources. (See Wat. Code, § 7075; *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 301.) The evidence does not indicate that imported water is involved, however, or that any party with an appropriative right to recapture the return flows from imported water has authorized WSID to make use of that right. Taken together, the available information indicates unlawful diversion or the threat of unlawful diversion by WSID.

4.3.2 Order 2015-0024 is Supported by Substantial Evidence Indicating the Threat of Unlawful Diversion

Additional information indicates that WSID threatened to divert water during a period in which information indicated that water was not available to serve post-1914 rights in the Delta. WSID's 2014 Curtailment Certification indicates that WSID then intended to serve its place of use with reclaimed water from its tile drains and with contract water purchased from the City of Tracy. WSID has never rescinded its 2014 Curtailment Certification and has never objected to filing a curtailment certification for 2014. On May 6, 2014, the Tracy City Council authorized the Mayor of Tracy to contract with WSID for sale of treated wastewater. (City of Tracy Resolution 2014-065.) The Mayor and Jack Alvarez, WSID's president, executed the 2014 Contract on June 19, 2014.

Tracy discharges wastewater into Old River, upstream from WSID's point of diversion. (2014 Contract, p. 1, recitals (b), (e).) The 2014 Contract allows WSID to divert all wastewater discharges "during the term, which amount may vary on a daily basis, but is estimated to be approximately 14 cfs on a continuous daily basis" from its intake canal for a price of thirty dollars per acre foot. (*Id.*, pp. 2-3, terms 4, 5, 9.) Parties were to coordinate on the amount of water available for diversion on a weekly basis, and WSID was to report its diversions to the City on a monthly basis. (*Id.*, p. 2, term 7.)

Notwithstanding section 1211 of the Water Code, the City did not file a wastewater change petition with the State Water Board, apparently believing that one was not required. (See *id.*, pp. 1-2, recitals (f)-(h); but see Wat. Code §§ 1210-11.) Martha Lennihan, the City's attorney, presented arguments to this effect in a June 2 email to Andrew Tauriainen. The 2014 Contract expired on October 21, 2014. (2014 Contract p. 2, term 3.) Documents submitted by the City indicate that WSID diverted a total of 1,287.39 acre feet under the 2014 agreement.

On March 3, 2015, the Tracy City Council adopted a new resolution authorizing the Mayor to execute a new contract for sale of treated wastewater to WSID. (City of Tracy Resolution 2015-033.) The City and WSID executed the 2015 Contract on March 26, 2015. The 2015 Contract contains identical terms and recitals as to the point of diversion, point of discharge, rate of discharge, price, and reporting requirements. (See 2015 Contract, p. 1, recitals (b), (e); *id.*, pp. 2-3, terms 4, 5, 7, 9.) Tracy and WSID also made identical recitals pertaining to section 1211 of the Water Code. (See *id.*, pp. 1-2, recitals (f)-(h).)

The 2015 Contract was set to expire on October 31, 2015. (2015 Contract, p. 2, term 3.) However, Tracy revoked the 2015 Contract by letter dated July 8, 2015, due to "conditions imposed by the California State Water Resources Control Board." (Tracy City Manager Troy Brown, letter to West Side Irrigation District Board of Directors, July 8, 2015; see also 2015 Contract, p. 3, term 11 [establishing right to revoke with three days prior written notice].) Karna Harrigfeld informed Andrew Tauriainen that WSID "has NOT diverted ANY water pursuant to the 2015 agreement" by email dated June 22, 2015. On July 1, 2015, Martha Lennihan told Mr. Tauriainen by email that "[a]s Karna earlier confirmed to you, there have not been any diversions under the 2015 agreement." Neither the City nor WSID have provided any records to the Division substantiating their statements that WSID did not divert water under the 2015 Contract. WSID diverted 156.62 acre feet during June 2014 and 544.81 in July 2014 under the 2014 Contract, according to City records provided by Ms. Lennihan.

On or about July 7, 2015, the Division received an email from Jeanne Zolezzi, counsel for WSID. The email was addressed to Thomas Howard, Executive Director for the State Water Board, with the subject line "The West Side Irrigation District/Curtailment Certification Form." The message purports to rescind WSID's 2015 Curtailment Certification. Her email states that WSID reserves the right "to commence the absolute minimum pumping required to sustain the permanent crops throughout the District." It is not clear from information available to the Deputy Director whether this statement refers to diversions of reclaimed tile drain water, 2015 Contract water, or both. This statement could reasonably be construed by the Deputy Director to give signs or warning of, i.e.

threaten, future diversion by WSID. (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 1224, col. 2.)

Statements by Ms. Zolezzi on behalf of WSID and the circumstances surrounding WSID's contract with the City indicate a threat of unlawful diversion. For this reason, the Informational Order requires WSID to submit diversion records and identify the basis of right for its diversions. This will allow the Division to evaluate the threat and verify assertions by Ms. Harrigfeld and Ms. Lennihan that no diversions occurred under the 2015 Contract. The Executive Director received information indicating the threat of unlawful diversion by WSID, as required to sustain an informational order under section 879, subdivision (c) of the Drought Regulations.

4.4 *Petitioner's Arguments that the Deputy Director Committed Error in Law are Without Merit*

4.4.1 *WSID's Arguments Concerning the July 10 TRO are Inapposite Because the Informational Order is not Based on WSID's 2015 Curtailment Certification*

WSID asserts that the Division obtained the 2015 Curtailment Certification in violation of WSID's due process rights and Judge Chang's July 10 TRO. (MPA 13:27 to 14:2.) According to WSID, the TRO forbids the State Water Board from "utiliz[ing] any information contained in the Certification as a basis for supporting the Information[al] Order." (MPA 14:20-21.) This interpretation is puzzling, since the TRO restrains the Board from "taking any action against [WSID] on the basis of a failure to complete a Curtailment Certification Form." (TRO at p. 5; accord MPA at 14:17-20.) The Division has not taken any action against WSID based on any failure to complete a Curtailment Certification.

As already noted, the Informational Order is based on information available to the Deputy Director, including Mr. Collins' inspection report, the 2014 Contract and 2015 Contract, diversion records provided by the City, maps, aerial photographs, statements of WSID's counsel and staff, and the basin wide water availability analysis. Petitioner makes no discernible effort to explain or justify its conclusory assertions to the contrary. Petitioner does not identify any evidence discussed in the Informational Order that relies on the 2015 Curtailment Certification. The Informational Order is not based on a failure to complete a Curtailment Certification Form or the 2015 Curtailment Certification, and therefore cannot violate the TRO.

4.4.2 *WSID's Arguments Concerning the Applicability of the Fourth Amendment's Prohibition Against Unreasonable Search and Seizure*

***are Inapposite Because the Informational Order is not Based on
WSID's 2015 Curtailment Certification***

WSID also argues that the Deputy Director committed an error in law by failing to apply certain legal doctrines derived from the Fourth Amendment Prohibition against unreasonable search and seizure in criminal proceedings. (See generally MPA14:24 et seq.). According to Petitioner, reconsideration should be granted because the Deputy Director failed to exclude the 2015 Curtailment Certification from consideration. WSID does not cite authority for the proposition that the Fourth Amendment applies to State Water Board administrative proceedings.

As was explained in section 4.3, the Informational Order is based on information made available to the Deputy Director that indicated the actual or threatened unlawful diversion of water by WSID, not the 2015 Curtailment Certification. Therefore, WSID's arguments concerning the Fourth Amendment do not raise a cause for reconsideration.

4.4.3 *Petitioner's Legal Arguments Regarding Finding 17 are Unsupported and Without Merit*⁶

According to WSID, Finding 17 of Order 2015-0024 is defective because "the reclaimed return flow diverted by WSID does not enter Old River." (MPA 7:15-16.) WSID asserts that its diversions, allegedly limited to its Bethany Drain return flows, are lawful under the salvage doctrine and section 7075 of the Water Code. For this reason, WSID contends that the Deputy Director committed an error in law by issuing an informational order under section 879, subdivision (c)(1)(D). However, Mr. Collins' inspection report indicates that WSID's return flow diversions occur at the same point of diversion as License 1381: Old River Cut. It is unclear how WSID can be licensed to divert water from Old River through the Old River Cut and yet claim that flows at the same point of diversion do "not enter Old River."

WSID diverts from a channel that appears to contain water from multiple sources, potentially including natural flow from Old River, and return flows from multiple landowners abutting the channel. As noted earlier, although an appropriator may capture its return flows if certain conditions are met, the evidence does not indicate that those conditions are being met here. As the Informational Order observes, the recapture cannot rely on water from Old River to provide additional supply or improved

⁶ Petitioner also contends that Findings 17, 19 and 20 in Order 2015-0024 are not supported by substantial evidence. The substantial evidence supporting the order is discussed in section 4.3, supra. Although Petitioner contends that these particular findings are not supported by substantial evidence, Petitioner ignores the evidence identified in those findings. Petitioner's arguments concerning Findings 17, 19 and 20 are essentially legal, asserting errors in law.

water quality. (Order 2015-0024, par. 17.) Furthermore, the initial diversion and use which resulted in the return flows must have been authorized, based on the availability of water for diversion under the appropriator's priority of right at the time of the diversion, for recapture to be authorized. Although it may be argued that WSID may lawfully recapture its own return flows, at least where those return flows are reused before they are discharged into a stream, lake or other body of water, there was substantial evidence indicating that other return flows or Old River water were taken or could be taken by WSID's pumps. The requested information will allow the Division to verify WSID's assertions that its diversions do not exceed its discharges to the Old River Cut and to substantiate WSID's assertions that it has not diverted under the 2015 Contract.

4.4.4 *Petitioner's Legal Arguments Regarding Finding 19 and 20 are Unsupported and Without Merit*

WSID alleges that finding 19 is defective because "no appropriative water right is necessary for the diversion of return flows or waste water treatment plant flows." (MPA, 7:19-20.) To the contrary, the appropriative water right system applies to return flows, both untreated and discharged from treatment plants. (Wat. Code, § 1202, subd. (d).)

This does not necessarily mean that a water right permit is required for diversion and use of treated wastewater. The issue is whether the diversion or use is unauthorized. Section 1211 of the Water Code requires State Water Board approval of a water right change petition before changing the point of diversion, place of use, or purpose of use of treated wastewater. Section 1052 of the Water Code prohibits the diversion or use of water subject to division 2 (commencing with Section 1000) of the Water Code, except as authorized under division 2. Section 1211 is part of division 2. Thus, if the diversion of treated wastewater requires State Water Board approval under section 1211, and that approval has not been obtained, the diversion is unauthorized. If the evidence indicates that the diversion is unauthorized, an informational order may be issued.

Neither Petitioner nor the City asked the Board to approve a change in the place or purpose of use of the City's discharge. The Board has approved no such change. WSID attempts to escape the requirement for State Water Board approval by invoking subdivision (b) of section 1211, which states "[s]ubdivision (a) does not apply to changes in the discharge or use of treated wastewater that do not result in decreasing the flow in any portion of a watercourse." (Wat. Code, § 1211, subd. (b).) WSID's theory is that "[i]f WSID were to divert wastewater flows from the City of Tracy in Old River, no decreases in flow will occur because of the nature of the Delta and tidal flows – if water is diverted from the channel, it is immediately replaced by tidally-influenced bay water." (MPA, 7:25-28.) This assertion misinterprets Water Code section 1211, subdivision (b), which refers to a decrease in flows, not a decrease of the quantity of

water present in a water body. Flow and quantity are different things, especially in the tidally-influenced Delta.

As Petitioner notes, any water it diverts is “replaced by tidally-influenced bay water.” That is precisely the point. If flows through the Delta decrease, there has been a decrease in flow, even if the effect of decreased flows is a decline in water quality, not a reduction in the total volume of water present. (See *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 107 [“Salt water entering from San Francisco Bay extends well into the Delta, and intrusion of the saline tidal waters is checked only by the natural barrier formed by fresh water flowing out from the Delta. But as fresh water was increasingly diverted from the Delta . . . salinity intrusion intensified, particularly during . . . years of low precipitation and runoff into the river systems.”].) For this reason, WSID’s argument that the Informational Order is based on error in law is without merit. WSID actually diverted City wastewater in 2014 and has asserted the right to resume its diversions without prior approval from the Board. This information indicates actual or threatened unlawful diversion of water by WSID and is sufficient to sustain the Informational Order. The information requested in the Informational Order is necessary to verify WSID’s assertion that it has not diverted water under the 2015 Contract with the City.

4.4.5 *Petitioner’s Objections to the Board’s Authority are Without Merit*

WSID objects to legal authorities cited by the Informational Order in support of the Division’s action. Each objection is discussed below.

Executive Order B-29-15

Executive Order B-29-15 directs the State Water Board to “require frequent reporting of water diversion and use by water right holders, conduct inspections to determine whether illegal diversions or wasteful and unreasonable use of water are occurring, and bring enforcement actions against illegal diverters and those engaging in the wasteful and unreasonable use of water.” (Executive Order B-29-15, ¶ 10.) The Board adopted section 879, subdivision (c) in part because of this directive from the Governor and pursuant to its authority under Water Code section 1058.5. Because section 879, subdivision (c) provides sufficient authority for the Informational Order, it is unnecessary to address whether the Executive Order B-29-15 provides separate authority.

May Unavailability Notice

As was explained in section 4.2.2, *supra*, the Informational Order is not based on the May Unavailability Notice. The data and analyses that supported the May Unavailability Notice were among the information available to the Deputy Director. When considered alongside Mr. Collins’ inspection report, the 2014 Contract and 2015 Contract, diversion

records provided by the City, maps, aerial photographs, and statements by WSID's counsel and staff, this information collectively indicates actual or threatened unlawful diversions by WSID. This is different from a finding that WSID's diversions are actually unlawful, for the reasons specified in section 4.1, supra.

Water Code section 183

WSID agrees that Water Code section 183 "is a general grant of authority to the State Water Board to hold hearings and conduct investigations." (MPA 10:25-26.)

Nevertheless, WSID argues that the Board's broad authority to "hold any hearing and conduct any investigations in any part of the state necessary to carry out the powers vested in it" does not include the authority to issue informational orders. But to investigate is to "to observe or study by close examination and systematic inquiry." (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 615, col. 2.) WSID includes no factual or legal arguments to support its position, which is belied by the plain meaning of "investigate."

There is similarly no merit to WSID's contention that because the authority conferred upon the Board in section 183 is "general" that it may not be implemented under specific circumstances. Finally, even if Water Code section 183 would not by itself authorize issuance of the Informational Order, Water Code section 183 provided additional support for the Board's adoption of section 879, subdivision (c), which clearly authorizes issuance of informational orders.

Water Code section 1051

WSID insists that Water Code section 1051 "describes the State Water Board's investigative powers in furtherance of the reasonable and beneficial use policy contained in Article X, section 2 of the California Constitution." (MPA 11:13-15) Petitioner's argument for a narrow reading of the State Water Board's investigative powers is inconsistent with the plain language of the statute. Water Code section 1051 states that

The Board for the purposes of this Division may:

- (a) Investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water.
- (b) Take testimony in regard to the rights to water or the use of water thereon or therein.
- (c) Ascertain whether or not water heretofore filed upon or attempted to be appropriated is appropriated under the laws of this State.

Petitioner's argument also ignores Water Code section 1050, which specifies that division 2 of the Water Code—which includes section 1051, the prohibition against unauthorized diversion set forth in section 1052, and the requirements for State Water Board approval of wastewater change petitions, among other requirements—is in furtherance of Article X, section 2 of the California Constitution.

Section 879, subdivision (c)

WSID contends that California Code of Regulations, title 23, division 3, chapter 2, article 25 “applies only to the State Water Board’s authority over appropriators diverting water pursuant to state-authorized water rights permits, licenses or registrations.” (MPA 12:6-8) Petitioner cites the descriptive title of chapter 2 of the title 23 of the California Code of Regulations as the sole authority in support of its argument. This is incorrect. Chapter 2 of title 23 of the California Code of Regulations is titled “Appropriation of Water.” From this fact WSID concludes that section 879, subdivision (c) applies only to water right permit, license, and registration holders. This conclusion depends on an untenably narrow reading of “appropriation of water” and ignores the general rule that “chapter and section headings cannot be resorted to for the purpose of creating ambiguity when none exists.” (*City of Berkeley v. Cukierman* (1993) 14 Cal.App.4th 1331, 1340, citing *Sullivan v. Fox* (1987) 189 Cal.App.3d 673, 679-680.)

Section 879, subdivision (c) clearly identifies the circumstances under which the Deputy Director may issue an informational order. The regulation is not limited to requesting information about diversions under Board-issued water rights. Informational orders may be issued “[u]pon receipt of information that indicates actual or threatened ... unlawful diversions of water by any water right holder, diverter or user.” (§ 879, subd. (c)(1)(D).) Petitioner’s narrow reading of the plain language “any water right holder, diverter or user” is inconsistent with the Board’s authority to prevent illegal diversions, regardless of the basis under which the right is held. (*Young*, 219 Cal.App.4th 397.) Likewise, Petitioner’s interpretation ignores the Board’s authority “to investigate water use and to ascertain whether water is being diverted other than as authorized in the code,” (*id.* at p. 405), and its “power to investigate whether the water use in streams, including the use of water ‘made under appropriations or attempted appropriations acquired or asserted prior to [1914],’ is in conformity with the water appropriation laws of the state,” (*ibid.*, quoting *Meridian, Ltd. v. San Francisco* (1939) 13 Cal.2d 424, 450). There is simply no basis for reading section 879, subdivision (c) so narrowly.

Water Code section 1052

WSID contends Water Code section 1052 does not apply to WSID “[b]ecause WSID is not diverting under its priority of water right.” (MPA 13:12-13, emphasis in original.) It is unclear what WSID means by this statement. *Young* made clear that

The Legislature expressly vests authority in the Water Board to determine if any person is unlawfully diverting water; to determine whether the diversion and use of water is unauthorized, it is necessary to determine whether the diversion and use that the diverter claims is authorized by riparian or pre-1914 appropriative rights.... "Put simply, the claim that a diversion is authorized under riparian or pre-1914 right is no different from any other argument that there has been no unauthorized diversion; the argument does not deprive the State Water Board of the authority to determine whether an unauthorized diversion has in fact occurred or is threatened."

(*Young*, 219 Cal.App.4th at p. 406, quoting State Water Board Order WR 2012-0012, at p. 5.) Accordingly, the Board's authority under Water Code section 1052 applies to any unauthorized diversion by WSID. The Informational Order does not, however, conclude that unauthorized diversion or use of water is occurring. The Informational Order, as already discussed above, was issued pursuant to section 879, subdivision (c) based on the Deputy Director's receipt of information indicating actual or threatened unlawful diversion by WSID. That the Informational Order purports to reserve the Board's separate authority under Water Code section 1052 is inapposite to the propriety or legal sufficiency of the Informational Order and does not provide cause for reconsideration.

5.0 CONCLUSION

The West Side Irrigation District's Petition for Reconsideration is denied because it fails on the merits, as explained above. WSID's arguments depend on the assumptions that the Informational Order is solely based on analyses of water availability presented in the Unavailability Notices or based on the 2015 Curtailment Certification. However, an independent review of information available to the Deputy Director reveals that this is not the case. Order 2015-0024 is based on information that indicates actual or threatened unlawful diversion of water by WSID. This is sufficient to sustain an informational order under section 879, subdivision (c). Order 2015-0024 is not based on WSID's 2015 Curtailment Certification or the Unavailability Notices. In addition, as discussed in this order, Petitioner's legal objections are without merit and do not establish error in law by the Deputy Director in issuing Order 2015-0024.

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 the purpose of proving an unauthorized diversion by WSID. Likewise, nothing in the Deputy Director's order or this order on reconsideration constitutes a final determination as to whether Petitioner's diversion of water was unlawful.

ORDER

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

Dated: 11/5/15

Thomas Howard
Thomas Howard
Executive Director