

STATE WATER RESOURCES CONTROL BOARD

BOARD MEETING/HEARING

(Portion)

MARCH 17, 2015

Coastal Hearing Room - Second Floor  
1001 I Street  
Sacramento, California 95814

scribed By: Diane F. Fattig, CSR No. 3692

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STATE WATER RESOURCES CONTROL BOARD

BOARD MEMBERS

Chair Felicia Marcus

Vice-Chair Frances Spivy-Weber

Board Member Tam M. Doduc

Board Member Steven Moore

Board Member Dorene D'Amamo

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PORTION OF TRANSCRIPT OF PROCEEDINGS

(File 9, 2:00 until end)

(File 10, entire file)

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CHAIR FELICIA MARCUS: We're reconvened at 5:20.

Mr. Howard, are you ready for item number nine?

BOARD MEMBER DORENE D'AMANO: Let's call for the  
vote.

CHAIR FELICIA MARCUS: I was trying to see who was  
just going to step up and -- maybe I should have made it a  
longer coffee break, but we need to get going.

Item number nine.

ANDREW TAURIAINEN: Good evening --

CHAIR FELICIA MARCUS: Good evening.

ANDREW TAURIAINEN: -- Chair Marcus and members of  
the Board. I'm Andrew Tauriainen, attorney with the  
Office of Enforcement.

Due to an unfortunate and also a bit convoluted  
series of events I'm kicking off this staff presentation.  
Mr. O'Hagan's voice is gone due to an illness so we'll be  
-- Brian Coats and I will be tag teaming on the  
presentation.

CHAIR FELICIA MARCUS: And you can say all the  
things you always wanted to say when Jon was speaking  
before.

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1           ANDREW TAURIAINEN: His voice isn't all the way  
2 gone. Right. But -- so --

3           BOARD MEMBER STEVEN MOORE: And Jon can use sign  
4 language like -- yeah, that kind of thing.

5           ANDREW TAURIAINEN: This slide I won't linger too  
6 much on just because it really gives the headings of all  
7 the subsequent slides. But this is the outline of our  
8 presentation.

9           Now I'll turn it over to Brian.

10          BRIAN COATS: Okay. These first four slides are  
11 somewhat redundant based on the information that you have  
12 all seen earlier today from the presentations by the DWR,  
13 USBR and other agencies. So I'll go through them really  
14 quick.

15          On the first slide here we're indicating that these  
16 are two pictorial representations of the level of drought,  
17 the one on the left being from 2014 in March and the one  
18 on the right being from 2015. The darker the color, the  
19 more severe the drought.

20          And, as you can see, we're in much worse shape this  
21 year than we were last year with the exception of the  
22 North Coast. Every other area seems to be pretty much a  
23 darker shade.

24          And this is just a little background information as  
25 the -- as to the continuing need for the emergency. Due

1 to insufficient rainfall being able to end the state's  
2 historic drought, Governor Brown signed an executive order  
3 on December 22, 2014, extending the California  
4 Environmental Quality Act waiver to May 31st of 2016,  
5 which consequently extended the Board's authority to adopt  
6 emergency regulations.

7 To mitigate the effects of the drought and allocate  
8 the limited water resources, State Water Board needs an  
9 effective method of acquiring information to address water  
10 allocation during curtailment, responding to complaints  
11 and enforcing against unauthorized diversions.

12 Due to time commitments required pursuing these  
13 changes in our normal rule-making process and a limited  
14 window for the current water year, the need for emergency  
15 relations is present.

16 And here you can notice that there's two graphs.  
17 One is on the Sacramento eight-station precipitation  
18 index, and the one on the right is the San Joaquin  
19 five-station precipitation index indicating as of  
20 yesterday on March 16 we currently stand at 31.1 inches  
21 for the Sacramento eight-station area and then 13.5 for  
22 the one on the right.

23 Okay. And -- turn it back on. Okay. All right.

24 And this is a -- it's still doing that to me. So  
25 this is just a little bit of background information as

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1 well, as of -- I don't know. This is a couple days ago.  
2 We're currently standing at 17 percent of normal for date  
3 -- is it working? Okay.

4 And then there's some background information there  
5 for the Sacramento Watershed Supply Forecast and the San  
6 Joaquin River Watershed Supply Forecast you can visit.  
7 These are the supply forecasts for different levels of  
8 exceedence and as well as a general summary provided by  
9 Bulletin 120 at the following address.

10 Okay. Okay. So for the 2014 curtailment effort,  
11 our goals consisted of improving the enforcement process  
12 with better information, namely refined reported demand,  
13 and noting which curtailed post-1914 rights could claim an  
14 alternate basis of right.

15 Secondly, providing a level of transparency in our  
16 analysis to the public. Through this increased level of  
17 transparency gaining stakeholder buy-in of our analysis  
18 through watershed meetings and providing our analysis  
19 dataset willingly.

20 And, lastly, providing the public with frequent  
21 updates to the curtailment effort and ensuring the  
22 effort's effectiveness by enforcing against any party  
23 failing to respond to a Board order and/or notice.

24 During the 2014 curtailment effort, division staff  
25 hosted watershed stakeholder meetings to improve data

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1 quality and discuss project operations. Once curtailment  
2 notices were issued, we later hosted meetings to discuss a  
3 method of lifting curtailment in response to short-term  
4 rainfall events. That method of implementing an e-mail  
5 notification system was very effective at notifying  
6 curtailed parties of a temporary lift and later a  
7 permanent lift of of the 2014 curtailments due to  
8 short-term rainfall events.

9 Division staff have also posted our 2015 demand data  
10 set on our website as of February, which uses a four-year  
11 average demand versus the prior year's curtailment's  
12 single year. By posting the demand data set well in  
13 advance of any potential curtailments, division staff have  
14 contributed to our goal of increased transparency.

15 Currently division staff are in the process of  
16 preparing to host another stakeholder meeting, initially  
17 for the San Joaquin River Watershed, to discuss potential  
18 curtailment.

19 Division staff are also in the process of  
20 downloading and analyzing almost 1,000 responses to the  
21 most recent Informational Order for the Sacramento,  
22 San Joaquin and Delta statements.

23 As you know, over 9,000 curtailment notices were  
24 issued in 2014. While the 2014 emergency regulations  
25 provided the means to issue orders after the notices had



1 gone out, division staff did not pursue this enforceable  
2 route due to limited resources already deployed for  
3 curtailment inspections.

4 For the watersheds not curtailed but considered in  
5 our spring analysis, local voluntary solutions such as  
6 those in the Tulare Lake Basin and also lack of supporting  
7 information for the Salinas River Watershed were found not  
8 to meet the need to go about the order route.

9 Lastly, since the 2014 emergency regulations were  
10 limited to post-1914 rights, there was no avenue to issue  
11 an enforceable curtailment order against a senior right.

12 Of the parties that returned the curtailment  
13 certification form, some of the responders claimed a  
14 senior right as an alternate source. Division staff  
15 looked at a 325 inspection sample size out of the 950  
16 conducted and found 54 claimed a senior right. Of those  
17 54, 20, or about 37 percent, did not have a statement  
18 filed with the division.

19 For these 20 parties, if 2014 was the first year of  
20 use under their senior right, they are required to file an  
21 initial statement by July 1, 2015, which currently  
22 restricts enforcement of the statement filing law until  
23 the summer. Had curtailment orders been issued in  
24 addition to the notices for post-1994 water rights, the  
25 result would likely have been the same.

1           And this is just the most recent update of the  
2 curtailment certification form response table. Hasn't  
3 been an update for the last months, but just indicates the  
4 number that have been curtailed, the number that have been  
5 returned, the percent at face value, and so forth.

6           CHAIR FELICIA MARCUS: Can you go back? The percent  
7 returned by face value number is obviously really  
8 important.

9           BRIAN COATS: Right.

10          CHAIR FELICIA MARCUS: The percentage of forms that  
11 are returned, though, are crazy low.

12          BRIAN COATS: Yeah. That column is a little  
13 interesting. That's the percent forms that were returned  
14 and the amount that was curtailed by face value. So of  
15 the amount -- of the forms that were returned.

16          So of the 40 that were returned, let's say, for the  
17 Sacramento Watershed, the 40 percent there, how much of  
18 that was actually curtailed by face value, meaning they  
19 didn't claim an alternate right.

20          CHAIR FELICIA MARCUS: Oh, how much of the 40?  
21 That's not how much of the --

22          BRIAN COATS: Yeah. So that's 7.3 percent.

23          So percent forms returned and diversion curtailed by  
24 face value. So of the 40 percent that were returned, that  
25 represents 7.3 percent of the actual face value that was

1 actually curtailed, meaning they actually stopped and they  
2 didn't claim an alternate basis of right.

3         So some of those that were claiming a senior right  
4 since the post-1914 right was curtailed. So in that  
5 event, yes, their post-1914 right was curtailed but the  
6 actual amount diverted is -- they're still diverting it,  
7 but they're doing it under a senior right.

8         CHAIR FELICIA MARCUS: But wait. That's just a  
9 percent from the ones that returned the form.

10         BRIAN COATS: Yes.

11         CHAIR FELICIA MARCUS: What about people that didn't  
12 return the form?

13         BRIAN COATS: We don't have that information right  
14 there. We can compile it, I'm sure. Yes.

15         CHAIR FELICIA MARCUS: Well, it's just apropos of  
16 the enforcement conversation we keep having.

17         BRIAN COATS: Yeah, there's always been a lot of  
18 questions on that last column. It's kind of interesting  
19 but, you know. Okay.

20         Okay. And late last year division staff issued 23  
21 Informational Orders to parties downstream of Friant Dam  
22 as a result of a complaint filed in May of 2014.

23         Enforcement action has been taken for failure to  
24 respond, with additional actions for failure to respond,  
25 and threatened and/or unauthorized diversions are pending.

1 Of the Informational Order recently issued in  
2 February 2005 to the top 90 percent of Delta statement  
3 holders and the remaining top 90 percent of the Sacramento  
4 and San Joaquin River statement holders, we have received  
5 as of a couple days ago, over a 94 percent response rate  
6 with the preliminary results showing in the following  
7 graphs.

8 CHAIR FELICIA MARCUS: Now, that's a number.

9 BRIAN COATS: That's pretty good.

10 CHAIR FELICIA MARCUS: I like it.

11 BRIAN COATS: I like it. Okay. So this -- again,  
12 on the -- this is the actual amount of water that we were  
13 using. On the left there, the brown or red, whatever, if  
14 you're color-blind or not. So that's the 2010 to 2013  
15 four-year average demand we were using for curtailment  
16 analysis up to the Informational Order.

17 And so you can see there there's 5.2 million  
18 acre-feet or fifty two hundred fifty four thousand  
19 acre-feet that we had planned on being consumed for the  
20 Sacramento, San Joaquin and Delta statement holders.

21 After compiling the responses to the web form from  
22 the informational order, we noted -- we noticed a  
23 reduction for 2014 reported diversions of about 23 percent  
24 down to about 4,031 -- or 4 million acre-feet. So that's  
25 already a 23 percent reduction in demand just from the

1 Informational Order results we compiled.

2 CHAIR FELICIA MARCUS: Not a reduction in demand.  
3 It means it's trued up the numbers we would be relying on  
4 versus our estimate.

5 BRIAN COATS: Right. So in our --

6 CHAIR FELICIA MARCUS: That's an important reason to  
7 have the information.

8 BRIAN COATS: Exactly. That's the reason why --  
9 that's the benefit of the Informational Order is prior to  
10 those results coming in from the Informational Order, we  
11 would have utilized the 5.2 million acre-feet number for  
12 demand, which would have unfortunately caused us likely to  
13 curtail people that didn't need to be because the 2014  
14 demand is showing a lesser number.

15 And then the 2015 in green is the projected  
16 diversions. So it's a little bit less. And so that's the  
17 April through September summary.

18 And if you go to the next graph here, and this is  
19 the monthly distribution. Because, again, when we  
20 requested that information from the statement holders, it  
21 was by month, and so we graphed this to show that as well.

22 So the top curve there representing the four-year  
23 average demand we were initially using. The blue curve  
24 representing the adjusted 2014, and then the green what  
25 they plan on doing this year for demand. And so that's

1 going to help everyone because we're not going to need to  
2 curtail down to a certain level or curtail at an earlier  
3 date in the absence of that.

4           Yeah. And that's -- another issue there is we --  
5 that 94 percent reporting as of March 12, but most of that  
6 data was due on March 6. So we've done about the last  
7 week and a half of compiling that.

8           BOARD MEMBER STEVEN MOORE: And roughly on face  
9 value, so 94 percent of the parties?

10           BRIAN COATS: Yeah, it's 94 percent of the statement  
11 holders. So we sent that out to 1,061 statement holders.  
12 And so 94 percent response rate, and so we're only  
13 tallying up the 94 percent that responded in comparison to  
14 the four-year average demands.

15           BOARD MEMBER STEVEN MOORE: Okay. So --

16           BRIAN COATS: I'm sorry. Go ahead.

17           BOARD MEMBER DORENE D'AMANO: This shows a peak of  
18 decline in June and July. Doesn't that seem a very odd  
19 pattern, especially if it's principally irrigation water?

20           CHAIR FELICIA MARCUS: Yeah.

21           BRIAN COATS: Some of that might include the  
22 storages.

23           And so, again, this is just the rough summation of  
24 the submitted data. There's additional comments that we  
25 haven't had time to actually compile yet because it's only

1 been less than two weeks. But this is just the initial  
2 results.

3 BOARD MEMBER DORENE D'AMANO: And I guess --- it was  
4 my understanding that last year in 2014 crops came in  
5 earlier because it was so hot, and so you might have had a  
6 decline because they were just harvesting rather than  
7 watering.

8 Well, not in May, but when you get out to July.

9 BOARD MEMBER STEVEN MOORE: I think historically the  
10 storage units sounds correct. Thank you.

11 BRIAN COATS: Okay. At this point I'll hand the  
12 presentation over to Andrew.

13 ANDREW TAURIAINEN: Thank you. I'm going to get  
14 into the nuts and bolts of the proposed emergency  
15 regulation. First I want to just mention briefly what the  
16 existing 879(c) does, the one adopted last July.

17 879(c), the current, allows informational orders  
18 only against pre-1914 and riparian claimants and only in  
19 two limited conditions. One is whether -- when there's a  
20 complaint received alleging an interference with a water  
21 right by that type of claimant or, two, when the division  
22 receives information alleging unlawful diversion of stored  
23 water. So it's a very limited tool for gathering this  
24 type of information.

25 The proposed emergency regulation expands this

1 authority. It makes it a more useful tool for the  
2 purposes that we're proposing it for. Let me talk about  
3 what it is.

4 It's an enforceable tool to investigate complaints  
5 alleging interference with a water right by a water right  
6 holder, diverter or user. And in that sentence -- and  
7 this is the way it reads in the -- in the resolution --  
8 oh, and also you've probably seen, but the first page of  
9 the digest has a red-lined version or strike-out bolt  
10 underlined, and strike-out version comparing the proposal  
11 to last year's because the changes are fairly significant.

12 But in the first sentence in the first bullet point,  
13 the interferor is the water right holder, diverter or  
14 user. The complaints don't have to come from those  
15 parties.

16 So also, in circumstances where parties claim  
17 previously unasserted senior rights in response to an  
18 investigation or curtailment, which we did see last summer  
19 and last fall during the inspections on the curtailment  
20 notices.

21 Also in response to parties claiming unverified and  
22 previously unnoticed transfers or contract purchases.  
23 What we mean there is when a party claims instead of a  
24 senior right they say I've purchased or I've received a  
25 transfer from somebody claiming a senior right. And this



1 would allow us to verify the underlying status of the  
2 right.

3           And then finally, in circumstances where there are  
4 threats of waste or actual waste, unreasonable use,  
5 unreasonable method of diversion, unlawful diversion of  
6 water by any water right holder, diverter or user.

7           So in any of those circumstances those -- that last  
8 slide was the triggering conditions. If any of those  
9 conditions are met then the Deputy Director may issue an  
10 order requiring information regarding claim of right,  
11 property patent date, date of initial appropriation, and  
12 diversions made or anticipated during the current year.

13           Those are all more or less in the current version of  
14 879(c). The last two bullets points, compliance with  
15 transfer law if the diversion is not subject to approval  
16 of Board or Department of Water Resources. Again, that's  
17 a paraphrase of what's actually in the section, but the  
18 intent there is to allow us to gather information  
19 regarding the right underlying any approval -- or any  
20 transfer or contract purchase if we didn't already know  
21 about it.

22           And then finally, any other information relevant to  
23 authenticating the right or forecasting the use and  
24 supplies in the current drought year.

25           So why do we need this tool? This allows the

1 division to focus information gathering into really two  
2 categories. The first is investigations and enforcement  
3 in response to complaints, curtailment notices and  
4 allegations of waste and unreasonable use or unreasonable  
5 method of diversion. And then also, as Brian has noted  
6 and shown, to address curtailment decisions and to use the  
7 information gathered to help refine the curtailment  
8 decisions.

9 An important distinction is that the proposed  
10 regulation does apply to post-'14 water rights as opposed  
11 to just pre-'14s and riparians under the current version.

12 And then finally, that we can and almost certainly  
13 will require reporting on water use and compliance with  
14 any curtailment notice if there's an Informational Order  
15 issued in response to a curtailment notice or a complaint  
16 that involves a curtailment notice.

17 This kind of regulation, this kind of information  
18 tool, allows us to get better information faster. It is  
19 important to note that as a regulation adopted under the  
20 drought emergency provisions of the water code it becomes  
21 immediately enforceable. That is, a party who doesn't  
22 respond or who wholly inadequately responds could  
23 potentially be subject to enforcement immediately.  
24 There's a \$500 per day provision allowing going directly  
25 to administrative civil liability for that kind of

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1 violation.

2 But the penalties -- or enforcement can also take  
3 place under the sort of standard enforcement provisions of  
4 the water code. That is, start with a cease and desist  
5 order and then go into ACLs, administrative civil  
6 liabilities, for violations of the cease and desist order,  
7 or an administrative civil liability for unauthorized  
8 diversion.

9 These -- the orders themselves won't necessarily  
10 cause these kinds of enforcement actions, but they will  
11 help bolster those cases.

12 And finally, better information aids enforcement,  
13 helps the Board to more quickly and accurately refine  
14 curtailments.

15 A couple slides about the fiscal impact analysis.  
16 This is Appendix 10 of the regulatory digest.

17 As you're aware, the analysis is required by the  
18 Office of Administrative Law to examine the effect on  
19 state and local government, federal funding of state  
20 programs. And the analysis does not require a broader  
21 economic impact analysis. It's just impacts on public  
22 agencies.

23 So here the government agencies we've identified as  
24 being potentially affected are public, agricultural and  
25 municipal water agencies and state and local governments.

1           The cost to the -- to water agencies associated with  
2 the new certification form: Again, we were anticipating  
3 that the type of form that was used under the recent  
4 Informational Order, the one that was issued in February,  
5 would apply to any new Informational Orders issued under  
6 the new -- the new proposed regulation.

7           And that form is essentially -- it's a web-based  
8 form that you fill out, and then in some cases where there  
9 needs to be further justification of the basis of the  
10 water right claimed, that information is e-mailed in. So  
11 we've estimated the time we -- we think it would take for  
12 public agencies to comply with this form. There are 2,483  
13 diversions owned or controlled by public agencies in our  
14 records. Of those, 2,058 are post-'14 water rights. So  
15 they're permits or licenses. In those cases those  
16 agencies would not have to submit the backup information  
17 to support their claim of right. That's already on file.

18           So for them it would take, we estimate  
19 conservatively, about an hour to gather their diversion  
20 data because that's information they should be collecting  
21 along the way anyway, compile it and then submit it.

22           For riparians and pre-'14s, there are 425 riparians  
23 and pre-'14 claims controlled or owned by state and local  
24 governments. There they have the one hour to compile  
25 their diversion data and submit it on the form, but they

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1 also need to gather the underlying supporting information.

2 We've estimated that, you know, conservatively -- or  
3 roughly estimated that about half of the agencies will  
4 have that information somewhat easily obtainable, meaning  
5 they can obtain it within three to five hours of staff  
6 time. In other cases it may take them a lot longer, so  
7 the other half would be up to 24 hours of staff time to  
8 gather the information.

9 We averaged that out to 15 and a half hours total  
10 compliance time for those 425 diversions.

11 Multiply all of the hours that we -- it would take  
12 for each of these diversions by our estimate of \$65 an  
13 hour for a staff engineer. It's the same estimate used in  
14 last year's fiscal analysis for the previous version of  
15 this emergency regulation. And the total fiscal impact of  
16 the cost state wide -- and this is important to note.  
17 This would assume that every state agency's diversion  
18 receives an Information Order, which I think is a very,  
19 very conservative estimate, is \$561,958.

20 The curtailments and related costs were not affected  
21 by these Information Orders, and in our examination  
22 there's no effect on state or local government or on  
23 federal funding of state programs.

24 There's one -- we didn't do a change order for this.  
25 There's one small typo that occurred in between bullet --

1 well, it occurred in between the agenda notice that went  
2 out about ten days ago and the digest that was posted  
3 about four or five days ago. One letter of one word of  
4 Subsection (c)(1)(C) was changed. And you can see at the  
5 very end the word "has" was changed to "had."

6 So that's the correction. Again, we don't have a  
7 change sheet, but we're going to propose that -- we're  
8 going to recommend that the Board adopt the resolution as  
9 presented with this correction.

10 The next steps -- this is repetitive of the present  
11 staff presentation from the prior item. This is just the  
12 OAL process. We are hopeful that the regulation can go  
13 into effect in early April. The current version of 879(c)  
14 expires on April 14. It -- it goes through April 13. And  
15 then it would last for 270 days.

16 That last point about when the regulation expires is  
17 relevant because a number of the commenters made comments  
18 about the status of Section 879(c). The comment deadline  
19 was extended until yesterday at noon.

20 We received about seven comments. We did list them,  
21 but I haven't been able to, you know, tabulate what the  
22 comments are into a slide. I can briefly note what the  
23 main comments are, the ones that are shared by several  
24 commenters.

25 The first is that there -- that the 30-day time

1 limit might not be enough when it's necessary to gather  
2 information to support the basis of a right.

3         We found this to be a common theme of the responders  
4 to the February Information Order. And so the proposed  
5 regulation is (C)(3), allows the Deputy Director to grant  
6 additional time beyond the 30 days upon a showing of good  
7 cause and if there's substantial compliance with the rest  
8 of the regulation requirements. Meaning if they can  
9 submit what they have. And that especially means the  
10 diversion data which should already be present. Most  
11 agencies should already have that. Or most diverters.

12         The second comment is that Section 879(c) actually  
13 expired on February 28. A number of commenters -- local  
14 agencies of the North Delta, Restore the Delta,  
15 San Joaquin Tributaries Authority, and Spaletta Law -- all  
16 made this comment. There may be others that I'm  
17 forgetting.

18         Oh, pardon me. It's Merum Crabtree's comments. The  
19 Banta-Carbona.

20         The -- 879(c) was adopted in an emergency regulation  
21 that was approved by OAL on July 16th of last year, so it  
22 doesn't expire until April 14. April 13 is the last date  
23 it's valid

24         CHAIR FELICIA MARCUS: They're counting from the  
25 date of adoption rather than OAL?

1           ANDREW TAURIAINEN: No. They're counting from the  
2 date that 879 initially was adopted under last year's  
3 version of the fisheries regulation, and that did expire  
4 on February 28. But 879(c) was added in July with the  
5 state-wide curtailment order. Right.

6           DAVID ROSE: Yeah, briefly. The initial package  
7 that you -- well, the Mill, Deer and Antelope Creek  
8 package that the Board just heard about was initially  
9 adopted last year -- I believe May 21 -- and that included  
10 a number of sections in brand new Article 24. One of  
11 those was Section 879. It only included subdivisions (a)  
12 and (b), which were reporting requirements for anybody who  
13 received a curtailment order.

14           This item, this state-wide curtailment and  
15 Informational Order item, was presented at the Board and  
16 made its way around about a month later. And 879(c) was  
17 added at that time. So while it's true that --

18           CHAIR FELICIA MARCUS: We didn't do everything on  
19 the same day last year.

20           DAVID ROSE: No, we did not. 879(a) and (b) have in  
21 fact expired except that the Board readopted them an hour  
22 ago. They haven't gone to OAL yet, so they're not on the  
23 books. But 879(c) is not floating out there in the ether.  
24 It does still exist and will until April 14, when it would  
25 expire after 270 days.



1           ANDREW TAURIAINEN: And then the last sort of  
2 general category of comments -- there's a number of  
3 comments that I'm going to skip. I see that most of the  
4 commenters are here and they will probably bring up some  
5 of the specific ones.

6           But the comment that I think was most common is that  
7 the regulations should define the term "complaint" as it's  
8 used in Section (c)(1)(a). And again, the language there  
9 is upon -- it's a triggering condition for issuing these  
10 orders upon receipt of a complaint alleging interference  
11 with a water right by a water right holder, diverter or  
12 user.

13           The term "complaint" has its commonly understood  
14 definition, and the Board has always used it that way.  
15 There is no specific definition of "complaint" anywhere.

16           There is a section in the Code of Regulations  
17 addressing complaints alleging certain types of harm  
18 caused by violations of permit and term -- permit and  
19 license terms or conditions. But that's -- that's really  
20 more of a form-in-process requirement.

21           Broadly speaking, there's always been a complaints  
22 unit in the Division of Water Rights, and there still are  
23 staff that receive complaints. There's a direct phone  
24 line for phoning in verbal complaints and there's no  
25 format requirement there.

1           We get complaints from a number of other vectors,  
2 notably the Cal EPA website. And, again, that's just a  
3 simple web form that alleges complaints.

4           CHAIR FELICIA MARCUS: Isn't that what some folks  
5 wanted? It's almost like a standing argument? They  
6 wanted the complaints to only be from another water rights  
7 holder as opposed to anyone else?

8           ANDREW TAURIAINEN: Yeah, that's one of the other  
9 comments, that standing or -- standing as a water right  
10 holder or standing as a water right holder who's been  
11 harmed. I think injury and standing are sort of  
12 conflated. And that's never been a condition that the  
13 division has required for investigating complaints. And I  
14 think it's evident in the fact that the division  
15 investigates complaints alleging public trust harm, waste  
16 and unreasonable use allegations, and complaints that may  
17 have no definitive source at the time the complaint is  
18 made. My stream went dry. I don't know what caused it,  
19 but maybe somebody upstream is doing that. Is causing it.

20           But, you know, the -- the complainant at the time  
21 can't point to specific injury caused by a specific  
22 diverter necessarily.

23           So -- and then related -- I'll go a little further  
24 in this concept of complaint because a couple of the  
25 commenters have proposed language to the effect that staff

1 -- that the division should make a determination that any  
2 complaints that are issued are reasonable and  
3 substantiated.

4 Another one of the proposed languages is that the  
5 complaints meet a minimum standard of evidence to support  
6 a claim of unlawful diversion.

7 Staff does these kinds of examinations for every  
8 complaint that's received. If a complaint comes in and  
9 has no basis and no substantiation through staff's own  
10 investigation, or based on what's received, then the  
11 complaint goes no further. But if there is some basis for  
12 it, complaints -- investigations can occur for a very long  
13 time. I'm one of the attorneys now who helps shepherd  
14 those complaints through their -- and those investigations  
15 through their process.

16 So I would say those proposed changes are  
17 unnecessary.

18 We've hit most of the main comments -- I don't --  
19 unless the Board would like, I don't necessarily want to  
20 list right now all the specific comments, because I think  
21 we're about to hear them relating to, you know, the  
22 concept of water rights in the Delta or water availability  
23 in the Delta for a couple reasons. One, we're about to  
24 hear them and, two, a lot of the issues are raised in  
25 petitions for reconsideration of the Delta -- or of the

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1 statewide San Joaquin, Sacramento and Delta Informational  
2 Order that was issued in February. It's Order WR  
3 2015-2-DWR. And I don't necessarily want to go too deeply  
4 into any of those matters that might be subject to the  
5 petition.

6 At this point that concludes the staff presentation.  
7 And we'll take questions now.

8 CHAIR FELICIA MARCUS: Questions now?

9 All right. Well, let's move on to the comments now.  
10 Thank you very much.

11 First we have Jon Rubin, San Luis and Delta-Mendota  
12 Water Authority. I'd thought you'd be last and you could  
13 open and close. Someone thought you wanted to do that,  
14 but here you are on the top of the pile. What can I do?

15 JON RUBIN: After your reaction to my comments this  
16 morning, I'm happy to be before you.

17 CHAIR FELICIA MARCUS: He's followed by Tim  
18 Stroshane.

19 JON RUBIN: Good afternoon, Madam Chair, members of  
20 the Board. Jon Rubin, general counsel for the San Luis  
21 and Delta-Mendota Water Authority, and I do have just a  
22 brief comment for you.

23 The water authority believes it's important that the  
24 State Water Board be prepared to exercise mechanisms or a  
25 mechanism to stop the diversions that are causing a

1 trespass on the waters of this state.

2           And because of that, I do want to highlight what's  
3 not before you today. Last year when you were faced with  
4 this question about action to stop it -- diversions that  
5 are illegal, there was discussion about the mechanism that  
6 you currently have or the mechanisms that you currently  
7 have that are set forth in the water code. And there was  
8 also a discussion about supplementing that.

9           And last year staff had proposed a regulation,  
10 emergency regulation, and through discussions with the  
11 Board ultimately the Board adopted something, but it was  
12 different than the staff's proposal. I believe it was  
13 codified under Section 875.

14           That regulation or something similar to that  
15 regulation is not before you.

16           I stand today not to recommend a particular course  
17 of action, but just to highlight how important it is,  
18 given how dry conditions are, that you do have a mechanism  
19 that would allow you to act very quickly to stop illegal  
20 diversions.

21           From my understanding of the Water Code, if you do  
22 not adopt an emergency regulation, you really only have  
23 one mechanism available to you, and that's under Water  
24 Code Section 1052, and specifically it's a referral to the  
25 attorney general.

1           And so with that, I have nothing further but, again,  
2 just want to stress the importance of being able -- of you  
3 being able to stop illegal diversions if they do occur.

4           CHAIR FELICIA MARCUS: Thank you. I agree. We're  
5 not foregoing an ability to come back later, but I think  
6 getting information first and foremost to deal with this  
7 is going to put us in a better position to decide what to  
8 do.

9           But good point.

10          JON RUBIN: Thank you.

11          CHAIR FELICIA MARCUS: Tim, followed by Kyle Jones  
12 from Sierra Club.

13          How do you say your last name again? I say it wrong  
14 every time.

15          TIM STROSHANE: Oh, it's just -- there's no accent  
16 to it. It's --

17          CHAIR FELICIA MARCUS: "Stro-shane."

18          TIM STROSHANE: -- "Stro-shane." That's how I've  
19 always heard. But it sounds funny to say the other way.

20          Good evening. So we've made it to the evening  
21 already. I'm Tim Stroshane, policy analyst with Restore  
22 the Delta. Our organization submitted comments yesterday  
23 morning, and I will summarize some of them.

24          Drought emergency regulations may come and go, but  
25 much of the data that the Board collects through its

1 Information Order should be useful beyond just  
2 constructing this year's demand curves. We encourage the  
3 State Water Board to address the paper water issue for all  
4 Central Valley water right holders, perhaps not now but in  
5 the future when there's more time perhaps.

6 And the California -- that you would address this  
7 issue for all Central Valley water right holders and the  
8 California public that cares about the state's rivers and  
9 streams and the natural heritage of the Delta.

10 Paper water is the practical reality that there are  
11 far more water rights claims to use water than there is  
12 actual water available to allocate especially, of course,  
13 during droughts.

14 Since eight of the last nine years have been below  
15 normal water years, it may be that in the era of climate  
16 change, California enters a new normal. We urge the Board  
17 to ask and hopefully answer questions like if water right  
18 holders have riparian or pre-1914 right and also post-1914  
19 rights, do they really need multiple rights?

20 There may be a basis for it. I don't know. And the  
21 Board would need to investigate that, but it's a question  
22 that I think you should be asking.

23 What is the status of claims -- the second question  
24 is what is the status of claims against which enforcement  
25 actions are applied? Are those claims to divert water

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1 extinguished permanently by Board action under emergency  
2 drought regulations or are enforcement actions merely in  
3 effect while the emergency regulations are in effect?

4 Third, what due process and equal protections must  
5 the Board apply to permanently eliminate redundant --  
6 excuse me. Redundant water rights once they are  
7 identified?

8 Another question is if the State Water Board  
9 believes it obtains meaningful information on demand and  
10 supply, could and should the Board encourage the  
11 Department of Water Resources and the Bureau of  
12 Reclamation to better plan their operations to fit that  
13 new normal better than they do now?

14 By doing so couldn't the multiple objectives of  
15 reservoir operation for water supply, temperature control  
16 and salinity and water quality control in the Delta be  
17 planned before experts -- sorry. Exports are determined?

18 I've done research into these sorts of questions,  
19 but I don't know the answers to them. I don't -- I'm not  
20 sure that you do either right now.

21 But it seems to me that answers to such questions  
22 may help reduce confusion and increase reliability of  
23 water rights found valid by the Board. By reducing  
24 confusion the Board can help reduce the claims of so many  
25 chasing so little water during California's droughts,



1 today's as well as tomorrow's.

2 Other western states have done much to accomplish  
3 something similar. Reduced water demand would benefit  
4 public trust resources, including listed species ease in  
5 the Delta, whichever ones still exist.

6 The Delta Protection Act of 1959, I'll conclude,  
7 states that it is state policy that no person, corporation  
8 or public or private agency or the state or the United  
9 States should divert from the channels of the Sacramento/  
10 San Joaquin Delta to which the users within said Delta are  
11 entitled.

12 Finally, the act also says that in determining the  
13 availability of water for export from the Delta, no water  
14 shall be exported which is necessary to meet the  
15 requirements of the act.

16 And I want to thank you for the opportunity to  
17 comment.

18 CHAIR FELICIA MARCUS: Thank you very much.

19 After Mr. Jones, Tim O'Laughlin. Or Valerie  
20 Kincaid.

21 KYLE JONES: Good evening, Chair, Board. Sierra  
22 Club of California -- Kyle Jones with Sierra Club of  
23 California, and we'd like to show strong support for this  
24 measure.

25 Information pertaining to rights that -- prior to

1 1914 and riparian rights is critical to helping us  
2 understand exactly what we're dealing with, what resources  
3 we have going forward through this drought and however  
4 long it may last and for future droughts.

5 Again, strong support for this. Thank you.

6 CHAIR FELICIA MARCUS: Thank you, Mr. Jones.

7 Valerie Kincaid, followed by Rebecca Akroyd from  
8 Westlands Water District.

9 VALERIE KINCAID: Thanks. Valerie Kincaid,  
10 San Joaquin Tributaries Authority.

11 The San Joaquin Tributaries Authority submitted  
12 comments, and I'm not going to go through those. It's  
13 late. But I do want to go through the issue of the  
14 finding of emergency and focus on that.

15 There were significant changes from the previous  
16 version to the new proposed version, and the finding of  
17 emergency doesn't explain the need for those changes and  
18 it doesn't explain why those changes are needed in an  
19 emergency context, which I think is very important.

20 And it feeds into my second point, which is that it  
21 would be very helpful from a stakeholder perspective to  
22 understand what the State Water Board and the State Water  
23 Board staff plans to do with this information. It's the  
24 number one question I get from clients all over the state  
25 is why are we submitting this? What are the next steps?

1           And unfortunately, there's not a good answer. I've  
2 talked to staff a little bit about that and have gotten  
3 somewhat vague answers. And I think that frequently feeds  
4 back into the emergency context. The State Water Board  
5 just asked and my understanding is received from the  
6 presentation today volumes of information. If it's not  
7 going to ask and receive and look at volumes of  
8 information from this now-proposed change regulation in  
9 the next couple months, it's not an emergency. You don't  
10 need it. So if you are, that's great, but it has to be  
11 part of a bigger plan.

12           And it would be really helpful for stakeholders to  
13 understand not only just for them to feel comfortable but  
14 for their due process rights if this is going to lead to  
15 an enforcement action, if there's an adjudication down the  
16 road.

17           And I understand that you might not have all of that  
18 figured out right this second, but there has to be a  
19 greater plan of why you're just collecting the  
20 information. Certainly collecting this information just  
21 to collect it and not do anything with it also probably  
22 can't be an emergency under these regs.

23           So we have the technical comments and I guess my  
24 plea maybe would be just to work with stakeholders and ask  
25 them for this information. Most of our clients, if you go

1 and ask and say hey, listen, we're unclear about the basis  
2 of your right, can you provide us this information in a  
3 nonthreatening and a nonenforcement context, they would be  
4 much more willing to do that.

5 I think unfortunately this round of emergency regs  
6 has put people a little bit on the defensive. They feel  
7 like they're having allegations thrown at them.

8 And then the second part of it is that they really  
9 don't understand what's going to happen with these  
10 allegations. So, you know, from my perspective this  
11 caused quite a bit of confusion and maybe from your  
12 perspective more panic than there needs to be since maybe  
13 you guys either have an understanding of what you would or  
14 wouldn't do and have a greater plan. But the stakeholder  
15 community doesn't understand that and hasn't been given  
16 enough information to better understand that.

17 Thanks.

18 CHAIR FELICIA MARCUS: Thanks. (Unintelligible)

19 MICHAEL LAUFFER: Well, first of all, I think the  
20 digest as well as the presentation you heard from the  
21 division staff and then also from Mr. Tauriainen this  
22 morning goes through a number of the reasons why the  
23 division may may be interested in using this information.

24 It's important to appreciate that until an order is  
25 actually issued, there hasn't been a finding, if you will,

1 as there is in the context of a specific order, that  
2 there's a basis for that specific request to the diverter.

3         However, in the context of the regulations and the  
4 types of information that the Board is interested in  
5 gleaning, some of it may be just for purposes, as  
6 Mr. Tauriainen explained, of determining whether or not  
7 there is an appropriate basis for the diversion. And that  
8 could potentially lead to a subsequent enforcement action.

9         And likewise, as you heard in the presentation  
10 earlier this evening, it is used to feed into our overall  
11 demand curve, which informs the Board's drought response.

12         I mean this is a recurring theme that you all have  
13 heard over the last year, which is the Board's inability  
14 to -- or the Board's lack of sufficient information to  
15 respond to the drought and make the determinations about  
16 whether or not curtailment needs to be turned on or off.  
17 And you see these regulations as part of an approach to  
18 ensuring that if we get to that point later this year we  
19 will have tools to issue informational orders or take  
20 other enforcement action as appropriate

21         CHAIR FELICIA MARCUS: Well, in a timely manner so  
22 that it might matter. Also in the hopes of resolving some  
23 of the long held, I would say rhetorical, badmitten  
24 matches that have gone on. I think our goal is to try and  
25 resolve issues in as timely a way we can. Some of them we

1 won't be able to resolve immediately, but the first basis  
2 would be to have the information, which we don't have at  
3 our fingertips for a variety of reasons.

4 BOARD MEMBER STEVEN MOORE: Thank you for that. I  
5 think that in some ways, you know, the comments we  
6 received -- we respect that concern. These things are  
7 happening quickly in the emergency context.

8 At the same time, I hope you can bring back to your  
9 clients and folks in the room that staff did turn around a  
10 summary analysis of the information we received in a very  
11 rapid fashion. You saw a graph in terms of the refinement  
12 of what we had to use based on 2010 statements of  
13 diversion and use versus the information we received in  
14 the last couple of weeks and how that's changed our  
15 assumptions on demand management, and that will feed into  
16 our determinations of what water is available or has to be  
17 curtailed.

18 So we hope that this gives you an example of our  
19 very firmly held goal, I believe -- I'll speak for  
20 myself -- of an orderly administration of water rights,  
21 especially during a drought emergency. And, you know,  
22 this is where we -- our system gets tested.

23 (End of file 9)

24 (File 10)

25 BOARD MEMBER STEVEN MOORE: The lessons we learned

1 from last year was that the quality of information, the  
2 timeliness of information was lacking for us to do the  
3 orderly administration.

4 That's just my take on it. I think those are valid  
5 questions and we didn't mean to communicate these type of  
6 intents. But I think it's important that we be -- that we  
7 respond in a fashion that mirrors our findings of  
8 emergency.

9 So I want to honor that comment

10 CHAIR FELICIA MARCUS: Ms. Akroyd, followed by John  
11 Herrick, South Coast Water Agency.

12 REBECCA AKROYD: Good evening. Excuse a bit of  
13 laryngitis. Rebecca Ackroyd, for Westlands Water  
14 District.

15 My comments are going to build slightly on Jon  
16 Rubin's comments that were made just a little while ago.  
17 As Jon pointed out, in July 2014 when the precursor to the  
18 present regulation was enacted, it was paired with an  
19 emergency regulation that allowed the Board to issue  
20 curtailment orders. Right now there's no similar  
21 curtailment order regulation being proposed.

22 However, as Jon also stated, there's existing  
23 authority that allows the Board to investigate and stop  
24 illegal diversions. Westlands's comments today would  
25 encourage the Board to be prepared to utilize that

1 authority, either existing authority or authority under  
2 new emergency regulations, to stop illegal diversions.

3 Separate and apart from the proposed emergency  
4 regulation regarding the Information Orders, the Board has  
5 the ability to undertake investigations to determine  
6 whether a water use is illegal. In Section 856 of the  
7 Board's regulations require the Board to investigate  
8 allegations of misuse of water.

9 And I think, going back to what was said earlier  
10 just talking about allegations, no complaint is required  
11 to investigate allegations of misuse of water.

12 Past investigations, the Board has the ability to  
13 take immediate actions to stop illegal diverters, whether  
14 the diverter claims riparian or other right. Water Code  
15 Section 275 requires the Board to take all of the  
16 proceedings or actions for executive, legislative and  
17 judicial agencies to prevent waste or unreasonable use.

18 So together the Water Board and Board -- sorry.  
19 Excuse me. The Water Code and Board regulations require  
20 the Board to both investigate and take appropriate  
21 proceedings to stop illegal diversion.

22 Although typically the Board has used the EO and  
23 administrative civil liability as the tools to accomplish  
24 this end, as Jon stated before, Section 1052 provides  
25 another even more important tool in the present drought,

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1 which is immediate referral to the attorney general to  
2 institute actions for injunctive relief.

3 That enables the Board to request the attorney  
4 general to have an action for a temporary restraining  
5 order, preliminary injunction or permanent injunction for  
6 any unauthorized diversion or use, including a violation  
7 of a Board order or decision.

8 We believe it's critically important that the Board  
9 be prepared to take immediate action to stop illegal  
10 diversions. While the Board must do so in a way that  
11 respects due process, the action must be swift. We  
12 believe taking swift action this year will put us in a  
13 better position for later this year, for next year if  
14 there's continued droughts or for future droughts.

15 If the Board does not plan on using its existing  
16 authority under Section 1052 or other provisions, then we  
17 would request that the Board consider adopting new  
18 emergency regulations that would give the Board additional  
19 authority to do so.

20 Any questions?

21 Great. Thank you.

22 CHAIR FELICIA MARCUS: All right. Mr. Herrick,  
23 followed by Mr. Nomellini from the Central Delta Water  
24 District.

25 JOHN HERRICK: Good evening, Ladies and Gentlemen,

1 Chairlady and members. John Herrick for the South Delta  
2 Water Agency. Thank you very much.

3 I won't say déjà vu all over again, but here we are  
4 in the fourth year of a drought, emergency regulations at  
5 the last minute in order to address problems, which is not  
6 the way to handle things. I think everybody would agree  
7 with that.

8 Last year we made comments -- I'll just say them  
9 briefly again -- dealing with the due process issues. You  
10 know, we all have serious concerns that an expedited,  
11 truncated process that would fine somebody for not  
12 responding within a short period of time actually turns  
13 out to substitute for an evidentiary hearing determining  
14 somebody's water rights.

15 So I don't know how the Division of Water Rights is  
16 going to make a decision that somebody is or isn't worthy  
17 of a cease and desist order or something else, you know, a  
18 in 30-day period after somebody's only had that much time  
19 to provide information. But that's the -- that's our  
20 complaint from before.

21 I'd like to join the comments of Ms. Spaletta and  
22 Ms. Zolezzi, and I want to focus on one issue and that was  
23 touched upon by staff and that deals with the -- what  
24 complaint might start an investigation.

25 The reason that's important is -- we've already gone

1 through this. There's either -- there are two issues.  
2 It's either a water right or a water availability issue  
3 for purposes of you going after them during the drought.

4 Now, for water rights, I think everybody remembers  
5 back in 2009 and before where the general consensus was to  
6 slander my clients in public and say they were all illegal  
7 diverters. And we had the legislation saying they're all  
8 illegal diverters, and appointed a watermaster to  
9 investigate only my clients, and not other people.

10 And the watermaster did three or four years'  
11 investigation and we spent -- we spent hundreds of hours  
12 and thousands of documents and hundreds of meetings -- not  
13 hundreds of meetings, lots of meetings -- and the  
14 watermaster prepared that I saw two reports or two updates  
15 that would be presented to you which said goodness, we  
16 just wasted all our time and money. It appears there are  
17 a few issues and we're pursuing those few people and it  
18 appears that everybody else has sufficient water rights.

19 So the notion that you need me to spend another  
20 thousand hours to give you more information on the Delta  
21 water right diverter seems odd at the very least. Your  
22 process has already made that initial threshold  
23 determination for purposes of pursuing somebody, I think.

24 Now, maybe you don't trust your prior watermaster.  
25 Maybe someone threw away his boxes. I don't know, but we

1 already went through that. And so I don't see you -- what  
2 the purpose is to have an expedited method by which to  
3 make me work overtime that I don't get paid for, even on  
4 St. Patrick's Day. So I have no concerns.

5         The second area deals with the supply. Now, I'm not  
6 going to get into that now, but we have the issue -- we've  
7 gone through this before -- about whether or not the Delta  
8 always has water. We think we showed you before that when  
9 you don't have releases, when you don't have stream flows,  
10 there's no water in the Delta, it slowly degrades and  
11 you're obligated to protect water salinity or quality.  
12 Excuse me.

13         All those things are, I guess, valid points of  
14 disagreement. We think it's pretty clear on our part.  
15 But that's a disagreement between the contractors, or the  
16 state and federal projects, and us. And we think it's all  
17 pretty clear.

18         So I don't know what you would do in the middle of  
19 that fight unless you're trying to fight for there being  
20 water surplus to the needs of the areas of our knowledge  
21 for the Delta. And this is the fourth year of drought.  
22 If anybody thinks there's water surplus to the needs of  
23 the North California Delta, I don't know what they're  
24 looking at. Right? We can't meet our minimum standards,  
25 so there isn't any surplus water.

1           So finding on the edges there to see if somebody can  
2 be shut down in the Delta so that, you know, four CFS is  
3 either released or not released from Shasta seems like a  
4 poor use of our time.

5           Now, again, I think that's something between the  
6 contractors, the projects, and us. I don't know what  
7 purpose or benefit you guys would have joining in that  
8 fight in that you would have to make these decisions based  
9 upon what we think was pretty clear. So I don't know.

10          Anyway, I also wanted to say really quickly the  
11 costs that you have done and the analysis for the thing is  
12 offensive, horribly wrong. The notion that somebody would  
13 -- would spend a short amount of time responding to a  
14 30-day demand or request to provide evidence of a pre-1914  
15 right is unrealistic, to say the least.

16          We have other fights going on, as you know. Some of  
17 them involve hearings scheduled here, so I'm not going to  
18 get into that. But, you know, we spent years and hundreds  
19 of thousands of dollars, and people are out there reading,  
20 you know, thousands of newspapers from 1880 through, you  
21 know, 1914, looking for certain key words.

22          The notion that it's a small cost for somebody to  
23 comply with this is incorrect. I mean it takes a long  
24 time, which again, argues against this notion that you  
25 need an emergency regulation so you can demand something

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1 in 30 days.

2 If you -- if you contact any diverter who's a single  
3 diverter, not an agency or an irrigation district, and you  
4 say show me what happened on your land in 1893 or 1914,  
5 that takes a lot of work. There isn't -- there aren't  
6 documents that say, you know, hi, got up this morning and  
7 applied water on 37 acres. There isn't that information.

8 So, you know, I don't see what the purpose of this  
9 is. The Board does need information. As you know, we've  
10 spent lots of time assisting you in gathering information.  
11 So I don't know why you need the threat against somebody  
12 to get it done.

13 I'm actually here to express my disappointment that  
14 nobody's thanked us for all the work that we did for that  
15 94 percent compliance rate. It's higher than that because  
16 a couple of -- a number of the ones that add up to the six  
17 percent were -- were statements that have been  
18 deactivated. So it wasn't a noncompliance.

19 But anyway, and with that stupid joke. You know, we  
20 think the regulation's unnecessary. We need to have a  
21 process that deals with these things on a normal basis,  
22 not at the last minute.

23 We cannot give you a complete history of a diversion  
24 upon 30-day notice. I thought I did that to a sufficient  
25 level with the last watermaster, and apparently it has no

1 effect on the Board's decisions now, so with that I oppose  
2 the regulation.

3 Thank you very much.

4 The extra time I took should come off of Dante's  
5 because of what happened last time.

6 CHAIR FELICIA MARCUS: And following Mr. Nomellini  
7 will be Terry Erlewine from the State Water Contractors.

8 DANTE JOHN NOME LLINI: Hello. I'm Dante John  
9 Nomellini, manager and co-counsel for the Central Delta  
10 Water Agency.

11 Without belaboring the point, I think your emergency  
12 regulations are an abuse of the emergency. I would just  
13 restate that for the record because that's my feeling,  
14 that we have artificially created a situation here where  
15 the projects depleted the storage, created a situation  
16 where we don't have sufficient water to meet the  
17 standards.

18 The standards have been set. The people have  
19 adopted emergency -- temporary emergency changes to let  
20 them off the hook. That's okay. The water's gone. And,  
21 like I said before, I recognize that there's not a hell of  
22 a lot to fight over at this stage.

23 Now, with regard to the emergency order, it seems to  
24 me that it's unnecessarily too broad and not defining what  
25 the delegation of the authority is to the -- your staff.

1 That any user could come in and say hey, we do an  
2 investigation and an emergency order could go out  
3 demanding information.

4 Now, we are committed in the Central Delta and the  
5 South Delta to give you 100 percent response. You know, I  
6 don't appreciate the shortness of time in the notice and  
7 the lack of discussion with your staff beforehand because  
8 we could have helped address this in a way that would make  
9 more sense.

10 However, I want to thank them for making changes in  
11 the form so we could at least have our clients find it.  
12 And there was a concerted effort, and it helped us achieve  
13 the success that we have in providing the information.

14 The other thing was we started trying to gather the  
15 database in September of last year, and we were  
16 fortunately able to get it indexed because the data is  
17 there. But how do you find it for an individual point of  
18 diversion?

19 So, and I think I said it before, I sent one of my  
20 staff over to try and find this information, whatever it  
21 is, and they stumbled into the State Lands Commission and  
22 they were willing to provide an index for the Central and  
23 South Delta.

24 I should have ordered it for the whole Delta because  
25 the database, I think, is for the whole state.

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1           Anyway, they wanted an immediate payment of \$5,000.  
2 We gave it to them and it took about -- over two months  
3 before we got an index. But it was that index that  
4 allowed us to be responsive to this short-term request.  
5 Don't think that that short term would allow somebody else  
6 that didn't have the fortune of getting the index to  
7 provide you that information.

8           I think we're okay. We've given you patents. We've  
9 given you -- that database has the certificates of  
10 purchase. It has the swamp and overflow surveys.

11           Now, what you're going to do with it -- and I  
12 cautioned everybody before -- is that we have no problem  
13 trying to give you the information, but what you're going  
14 to do with it is a different problem.

15           And that is you're going to formulate curtailment  
16 notices perhaps. And I've discouraged you from doing that  
17 because water rights are very specific to location and to  
18 the individual situation.

19           For example, the patent date in our -- in my humble  
20 opinion as a lawyer practicing in the water field, gives  
21 you the date of vesting, not necessarily the date of  
22 priority. The date of priority is when settlement took  
23 place, where you could have started water on the piece of  
24 property. That's a riparian right, and it's not  
25 quantifiable. In an adjudication you can quantify it, but

1 it doesn't have a limit except reasonable beneficial use.  
2 Okay.

3 So giving you a quantity for riparian right, no  
4 lawyer in their right mind that represented a client like  
5 that could do that short of an adjudication.

6 So some of the problems we have and you have and  
7 your staff has in reporting is trying to do something that  
8 we can't -- can't do.

9 CHAIR FELICIA MARCUS: Is that why you used the  
10 comment section?

11 DANTE JOHN NOMELLINI: Yeah. That's why we've given  
12 you an explanation. The comment section wasn't in the  
13 first round of the forms, but we submitted a standard  
14 explanation form with everything that we did in our office  
15 to you to explain that, and we talked to staff about it as  
16 well.

17 So the priority date is not the date of patent, but  
18 that establishes the vesting of the title to make that  
19 claim. So the priority date is different.

20 The pre-1914 date, some drunken miner went up on  
21 federal land and diverted water to separate the gold from  
22 the gravel diggings or whatever. That establishes a  
23 pre-1914 use of the water.

24 There's a very complicated issue as to whether  
25 there's a priority for that right versus the riparian

1 right and how it all works. I'm not sure I've got a firm  
2 grasp on that. I looked at cases, but the law is yet to  
3 be completely clarified.

4 Now, we also have filings -- post-1914 filings in  
5 the Delta. Years ago when there was turmoil around how  
6 water rights were going to be treated and this and that,  
7 many of the more sophisticated people said well, we better  
8 cover our bet, and they filed for appropriate rights with  
9 the Board.

10 So we have overlapping rights that we cannot unwrap  
11 without adjudication and determining some of these issues.  
12 And it isn't because we're just trying to be obstinate.  
13 It's a real practical problem for us.

14 Now, we are willing in the Delta, Central Delta and  
15 South Delta, to work with your staff to try and sort this  
16 out. Now, there has been double reporting because we  
17 hadn't been able to segregate it. And your staff doesn't  
18 like us to comment and say well, these are overlapping  
19 rights, you only count them once.

20 I'm going to try and do it for all of my future  
21 reports and try and get that sorted out so you don't  
22 accidentally end up with this complicated overlap of  
23 rights and a large quantity of water that is being  
24 criticized as being out there.

25 Now, water rights law created appropriations and

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1 filings with you people as a hunting license to go out and  
2 try and find water. So if somebody came in and said hey,  
3 in a flood year there's water coming down the river, we  
4 want to try and get a permit to go out there and exercise  
5 our due diligence to perfect that right.

6 So there's lots of filings. The two biggest  
7 examples are the State Water Project and the Federal Water  
8 Project. They asked for an extension from you for their  
9 due diligence. We objected to it and I never heard from  
10 anyone again.

11 They still want to be out there claiming all this  
12 water that doesn't exist or isn't practical to capture.

13 So it's those real problems that I hope you people  
14 will understand. We'll try and work with your staff in  
15 good faith. But to come up with a short timeline and  
16 expect people to respond and fine them to me is bad. You  
17 know, I mean it's just not the right thing do to.

18 CHAIR FELICIA MARCUS: There's something in between  
19 open-ended multiple decades and -- (Unintelligible)

20 DANTE JOHN NOMELLINI: Yeah, I agree with you. It  
21 was your --

22 CHAIR FELICIA MARCUS: We have the authority. As  
23 you can see from what we did last year, we didn't use it  
24 to the full extent. But we have the tools we need --  
25 (Unintelligible)

1 DANTE JOHN NOMELLINI: Yeah, but to me you shouldn't  
2 be using the emergency authority to do this. But I  
3 understand what people are saying, yeah. I just think --  
4 don't think --

5 BOARD MEMBER STEVEN MOORE: 94 percent's a good  
6 number. And we saw the same thing with our partner  
7 agencies, with the water agencies last year. They would  
8 give us 66 percent response on basic information and then  
9 when we required it with these uncomfortable enforcement  
10 provisions, we got 98 percent.

11 DANTE JOHN NOMELLINI: That's okay. If you give me  
12 a gun, you know, and go out and illegally put a gun to  
13 somebody's head and say I'm going to shoot you, then you  
14 may get some compliance. But it's procedural due process  
15 that you hear people talking about and the emergency  
16 authority to get at this.

17 There's no question you can be effective with -- I'm  
18 going to call it an unlawful means. And I'm appealing to  
19 you that that's not a good way to do it.

20 Now, I didn't file the suit against you on the  
21 emergency regulation and I'm thinking of other  
22 litigations, not necessarily against you. But the state  
23 and the federal projects are saying things about the Delta  
24 and all of a sudden they now claim they don't understand  
25 it, there's water in the Delta all the time, and I've

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1 given you their admissions. If we can't win that one, I'm  
2 going to quit.

3 But anyway -- you're hopeful, I realize that. That  
4 that's the case. But don't forget there are appellate  
5 courts, supreme courts and all of this and that. So you  
6 may not -- you may not prevail in that regard.

7 But I would urge you not to get into the detail of  
8 curtailment of water rights if it's possible. You have  
9 the bully pulpit. You have the ability -- people pay  
10 attention to you. I mean we have always paid attention to  
11 you. I pay attention to the chairperson's admonitions  
12 that other people have submitted all their information  
13 about their water rights.

14 I knew it was tough, but we lucked out and found a  
15 database that gave us a good bit of that information. A  
16 lot of people don't have that luck.

17 So anyway, I would appeal to you not to use the  
18 emergency requirements, to be flexible in dealing with the  
19 people with regard to the information.

20 I would caution your staff, although they're all  
21 very competent, aggressive people, that jumping into the  
22 detail of curtailment of water rights is a sticky,  
23 detailed process.

24 And so anyway, those are my comments. And I hope  
25 you don't require us to provide reams of information again

1 on a very short timeline because many of us lost our  
2 weekends and a lot of time. But we think -- we're happy  
3 with the success and we do want to give you the  
4 information you need to do your jobs.

5 So thank you.

6 BOARD MEMBER DORENE D'AMANO: I just have to jump in  
7 here and thank you for that because I think your  
8 leadership has a lot to do with the high numbers that we  
9 saw.

10 DANTE JOHN NOMELLINI: I think my luck has to do  
11 with the problem with the database.

12 BOARD MEMBER DORENE D'AMANO: Yeah, but even before  
13 you knew about that tool last year when we were here, you  
14 did say that you would comply.

15 DANTE JOHN NOMELLINI: Well, we want to comply.  
16 Why do we want to not comply with you guys? We got so  
17 many people to fight with. Why do we want to fight with  
18 you?

19 BOARD MEMBER STEVEN MOORE: I really don't want you  
20 to quit because I just really enjoy such a coherent  
21 description of the puzzle that's out there about the issue  
22 of overlapping water rights, and I thought your  
23 explanation was really easy to understand. It was a good  
24 teaching moment.

25 Thank you.

1 CHAIR FELICIA MARCUS: Mr. Erlewine, followed by  
2 George Hartman of District 2030.

3 TERRY ERLEWINE: Thank you. Good evening. Terry  
4 Erlewine, State Water Contractors.

5 I just wanted to say that the State Water  
6 Contractors support the resolution. We actually think  
7 that you don't need the emergency basis or emergency basis  
8 for passing the resolution. We think you could do it  
9 under the regular -- your regular authority, but we  
10 support the use of the emergency authority.

11 We think that this is a good step toward providing  
12 additional information that's needed to administer water  
13 rights, and particularly towards protecting stored water  
14 because we had some discussion of excess water over the  
15 last year. We had -- during the irrigation season when we  
16 were water short, it was project water that was going  
17 towards meeting all of the outflow and supporting a lot of  
18 the upstream use.

19 So I wanted to make sure that's on the record and  
20 reiterate that we are supportive of this resolution.

21 Thank you.

22 CHAIR FELICIA MARCUS: Thank you very much.

23 Mr. Hartman, followed by Jeannie Zolezzi. Jeanne  
24 Zolezzi.

25 GEORGE HARTMAN: Hi, George Hartman, representing



1 the Reclamation Districts 2030 and 2074. It's late.

2 Hello, everybody. Madam Chair, Board members.

3 I -- I have two concerns: First, as some of you  
4 know, I'd really like to change this dialog. I'd really  
5 like to see a different way of talking about these issues  
6 and hopefully an effort that we're working on will make a  
7 dent in that and set a precedent. We don't know. We're  
8 still working on it.

9 So I've got a couple of concerns. Number one is the  
10 attorney for staff -- I'm sorry. I don't know your name,  
11 sir. You talked about how staff vets these complaints  
12 before it takes action.

13 I don't think that's embodied in the regulations. I  
14 think that's an in-house safeguard that you have adopted  
15 to verify that a complaint has enough merit to warrant  
16 further action.

17 Is that about right?

18 ANDREW TAURIAINEN: Andrew Tauriainen.

19 GEORGE HARTMAN: I didn't know your name. I'm  
20 sorry.

21 ANDREW TAURIAINEN: Not necessarily in the way  
22 you're putting it. Maybe the way I explained it wasn't  
23 quite the way it is anyway.

24 An Information Order or even an inspection just on a  
25 complaint that comes in through the Internet, let's say,

1 by nature gets some vetting and some determination as to  
2 its efficacy, and those that have more get more  
3 investigation and they all result in something, an  
4 investigation report --

5 GEORGE HARTMAN: Who makes that decision? Who makes  
6 the decision as to whether it has efficacy or not?

7 ANDREW TAURIAINEN: The staff.

8 GEORGE HARTMAN: Under what guidelines?

9 ANDREW TAURIAINEN: Under their expert opinion.

10 GEORGE HARTMAN: That is set by what? I mean, where  
11 can I find a written description of what qualifications  
12 they have to have in order to render an expert opinion?

13 CHAIR FELICIA MARCUS: Staff does the best they can,  
14 based on their experience and judgment. They don't chase  
15 every complaint because there's not time to chase every  
16 complaint. We're not funded to chase every complaint.  
17 There's a certain amount of judgment involved.

18 If you're asking for us to put out every -- you're  
19 creating a giant mousetrap in which really nothing would  
20 ever happen. So I'm not quite sure the point you're  
21 trying to make.

22 GEORGE HARTMAN: Well, that would be okay with me  
23 but --

24 CHAIR FELICIA MARCUS: Well, it shouldn't be okay  
25 with you.

1 GEORGE HARTMAN: No, but --

2 CHAIR FELICIA MARCUS: People have lived in this  
3 agonizing finger pointing for years and years and years,  
4 and maybe some people enjoy living in it. I don't think  
5 you do.

6 BOARD MEMBER DORENE D'AMANO: I imagine you're  
7 getting to the suggestion that I think Jeanne Zolezzi has  
8 in her letter to tighten up the language.

9 GEORGE HARTMAN: Yeah, I think --

10 BOARD MEMBER DORENE D'AMANO: Just so we can be --

11 GEORGE HARTMAN: Yeah. I don't doubt the staff --

12 BOARD MEMBER DORENE D'AMATO: -- more specific on  
13 the point you're raising. I'm looking for that language.

14 ANDREW TAURIAINEN: I have one more point, I'm  
15 sorry, and that is specific to the regulations and the  
16 Information Orders that would be issued under the  
17 regulation.

18 Those orders -- every order of the Board requires  
19 findings to support the order. Those findings in every  
20 case will describe both the evidence and the reason --

21 GEORGE HARTMAN: Sure.

22 ANDREW TAURIAINEN -- for issuing the order. That's  
23 the safeguard that -- that, I think, is what you're  
24 looking for.

25 GEORGE HARTMAN: That's the consummate safeguard.

1           What I'm worried about is Mr. Nomellini described to  
2 you the great luck and fortune that he had in finding a  
3 State Lands database that has all the information that  
4 enabled his office and the engineers to really give you  
5 great compliance. And a lot of that involved my clients.  
6 They did an amazing job.

7           But it was -- there was fortune in that. It was  
8 luck. But it was a burdensome task that without finding a  
9 database I think would have been near impossible.

10           And so what I'm worried about is -- the trigger is a  
11 complaint. Someone files a complaint. That's a trigger.  
12 The staff is the first level of safeguard.

13           And -- and the gentleman talked about how they make  
14 an effort to determine the materiality or substantiality  
15 of that complaint before it goes any further. But when it  
16 goes further and an Informational Order gets issued --  
17 it's like a very nice client of mine, a lady who is not in  
18 Central Delta, who operates a dairy whose husband passed  
19 away a few years ago and she's doing it on her own. Came  
20 into my office on March 1 with the Informational Order.

21           And I had looked at the list attached to the order  
22 to see if her name was on it, and it wasn't. At least not  
23 alphabetically. Her deceased husband's name was on it  
24 indexed by his first name, and I didn't see it. She came  
25 in with it and said what do I do?

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1           She is not in Central Delta. She's in North Delta.  
2 And it was only because of all the work Dante and his  
3 folks had done, Ann Kelsey and Baker and on and on, we  
4 were able to get her information put together for her two  
5 points of diversion and be submitted to you.

6           Absent that, she would have been in violation and it  
7 would have been a very expensive burden for her to meet to  
8 ferret out the information that you were requesting.

9           I'm concerned about the fact that there's no  
10 threshold for filing a complaint. Anyone can file a  
11 complaint.

12           BOARD MEMBER DORENE D'AMANO: Well, if I could?

13           GEORGE HARTMAN: Yes.

14           BOARD MEMBER DORENE D'AMANO: It seems to me that  
15 there are two issues. One is whether or not the language  
16 should be tightened up. And I would just refer everyone  
17 to -- Jennifer Spaletta has a suggestion on the first page  
18 of her letter, and Jeanne Zolezzi, I'm sure she'll speak  
19 to this. Different language but language to tighten up  
20 the provision on the complaint.

21           But I'm just wondering if you're speaking to yet a  
22 separate issue. We have heard that there was just a lot  
23 of confusion when that order went out, and staff after --  
24 I think we had -- I don't remember when the Board meeting  
25 was, if it was maybe a month ago. Staff was very

1 responsive in putting additional information out on the  
2 form so that people could comment.

3 But this issue about finding out where you are on  
4 the list by first name, I just heard from a lot of people.  
5 They were very frustrated by this.

6 And so I'm just -- would like to hear from staff on  
7 in the event that you go forward again with another order,  
8 what can you do to commit to work with stakeholders in  
9 advance so that they can see a copy of the form in advance  
10 and provide suggestions?

11 Because I think a lot of the -- the criticisms that  
12 came in were not just we don't want to fill this out but  
13 they were frustrated. It was difficult for them to figure  
14 out how to fill it out and who it applied to and all those  
15 sorts of questions.

16 So could you respond to what your plans are in the  
17 event that you issue another order?

18 BRIAN COATS: Yeah. As far as the informational  
19 order form, we did provide a template on our website which  
20 had all three pages outlined as to what the questions were  
21 supposed to be asked. And they could download that and  
22 just at their leisure go about filling it out and then  
23 they can go to the actual form and fill it out.

24 BOARD MEMBER DORENE D'AMANO: Well, I'm referring to  
25 in the event that you do this again, what can you commit

1 to do to work with stakeholders in advance so that they  
2 can see what you plan on having people fill out so that  
3 they can make comments? You know, maybe it could be  
4 simplified or, you know, since they're out on the ground  
5 they may see some options that you all wouldn't have  
6 thought of.

7           And then the other issue that comes to mind is the  
8 website. I heard a lot of complaints about your website.  
9 It was too difficult for them to finally get to the place  
10 where they could get the information.

11           BRIAN COATS: Right. Yeah. On the first issue, I  
12 don't think management has any objection to providing the  
13 form in advance. I don't think there's a problem there.

14           As far as finding the link on the form, the  
15 hyperlink to the web form was referenced in the letter.  
16 So if they received the letter, the URL address was there  
17 on page 2, I think it was paragraph three.

18           As far as going to the website and finding it, yeah,  
19 we only had it listed on one particular area because at  
20 the time we were planning on doing a website revamp to a  
21 new format, tab style, and that never came to fruition.

22           But when we did receive enough people commenting on  
23 the fact that the link on the actual Informational Order  
24 that we posted on the website wasn't clickable, we went  
25 ahead and made the adjustments and everything seemed to be

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1 fine at that point.

2 CAREN TRGOVCICH: Just to reference, we are doing an  
3 upgrade of the website now. The tab form that Brian  
4 mentioned is going to go live hopefully soon. We've just  
5 had to work it through all the programs that have drought  
6 activities.

7 And the other thing is we are very happy to put out  
8 the form, and if there's a group of stakeholders that  
9 would like to provide input, that would like to sit down  
10 and talk to us about it, we're very happy to do that. It  
11 only helps us to do our job better.

12 GEORGE HARTMAN: Let me wrap up. I don't want to  
13 prolong this.

14 Had two other concerns. One is a client in the Los  
15 Banos area I met with yesterday was -- who's 86 years old,  
16 knows all the folks down in that area quite well. His  
17 property abuts the California aqueduct.

18 And he said how do these people get away with  
19 pumping groundwater and pumping it and putting it in the  
20 canal and getting paid for it?

21 Now, I'm going to dig into it a little further and  
22 find out what's going on, but as long as you're getting  
23 into abuse and reasonable or unreasonable uses of water,  
24 I've heard other rivers that that's happening, that people  
25 are selling groundwater somehow through some contrivance.



1 I'd like to know more about that, and if I find anything  
2 -- if there's materiality to it, I'll investigate it  
3 before I file a complaint.

4 And the other thing is one slide showed that it was  
5 costing a thousand dollars per report for public agencies  
6 to respond to your informational requests.

7 I think because there's no barrier to a person  
8 filing a complaint, if their complaint is found to be  
9 without merit, there ought to be some way to charge them  
10 with -- with the cost of a person having to prove that  
11 they have the right all along.

12 So I'll just throw in the old English system, loser  
13 pays, something like that.

14 So I think that's pretty much -- pretty much all I  
15 have to say, but I want to thank all the folks who helped  
16 us meet your order. They did a great job and I hope  
17 you're pleased with them.

18 Thank you.

19 CHAIR FELICIA MARCUS: Great. Thank you very much.  
20 I know we'll hear from more speakers, but we do have some  
21 suggestions on ways to clarify the comparing that might  
22 give people some comfort to allay their wildest fears  
23 about it or fear of use about it.

24 So I just want to encourage you guys to think about  
25 which -- because some of them sound kind of reasonable;

1 some require too much. But I want you to be thinking  
2 about that because I know we're going to be hearing -- I  
3 just want you to think about language, separate language,  
4 on that one because, again, people do -- they -- they fear  
5 an extreme in the absence. I don't think you can button  
6 it down all the way, but some of the suggestions are  
7 pretty reasonable.

8 BOARD MEMBER STEVEN MOORE: Is it true that with the  
9 development of the form that maybe we're refining that,  
10 and so future actions you feel would resolve some of the  
11 concerns?

12 DAVID COATS: Yeah. And when we actually developed  
13 a form through stakeholder comments, we made some  
14 revisions and some updates and we're continuing to refine  
15 it. So I imagine in the event that this were approved and  
16 we were -- got the go-ahead to issue more informational  
17 orders, we would consult with them and hopefully get our  
18 IT department to put a -- like a more robust password  
19 system into place because that was one of the complaints  
20 that they brought up.

21 But, yeah, we'll continue to refine it.

22 CHAIR FELICIA MARCUS: Thank you. Ms. Zolezzi,  
23 followed by Danny Merkle.

24 JEANNE ZOLEZZI: Thank you. Jeanne Zolezzi,  
25 representing Banta-Carbona Irrigation District and

1 Patterson --

2 CHAIR FELICIA MARCUS: I always want to call you  
3 Jeannie. Just the way it's spelled. Jeanne Zolezzi.

4 JEANNE ZOLEZZI: It's -- yeah. Either way.

5 CHAIR FELICIA MARCUS: I do it wrong all the time.

6 JEANNE ZOLEZZI: And Patterson Irrigation District.  
7 And obviously my letter's on file. I just have two issues  
8 that I want to hit that we think are the most important.

9 And the first is what a lot of people have  
10 mentioned, and that is our fear of an unsubstantiated  
11 complaint or I think to me, more importantly, the other  
12 requirement of information being provided. Because to me,  
13 it's just an opportunity for abuse.

14 The reason we're really concerned is because we saw  
15 what happened with the last Information Order that went  
16 out. And I won't belabor that. You've seen our Petition  
17 for Reconsideration.

18 But basically you got a letter with no information  
19 and no substantiating information saying someone's  
20 stealing my water and I think they're in the Delta. And  
21 you sent out a thousand Information Orders from, you know,  
22 way south on the San Joaquin River all through the Delta  
23 trying to investigate that. We don't think that was  
24 sufficient information on which to make people do all  
25 that.

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1           So my language, or Ms. Spaletta's language, I think  
2 something saying that that information or the complaint  
3 needs to be supported by at least some evidence determined  
4 by staff to be reasonable is a reasonable requirement, and  
5 with all due respect, as your staff mentioned, if they do  
6 that anyway then they really shouldn't mind if it's in the  
7 regulation. That would give us some protection, something  
8 to fall back on.

9           The second thing that we're very concerned about is  
10 the expansion of the regulation. We know that you needed  
11 the information. I agree with everyone else. We didn't  
12 think you needed to do it by emergency regulation. We  
13 didn't think you needed to do it by regulation. We have  
14 been volunteering that information since early last year  
15 saying that you needed that to make good curtailment  
16 decisions. And obviously you can see the impact that it  
17 makes, so we're glad about that.

18           We're very concerned with the expansion because we  
19 think it goes beyond information that you need and beyond  
20 your jurisdiction.

21           Two sections in the proposed regulation in  
22 particular expand the requirement to require information  
23 of compliance with transfer laws and information about  
24 transfers that haven't been approved by the Board and, as  
25 staff in its presentation said, unverified or previously

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1 unnoticed transfers. And makes it sound like it's  
2 something bad.

3 Those are transfers that are in compliance with law  
4 and outside of the State Board's jurisdiction.

5 And we have a serious concern that by requesting  
6 information on that you are going to somehow insert  
7 yourself into the legality of those transfers, and  
8 obviously that's a concern.

9 We acknowledge -- while we don't agree with it, we  
10 acknowledge that the courts have said that the State Board  
11 can determine the validity of a pre-'14 right. We just  
12 don't think that that court case went further than that  
13 and said and once you determine that validity you can then  
14 regulate that right and tell them when they can change  
15 their place of use, purpose of use and accomplish a  
16 transfer.

17 Because that's regulating that right and you don't  
18 have that authority. And the law already provides the  
19 standard for that transfer, and the method to object is to  
20 bring a lawsuit on that.

21 So that's our main concern with the regulation is  
22 the whole issue of verifying those transfers that haven't  
23 been noticed or approved by the Board.

24 So that and clarification of the complaints or  
25 information is what we would request. Thank you.

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1 BOARD MEMBER DORENE D'AMANO: I'm sorry. You  
2 mentioned -- Jeanne, you mentioned transfers a couple  
3 times here in your letter. So is there one code section  
4 in particular you're wanting us to look at?

5 JEANNE ZOLEZZI: Yeah. It's 879(c)(1)(C) and  
6 879(c)(2).

7 There's two places in the regulation that transfers  
8 are mentioned. One is I think they can ask someone for  
9 information if they're basing their right on a transfer or  
10 a contract. They can ask for information on that.

11 And then you can also, I believe, in (C) ask for  
12 information for any transfer that hasn't been previously  
13 approved or noticed by the Board.

14 CHAIR FELICIA MARCUS: Right. And your concern is  
15 that we would then insert ourselves in regulating it.

16 JEANNE ZOLEZZI: That transfer.

17 CHAIR FELICIA MARCUS: I think the purpose is not to  
18 regulate it, but to actually understand the validity of  
19 the numbers we get from folks we do regulate because we  
20 are getting information that someone says they got it from  
21 a transfer and then we have no way of knowing what that  
22 transfer was. You guys can say it more concisely than I  
23 can.

24 MARIANNA AUE: Yeah, so --

25 CHAIR FELICIA MARCUS: So that I can understand it.

1 MARIANNA AUE: Yeah. The issue is that similarly to  
2 when we sent a curtailment notice and then investigated  
3 and the response is oh, I'm using a riparian right for  
4 which I never filed a statement

5 JEANNE ZOLEZZI: That's totally different. We  
6 support that part of the regulation.

7 MARIANNA AUE: Okay. But with transfers there can  
8 also be a similar -- if it's something we've never heard  
9 of, then there's that same question of did somebody really  
10 do this.

11 And so being able to follow up and say okay, now,  
12 who did you get -- whose water right are you talking about  
13 and being able to look at their water right and say things  
14 like yes, it is for June and, yes, it is at a place where  
15 you could conceivably divert it here, allows us to look at  
16 that and decide is this something that needs to be  
17 investigated or is this something that -- that we just  
18 want to throw into the calculation of where the demand is  
19 on this stream system? Is it way up at the top? Is it  
20 down at the bottom?

21 JEANNE ZOLEZZI: Well, the information that the  
22 regulation says you can ask for is not narrowed in the way  
23 that you've just described it. Because if you said, you  
24 know, you have to provide us with how much you're  
25 diverting under that right and what right it is, then

1 that's different. But it goes way beyond that.

2 It says we can ask for all information upon it and  
3 we can ensure that it complies with transfer criteria.  
4 That's a whole different level of analysis that is not  
5 required under the law currently.

6 BOARD MEMBER DORENE D'AMANO: But could you  
7 recommend some language, as you did with --

8 JEANNE ZOLEZZI: Well, our recommendation would be  
9 taking it out.

10 BOARD MEMBER DORENE D'AMANO: Well, yeah. No. But  
11 -- but if we're going to move forward with trying to  
12 compile the information for a potential curtailment, I  
13 could see why we would need that information.

14 JEANNE ZOLEZZI: Well, you know, with all due  
15 respect, I think it's already encompassed in what you  
16 have. I'm just thinking of some of the transfers that I  
17 know are going on.

18 You are asking for -- already under the reg you  
19 would ask for how much they're pumping every month. So  
20 you have the amount they're pumping. You know that  
21 they're curtailed, so everything they're pumping has to be  
22 under that transfer that they're talking about.

23 You can obviously ask them who the transfer's from  
24 under your existing regulation. You can call that other  
25 diverter and say did you transfer to so and so? And you



1 know what that other diverter's right is because you can  
2 ask for that information as well.

3 So all you need is the total information. If that  
4 pre-'14 user has the right to pump 200 and there's 50  
5 being pumped at both points of diversion, you have enough  
6 information right there.

7 And that's all available under your existing  
8 regulation, so you don't really have to expand it to say  
9 we need all the information about your transfer so that we  
10 can go through and make sure it complies with transfer  
11 criteria. That's a whole different level.

12 So I think you already have the ability to get the  
13 information that you need to verify. I can't provide you  
14 language other than what's already in there.

15 DAVID ROSE: We're looking at it. Certainly.

16 CHAIR FELICIA MARCUS: My understanding is we had  
17 people who would say I got it from so and so, but we had  
18 no ability to get any awareness of whether so and so  
19 transferred the water and fallowed or did something to  
20 reduce their use by the amount they transferred. We're  
21 just trying to make sure --

22 DAVID ROSE: We are definitely intending to leave  
23 that in. But whether the language specifically of (c)(2)  
24 regarding compliance with transfer law could be narrowed,  
25 that's what we're trying to decide right now.

1           Because what you're talking about, the existence of  
2 the right whether it was in fact transferred, that goes to  
3 whether there was an unauthorized diversion, not  
4 regulating a pre-'14 or riparian water right. But we're  
5 trying to see -- we're working on that right now.

6           CHAIR FELICIA MARCUS: Okay. Thank you.

7           MARIANNA AUE: Because I think there's a little bit  
8 of a -- to assume that we can -- that someone says oh, I'm  
9 using water transfer for so and so means that we should  
10 immediately go investigate so and so because we can assume  
11 that there's an unlawful diversion, I think that's the  
12 kind of logical leap we were trying to avoid --

13          CHAIR FELICIA MARCUS: Right.

14          MARIANNA AUE: -- having to make every time. But I  
15 think that it is possible to get at everything we're  
16 trying to get at using more words that describe exactly  
17 the type of information we're looking for rather than just  
18 sort of the pithy, you know, was this transfer okay.

19          CHAIR FELICIA MARCUS: Yeah.

20          MARIANNA AUE: So I think we'll go for more detail  
21 and then run something by you guys.

22          CHAIR FELICIA MARCUS: Think about that one.

23          Mr. Merkley, followed by Deirdre DesJardins.

24          DANIEL MERKLEY: Thank you, Chair Marcus, members of  
25 the Board. Danny Merkley, with the California Farm Bureau

1 Federation.

2 I'm going to go real quick because I'm going to  
3 repeat some things that you've already heard. But I want  
4 to start with if this is truly about collecting data for  
5 managing the system better, then every effort needs to be  
6 made to convey that in a -- in a clear and better way.

7 I thought that was -- that was a very good point.  
8 It was up on the Power Point earlier by staff. And that's  
9 something that isn't necessarily conveyed to folks in a  
10 clear way. And, quite honestly, when this stuff comes, it  
11 comes across to people that are out there in a very  
12 threatening and scary way.

13 CHAIR FELICIA MARCUS: People read the most negative  
14 thing into something unless --

15 DANIEL MERKLEY: So anything we can do to help that  
16 tone in letters and notices like that, but then also when  
17 staff is reaching out to them. And as we all know, we're  
18 human beings and some of us are better at that than  
19 others, and some of us are better some days than other  
20 days, too.

21 Moving on, the information request is spelled out in  
22 this, seemed to be without the same careful triggers that  
23 were in the emergency regulations last year.

24 And that's a concern for us. It seems to be almost  
25 asking for information without cause. So -- so that's a

1 concern and something -- you know, we weren't real  
2 thrilled with the emergency regulations last year. We're  
3 even more so concerned with what we're seeing this opening  
4 up and the changes this year.

5         Also -- and I led into this a little bit. Please  
6 understand the unfamiliarity with this stuff for some of  
7 these folks out there. I mean you heard stories about  
8 some of the older ones and folks that really don't  
9 understand this stuff.

10         We're dealing with that every day with our members.  
11 I'm getting calls, far more calls than I can handle. I've  
12 probably got a bunch today, but I don't know because I've  
13 been here most of the day.

14         So -- so that's important. It's -- for the most  
15 part you're looking at very honest, hard-working people  
16 that are dealing with Mother Nature in a way that most of  
17 us have never had to deal with it, and they got to get it  
18 done or it doesn't get done and there are no excuses.

19         Maybe you can make a little excuse to the Water  
20 Board or ask for a little forgiveness or a little extra  
21 time to get something done and, if you're showing good  
22 effort, that works. But with Mother Nature it doesn't  
23 work. Doesn't at all. Especially if you have a dad  
24 you're working with on the ranch.

25         But I digress.

1           Also, want to be real clear about the ask. Why  
2 we're asking for this. A little bit what I said earlier  
3 and what we're asking for so that we really do understand.  
4 And I think that goes a long way to helping people realize  
5 that well, this is actually good information. It's going  
6 to help us with the curtailment notices so that we're not  
7 curtailing --

8           CHAIR FELICIA MARCUS: Right.

9           DANIEL MERKLEY: -- users that aren't necessary.  
10 And that's not necessarily put out there.

11           And I want to -- I was really concerned about the  
12 slides I saw talking about the fiscal impact. It -- maybe  
13 I missed something. Maybe I glazed over for a minute.  
14 But in talking about the fiscal impact to local  
15 governments and other governmental agencies, there's a  
16 huge fiscal impact and -- and resource burden on a lot of  
17 these folks in trying to get this stuff figured out.

18           Because it's information that -- that they assume  
19 they have. Whether that's correct or not, it takes time  
20 for them to go back and research this.

21           You heard some of this from -- from previous  
22 presenters. And that's -- that's a real challenge. We  
23 have worked -- Farm Bureau has worked very hard to try to  
24 help folks with the information to help them comply.

25           There's a number of things that have passed, laws

1 and regulations, that we were opposed to, we didn't like,  
2 but when they passed we're out there trying to help our  
3 members comply.

4       Every time a curtailment notice went out this last  
5 year, that very same day we sent information out to all of  
6 our members immediately to help them understand what was  
7 going on, to help them be in compliance, and we're  
8 continuing to try to do that.

9       But we need a little help helping you, if you will,  
10 with that and helping our members be in compliance with  
11 something that's new and difficult and very hard for them  
12 to do.

13       I'm going to end there because the buzzer just went  
14 off and it's late. Thank you.

15       CHAIR FELICIA MARCUS: Thank you very much. And  
16 thank you for the help when that happens. We actually do  
17 need all that, the help we can get that way.

18       DEIRDRE DES JARDINS: Thank you. I know it's real  
19 --

20       CHAIR FELICIA MARCUS: One second. After you will  
21 be Julie Ann Phillips.

22       DEIRDRE DES JARDINS: Thank you. I know it's late.  
23 I just had an observation about the Delta curtailment  
24 generally, and that's -- I know the method that DWR is  
25 using for the curtailment analysis, and they're not

1 considering -- there's a 55-year-old requirement for the  
2 Bureau of Reclamation to provide water for salinity  
3 control in the Delta. And the Board has required that  
4 since D-990 was instituted.

5 And I just want to -- you know, this is fundamental  
6 and this is what they said.

7 "Throughout these proceedings the Bureau's  
8 representatives have consistently affirmed their policy to  
9 recognize and protect all water rights on the Sacramento  
10 Watershed and in the Delta existing under state law at the  
11 time these applications were filed including riparian,  
12 appropriateness and others.

13 "Unfortunately, these rights have never been  
14 comprehensively defined. It is imperative, therefore,  
15 that the holders of existing rights and the United States  
16 reach agreement concerning these rights and the  
17 supplemental water required to provide the holders with a  
18 firm and adequate water supply, if a lengthy and extremely  
19 costly adjudication of the waters of the Sacramento River  
20 and its tributaries is to be avoided."

21 And as we know, they did reach that agreement with  
22 the Sacramento Watershed settlement contractors but not  
23 with the users in the Delta.

24 Skipping to -- there was a specific term included in  
25 the contracts.

1 "The State Water Rights Board reserves continued  
2 jurisdiction over permits issued pursuant to applications  
3 5625 --" yada, yada -- "until March 1, 1964, or such  
4 additional time as may be prescribed by the Board for the  
5 purpose of formulating terms and conditions relative to  
6 salinity control in the Sacramento/San Joaquin Delta.

7 "Permittee shall on or before 1962 and each six  
8 months thereafter submit to the Board a written report as  
9 to the progress of negotiations relative to agreement  
10 between permittees and the State of California and/or the  
11 permittee and water users in the Delta and in northern  
12 Contra Costa County."

13 They're not submitting these progress reports, and I  
14 don't -- it just seems like cooperative efforts have  
15 broken down. But I just wanted to urge the Board to think  
16 about this in the context of this curtailment proceeding  
17 because this was an interpretation of the area-of-origin  
18 rights by the Board when they initially issued this  
19 permit.

20 I calculated that they needed 2,000 CFS of  
21 supplemental water in June. Most -- they didn't -- 1,500  
22 CFS came from the Bureau, and that was exactly the amount  
23 that their engineers estimated they would need for  
24 salinity repulsion back in 1960.

25 It may not be that there's any extra water for



1 salinity. But are we going to shift the burden for  
2 salinity control onto the riparian users or not?

3 So thank you.

4 CHAIR FELICIA MARCUS: Thank you.

5

6 (Whereupon, end of file 10)

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REPORTER'S CERTIFICATE

State of California )  
                                  ) SS.  
County of Sacramento )

I certify that the statements in the foregoing hearing were transcribed in the within entitled cause by audio; that said hearing was taken at the time and place therein named; that the testimony of said witnesses was reported by me, a duly Certified Shorthand Reporter of the State of California authorized to administer oaths and affirmations, and said testimony was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for either or any of the parties to said hearing, nor in any way interested in the outcome of the matter named in said hearing.

In witness whereof, I have hereunto set my hand this 30th day of August, 2015.

Diane F. Fattig,  
Certified Shorthand Reporter  
Certificate No. 3692

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