STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2015-0033-EXEC

In the Matter of the Petition for Reconsideration of the

LOCAL AGENCIES OF THE NORTH DELTA

Regarding Order WR 2015-0002-DWR
Order for Additional Information in the Matter of Diversion of Water from Sacramento and San Joaquin River Watershed and Delta

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ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR[1]:

1.0 INTRODUCTION

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

Petitioner states that, with respect to Petitioner, the State Water Board did not satisfy the provisions of California Code of Regulations, title 23, section 879 when it issued the Information Order.[2] Specifically, Petitioner argues that Board did not receive a "complaint" alleging unlawful diversions in the northern Delta, which Petitioner argues is required to trigger the Board's information order authority under the regulation. Petitioner further contends that the Department of Water Resources (DWR) is contractually precluded from alleging unlawful diversion in the northern Delta and objects that the online reporting form used by the Board requests information beyond that authorized by section 879, subdivision (c). Petitioner objects that the Board failed to prepare a cost analysis before adopting the Regulation. Petitioner asserts that the Board

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

[2] Unless otherwise noted, all further references are to title 23 of the California Code of Regulations.

failed to hold a workshop before issuing the Information Order and suggests that this alleged failure renders the Information Order invalid. For these reasons, Petitioners request that the Board revise the Information Order so that it no longer requires LAND members or their clients to provide the required information.

Petitioner's Petition for Reconsideration is denied because it fails on the merits, as explained in detail below. Order 2015-0002 is based on sufficient information available to the Deputy Director for the Division of Water Rights (Division) to indicate unlawful diversions of stored water by some members of a group of riparian and pre-1914 appropriative water right holders that includes Petitioner. DWR's contractual obligations to Petitioner are irrelevant for purposes of determining whether sufficient information existed; the online reporting form is valid under the Board's authority; a "cost analysis" is not required for the Information Order or emergency regulations; and Petitioner's assertions regarding the need for a Board workshop have no basis in law or in fact.

2.0 GROUNDS FOR RECONSIDERATION

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

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

(§ 768.)

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

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

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

3.0 BACKGROUND

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

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

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

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

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

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

On July 23, 2014, DWR and the United States Bureau of Reclamation (Reclamation) (collectively, Project Agencies) alleged that riparian and pre-1914 diverters in the southern and central Delta were illegally diverting water stored and released by the State Water Project and the Central Valley Project (collectively, Projects) and water acquired by their contractors through transfer and exchange agreements. The Project Agencies requested that the State Water Board exercise its statutory authority to require Delta water users to provide the State Water Board with information that: 1) supports the basis of any asserted right or rights; and 2) reflects the quantity of water diverted and expected to be diverted. On August 5 and 7, 2014, the State Water Contractors and Westlands Water District submitted letters in support of the Project Agencies' request.

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

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

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

On November 23, 2014, the Division requested that Statement of Water Diversion and Use holders claiming riparian and pre-1914 rights in the Sacramento and San Joaquin River Watershed and Delta who had not previously identified their year of first use do so. On

February 4, 2015, the Division's Deputy Director signed Order 2015-0002. The order finds that the Deputy Director has information that indicates there may be unlawful diversions of stored water by riparian and pre-1914 appropriative water rights claimants in the Sacramento and San Joaquin River Watershed and Delta. The order requires riparian and pre-1914 water right claimants along the Sacramento and San Joaquin River Watershed and Delta to submit certain information to the Board. Specifically, claimants must provide their monthly diversion and the basis of right allowing such diversions for each month in 2014, projected diversions for 2015, the primary use of the water, the location of the point of diversion, the location of the place of use, and the purpose of use. Order 2015-0015 requires submission of supporting documentation for the claimed right, including the property patent date and the date of initial appropriation. Information was required to be provided no later than March 6, 2015.

On February 13, 2015, and March 6, 2015, the State Water Board received letters submitted by LAND requesting reconsideration of the Information Order. The Board deems these letters to constitute a valid Petition for Reconsideration. The Petition was received within the 30 day deadline for Petitions for Reconsideration.

4.0 ANALYSIS

4.1 Legal Standard

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

To sustain an information order under the regulation in effect at the time, information received by the Deputy Director must indicate unlawful diversion of stored water and indicate that riparian or pre-1914 appropriative water right holders are responsible. However, qualifying information need not identify or propose a particular culprit of unlawful diversion. This is clear from the text of the regulation, which uses the plural, "water right holders," in describing the person or persons who commit the unlawful diversion that must be indicated. (§ 879, subd. (c).) This

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

language contrasts with the regulatory text for complaints, which must allege interference with a water right by a singular "riparian or pre-1914 water right holder." (*Ibid.*) If information received by the Division indicates unlawful diversions of stored water by riparian or pre-1914 water rights holders, the Division's Deputy Director may use an information order to investigate whether such unlawful diversion is in fact occurring, identify which diverters are engaged in the unlawful diversion, and support such further corrective action as may be necessary.

The purpose of an information order as an investigation tool confirms this understanding of section 879, subdivision (c) of the Drought Regulations. Under the regulation, information orders serve to "provide certain information necessary for determining issues of relative priority" of riparian and pre-1914 water rights. (State Water Board Resolution 2014-0031, Finding No. 21.) Gathering this information is necessary "[g]iven complexities surrounding the relative priority of individual pre-1914 appropriative water rights and riparian water rights" (*ibid.*), which prevented the State Water Board from issuing curtailment notices notwithstanding water scarcity due to the extraordinary drought. Information obtained from these orders assists Board staff "to investigate whether curtailment notices and potential enforcement under the Board's existing processes should be pursued for these diverters based on the information received." (*Ibid.*)

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

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

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

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

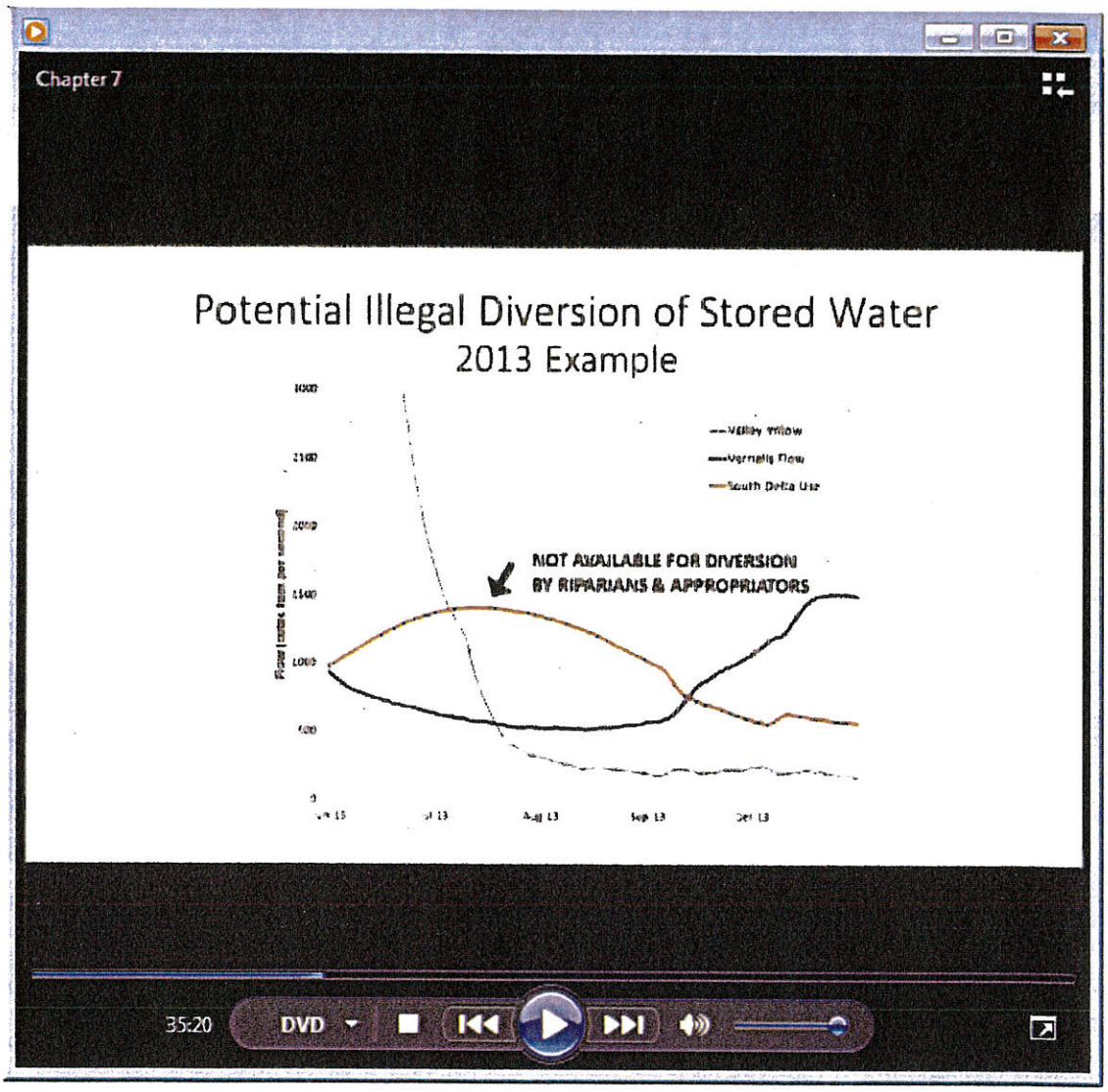

Figure 1: Screen capture from Curtis Creel's recorded testimony, Public Workshop: Central and Southern Delta Water Availability and Use, September 24, 2014

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

Based on the information presented, Creel concludes that riparian or pre-1914 appropriative water rights holders in the Delta are illegally diverting stored water. Key to Creel's analysis, however, is the assumption that riparian and pre-1914 water rights holders further upstream on the San Joaquin River are not themselves illegally diverting stored water. "[T]he estimates of the unimpaired runoff, the blue line, does not factor in any of the upstream impairments that would occur by those diverters that are along the San Joaquin River and would have, presumably, rights to divert those flows." (Disc 2 at 0:35:20 to 0:35:39.)

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

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

4.3 Including Petitioner within the Information Order's Scope was Proper

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

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

4.4 DWR's Contractual Obligations to Petitioner are Irrelevant

Petitioner asserts that DWR is contractually precluded from alleging that diversions in the North Delta are potentially unlawful under a 1981 water supply contract. As explained above, the Division received information indicating that stored water is being illegally diverted by riparian or pre-1914 appropriative water rights holders in the Sacramento and San Joaquin Rivers and Delta. That information came from a multiple sources, including during a public State Water Board workshop.

The Deputy Director issued the Information Order based on the information received and issued a Delta-wide Information Order. Whatever DWR's contractual obligations may be, they are not relevant to the Information Order's validity under section 879, subdivision (c).

4.5 The Online Reporting Form is Valid under the Drought Regulations

Petitioner objects that the information requested through this online reporting form exceeds the authority contained in section 879, subdivision (c). Order 2015-0002 requires identified water rights claimants to submit certain information, including:

> Identification and location of the point of diversion and place of use for water right being claimed for each point of diversion, the purpose of use, and the place of use being served with acreage and crop type, if applicable. All documentation supporting the type of water right claimed, including the property patent date and patent map, if riparian right. If pre-1914 right is claimed, a copy of notice filed with the county, copy of property deed and all other information supporting the pre-1914 right pertaining to initial diversion and continued beneficial use of water.

(State Water Board Order WR 2015-0002-DWR, at p. 3.)

The Division provided an online reporting form to facilitate the submission of this information. The form includes fields for each respondent's primary use of water, the basis of right claimed and supporting documentation, and certain information regarding any water supply contracts that may be applicable. The form also contains fields for supporting documentation pertinent to the basis of right claimed by a particular respondent, including documentation regarding

severance of riparian rights or documentation regarding continuous use of pre-1914 water rights.

Under the Drought Regulations, the Deputy Director may issue an order requiring riparian or pre-1914 water rights holders to "provide additional information regarding the property patent date, the date of initial appropriation, and diversions made or anticipated during the current drought year." (§ 879, subd. (c).) Thus, the Deputy Director is not limited to requesting the three specific information items listed in the Drought Regulations. The Deputy Director may request "additional information regarding" these items. (*Ibid.*) Nothing in the text of the regulation limits the scope of this additional information, provided that the additional information requested is "regarding" one of the three specific information items listed.

To "regard" means "[t]o relate, concern, or refer to." (American Heritage Dict. (2d college ed. 1982) p. 1040.) Information substantiating a factual assertion clearly relates to, concerns, or refers to that assertion. Thus, section 879, subdivision (c) allows the Deputy Director to require the production of supporting information for "the property patent date, the date of initial appropriation, and diversions made or anticipated during the current drought year." (§ 879, subd. (c).) Information necessary to establish the validity of an asserted legal right necessarily relates to, concerns, or refers to the asserted right and to activities authorized by that right. Thus, section 879, subdivision (c) allows the Deputy Director to require production of information necessary to establish the validity of the water right under which "diversions made or anticipated during the current drought year" will be made. This is consistent with the purpose of section 879, subdivision (c) as an investigation tool to identify potentially unlawful diversions and to protect water rights during the ongoing drought emergency. Without supporting evidence for the basis of right, merely knowing that particular diversions are being made or proposed is not sufficient for the Board to assess whether unlawful diversions are taking place.

Petitioners cite, as particular examples of their objections, the requirements that they submit supporting documentation regarding severance of riparian rights and submit documentation regarding continuous use of pre-1914 water rights. Severance of riparian rights regards (i.e. relates to, concerns, or refers to) the validity of the riparian water right under which diversions made or anticipated during the current drought year would be made. (See, e.g., *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 538–39 [discussing survival of riparian water rights upon division of parcel by grant deeds and petition decree]; *Hudson v. Dailey* (1909) 156 Cal. 617, 624 [conveyance of a part of a tract not abutting a stream would not normally carry a riparian right in the stream]; *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, 331 [same]; see also generally State Water Board Order WR 2011-0005, at p. 19 et seq. [applying severance principles].) Continuous beneficial use of a pre-1914 appropriative water right is generally necessary for that right to continue to be valid. (See, e.g., *Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879, 893.) Therefore, supporting documentation regarding continuous use of pre-1914 rights regards (i.e. relates to, concerns, or refers to) the validity of the pre-1914 water rights under which diversions made or anticipated during the current drought year would be made.

The State Water Board has the authority to make a preliminary determination, for purposes of enforcement, as to whether a diverter has the riparian or pre–1914 appropriative rights that the diverter claims before issuing an order against an illegal diversion of water. (*Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, 406; see also See Wat. Code, §§ 1052, 1831.) Requiring the production of information specified in Order 2015-0002 is well within the Deputy Director's authority under section 879, subdivision (c).

4.6 ***A Fiscal Impact Analysis or Cost Analysis is not Required***

Petitioner contends that the Board should reconsider the Information Order because, in part, there was "no preparation of a cost analysis due to adoption of the Regulations under the emergency provisions of the Government Code." (See Letter from Osha Meserve, Soluri Meserve on behalf of LAND, to Tom Howard (March 6, 2015), at p. 2.) Petitioner does not cite specific authority in support of this contention, and nothing in the text of title 23, section 879, subdivision (c) requires the Board to prepare a cost analysis before issuing an information order.

It appears that Petitioner is referring to section 11346.5, subdivision (a) of the Government Code. This subdivision obligates the state to include in the notice of proposed adoption of a regulation "[a]n estimate ... of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed ... other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state." (Gov. Code, § 11346.5, subd. (a)(6).) A related provision requires the notice to include certain information if the state agency "makes an initial determination that the action may have a significant, statewide adverse economic impact directly affecting business." (*Id.*, subd. (a)(7).) Both provisions apply to "notice[s] of proposed adoption, amendment, or repeal of a regulation," (*id.* subdivision (a)), but not to administrative orders executed pursuant to a regulation.

As Petitioner concedes,[4] the cost analysis required by Government Code section 11346.5, subdivision (a) does not apply to section 879 because the State Water Board adopted the Drought Regulations through the Government Code's emergency procedures in response to the ongoing drought emergency. (See Gov. Code § 11346.1; Governor's Proclamation No. 1-17-2014 (Jan. 1, 2014) [proclaiming a State of Emergency to exist in California due to drought conditions]; Proclamation No. 4-24-2014 (Apr. 24, 2014) [proclaiming continued State of Emergency]; see also Governor's Exec. Order No. B-28-14 (Dec. 22, 2014) [extending drought emergency proclamations and waivers of certain regulatory requirements through May 31, 2016].) The Board complied with the emergency rulemaking requirements of section 11346.1 of the Government Code. (See Office of Administrative Law, Notice of Approval of Emergency Regulatory Action, OAL File No. 2014-0708-02 E, July 16, 2014.)

Notwithstanding the inapplicability of the requirements to Government Code section 11346.5 to emergency regulations, the State Water Board substantially complied with its requirements. The Board's Notice of Proposed Rulemaking includes the estimate of cost or savings, as

[4] Letter from Osha Meserve, Soluri Meserve on behalf of LAND, to Tom Howard (March 6, 2015), at p. 2.

specified in section 11346.5, subdivision (a)(6) of the Government Code. (State Water Resources Control Board, Notice of Proposed Emergency Rulemaking (June 20, 2014), p. N-3, at <http://www.waterboards.ca.gov/board_info/agendas/2014/jul/070114_5.pdf> [as of August 12, 2015].) The Board also prepared a regulatory digest, a cost estimate, and discussion of the proposed Drought Regulation's fiscal effects. (State Water Resources Control Board, Informative Digest (June 20, 2014), pp. 20–21.) Thus, to the extent that Petitioner objects that the Board improperly promulgated section 879, subdivision (c) of the Drought Regulations, Petitioner's objections are without merit.

4.7 ***Petitioner's Assertions Regarding a Board Workshop have no Basis in Law or Fact***

As previously explained, the Drought Regulations authorized the Division's Deputy Director to issue an information order upon receipt of a complaint containing certain allegations or upon receipt of certain information. Nothing in the text of the regulation indicates that the Board is obligated to conduct a workshop prior to the Deputy Director's issuance of an information order. Petitioner cites no authority to support such a proposition.

Notwithstanding the absence of any obligation to do so, the Board in fact held a workshop before issuing the Information Order and the Deputy Director considered the information made available through the workshop. On September 24, 2014, the Board convened a public workshop on Central and Southern Delta Water Availability and Use in Sacramento. (State Water Resources Control Board, Board Meeting/Workshop Agenda, Sept. 23–24, 2014, at <http://www.waterboards.ca.gov/board_info/agendas/2014/sep/09232414_agenda.pdf> [as of August 12, 2015].) Eric Ringleberg provided testimony on behalf of Petitioner. (See Disc 2, 0:23:38 to 0:27:35.) There is simply no basis in law or fact for Petitioner's assertions.

5.0 CONCLUSION

The Local Agencies of the North Delta Petition for Reconsideration is denied because it fails on the merits, as explained above. Order 2015-0002 is based on sufficient information to indicate unlawful diversions of stored water by some members of a group of riparian and pre-1914 appropriative water right holders, which includes Petitioner. Moreover, the Deputy Director properly issued the Information Order, and the information requested is within the authority conveyed by the Drought Regulations.

ORDER

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

Dated: 10/7/15

Thomas Howard

Thomas Howard
Executive Director