# LOCAL AGENCIES OF THE NORTH DELTA

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February 13, 2015

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

State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

**RE: Informational Item # 4**
**Report on Recommended Improvements to the Implementation and Enforcement of Water Rights During Drought Conditions**

Dear Board Members and Staff:

These comments are submitted on behalf of the Local Agencies of the North Delta ("LAND") regarding recent actions of the State Water Resources Control Board ("Board") with respect to the Board's response to the drought conditions. LAND is a coalition comprised of reclamation and water districts in the northern geographic area of the Delta.[1] Water users within the Delta generally have senior water rights and are also protected by various Area of Origin statutes. Maintenance of these historic and agriculturally productive water rights is very important to the continued viability of the local agricultural economy and the stability of the districts that provide services to landowners within each district. As explained below, we are concerned that the Board's February 4, 2015 Order for Additional Information ("Order") is improper, unduly burdensome and confusing, and therefore should be modified or withdrawn, along with the Online Reporting Form (attached as Exhibit A).

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

*A Workshop Should Have Occurred Prior to Issuance of the Order and Development of the Online Reporting Form*

We are disappointed that there has not been adequate opportunity to interface with Board staff regarding the content of the Order and the development of the Online Reporting Form prior to rollout. Had a workshop been offered, many problems could have been avoided. As it is, the Order is threatening penalty fines after March 6th for diverters listed in the attachment to the Order.[2] Additionally, the Online Reporting Form is very difficult to use and includes several information requests that go beyond the scope of the Complaints to which the Order was allegedly issued in response.

*The Complaints Filed by DWR/BOR and CSPA Did Not Complain of Diversions in the North Delta*

Under Title 23 of the California Code of Regulations, section 879, subdivision (c) ("section 879(c)"), if a complaint is filed regarding unlawful diversions, the Deputy Director may order "such 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."[3] The Order specifically refers to this authority and to the Complaints filed by the Department of Water Resources ("DWR")/Bureau of Reclamation ("BOR") (July 23, 2014) and the California Sportfishing Protection Alliance ("CSPA"). (Order, Background, ¶¶ 5-7.)

Yet neither the DWR/BOR or CSPA complaints refer to diversions in the north Delta as being potentially unlawful. Indeed, DWR is specifically precluded from asserting such a claim under its 1981 contract with DWR for provision of water supply.[4]

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[2] The lack of due process on this issue is particularly concerning since diverters' use of water is a property right. Should penalties and enforcement ensue from this truncated and improper process, federal and State Due Process claims may arise. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.)

[3] Leading up to the Board's adoption of this regulation, LAND and many others commented that provision of complex water rights information within 5 days would not be possible. The Board adopted the regulation over these objections.

[4] Here is the specific language of the NDWA Contract: "This contract shall constitute the full and sole agreement between the State and the Agency as to (1) the quality of water which shall be in the north Delta channels, and (2) the payment for the assurance given that water of such quality *shall be in the Delta channels for reasonable and beneficial uses on lands within the Agency, and said diversions and uses shall not be disturbed or challenged by the State* so long as the Contract is in full force and effect." (NDWA Contract, ¶ 8.a(i), italics added.)

Thus, there is no authority under the Board's emergency drought regulations to order information from north Delta diverters. To the extent additional information regarding water use would be helpful to the Board in managing limited supplies (such as monthly or projected water use), the extensive information required in the Online Reporting Form far exceeds that scope.

*The DWR/BOR Complaint Alleges Unlawful Diversion of Stored Water Yet the Order Will Not Lead to Information that Better Defines the Amounts DWR/BOR States It Is Entitled to Divert*

As explained in LAND's comments dated September 15, 2014, factual questions exist around the amount of water in Delta rivers and sloughs that is stored water as opposed to natural flow. As acknowledged in the SWRCB's 2015 Dry Year Program Report, "most water sources in the state are not gaged." (p. 12.) Thus, the more pertinent question is what, if any, legally stored, surplus or abandoned water is available during the drought for export by DWR and BOR after in-Delta water rights are satisfied? Rather than attempt to address this important question, the Order and the Online Reporting Form myopically focus on a determination of the validity of all riparian and pre-1914 Delta diversions even though no specific claims of unlawful diversions have been filed. Even if all questions regarding the priority and validity of Delta diversions are eventually answered, the issue of what water has been stored versus what water is natural or abandoned flow and is available for diversion will not have been answered, leaving a huge information gap.

The drought should not be used as a vehicle to reorder water rights because certain powerful appropriators are unhappy with their priorities and do not wish to meet their legal responsibilities to maintain flows for fisheries and other beneficial uses. Especially as DWR moves forward to literally block off hundreds of north Delta water diversions from their primary freshwater source, and at the same time seek to increase summer pumping above the prior "health and safety" level of 1500 cfs,[5] the SWRCB should not place additional and unnecessary burdens on Delta diverters.

We support the Executive Director's February 3, 2015, decision not to grant DWR/BOR's requested higher pumping limits due to unreasonable impacts on fish and wildlife. Higher pumping limits would also be inconsistent with DWR's plan to place barriers on Sutter and Steamboat Sloughs. Such barriers could also redirect even greater numbers of fish toward the south Delta pumping facilities when the Delta Cross Channel is open.

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[5] We also believe additional support for this level of pumping as being necessary for health and safety should be provided.

*The Water Reporting Form Is Wasteful and Overbroad*

For riparian claims, the Water Reporting Form requests the patent date. It is not clear from the Online Reporting Form, but a copy of the patent, patent map and parcel may also be necessary from each diverter. The patent date is when the grant from the United States government was obtained, and indicates the riparian priority date. Yet from the work of the South and Central Delta Water Agencies, we see that virtually all of the patent dates for diverters in those areas are in the mid- or late-1800s. While these priority dates could conceptually become important in a very severe drought when all water rights are curtailed, it is fairly obvious that riparian rights would be the last to be curtailed. Forcing landowners to locate records over one-hundred years old in various locations and retain experts and counsel within a couple of weeks is entirely unnecessary and is a form of harassment. While the Bureau of Land Management website is helpful in obtaining patent dates, the supporting documents are not always available, and must be mail-ordered from the East Coast.

The focus of any Online Reporting Form in the short term should be on the Board obtaining the information it needs to effectively manage scarce water resources during drought conditions (such as planned water use for the coming growing season). To this end, the Online Reporting Form should allow diverters to indicate the entire amount of water planned to be used, irrespective of the right upon with it is based. Such "total net use" under all claimed rights, could in turn help determine water availability. The Board's legitimate need for information, however, does not reasonably include forcing diverters to track down arguably irrelevant historic documents, or attempting to entrap unwary diverters into making admissions against their interests regarding complex legal issues such as severance of riparian rights and forfeiture of pre-1914 rights. As the scope of the Order and the Online Reporting Form go well beyond these needs, they should be modified.

Additional technical and substantive comments, along with recommendations for specific changes to the Online Reporting Form are included in Exhibit B to this letter. Most importantly, we believe that the Online Reporting Form should not, as a matter of due process, include the current questions and document production requirements relating to severance of riparian rights and nonuse of pre-1914 rights. Even once these questions are removed and the form accessibility and other technical issues are addressed, additional compliance time will be required. We suggest that the Board prioritize the information that is needed most, and narrow the scope of both the Order and the Online Reporting Form to only include that information in the short term. Information that may be helpful to complete Board records but is not immediately needed should be requested within a longer timeframe.

**Conclusion**

For the reasons discussed above, we request that the Order be withdrawn and modified to better reflect the Board's real need for information, and then provide a reasonable timeframe to provide that information. Should the Board determine not to withdraw or modify the Order, we would appreciate the opportunity to work with staff to implement necessary changes to the Online Reporting Form to improve the ability of water diverters to effectively respond to the Order. We hope this letter is helpful in the Board's process of refining its approach to ensure that the implementation and enforcement of water rights during the drought is both effective and equitable.

Very truly yours,

**SOLURI MESERVE**
A Law Corporation

By:
Osha R. Meserve

Attachments:

Exhibit A (Online Reporting Form)
Exhibit B (Additional technical, substantive comments, and recommendations for specific changes to the Online Reporting Form)

cc (sent via email):

Felicia Marcus, Chair, State Water Resources Control Board
(Felicia.Marcus@waterboards.ca.gov)
Frances Spivy-Weber, Vice Chair, State Water Resources Control Board
(Frances.Spivy-Weber@waterboards.ca.gov)
Dorene D'Adamo, Board Member, State Water Resources Control Board
(Dorene.Dadamo@waterboards.ca.gov)
Tam M. Doduc, Board Member, State Water Resources Control Board
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Thomas Howard, Executive Director, State Water Resources Control Board
(thoward@waterboards.ca.gov)

Michael George, Delta Watermaster
(deltawatermaster@waterboards.ca.gov)
John O'Hagan, State Water Resources Control Board
(johagan@waterboards.ca.gov)

# EXHIBIT A

# Informational Order Supporting Data (Part 1)

- Please fill out and submit the web form below for *each* Statement of Water Diversion and Use (Statement).
- Attachments should be sent to the following email address: SWRCB-2014informational-order@waterboards.ca.gov with the subject title named as directed in the web form.

Questions regarding this form can be directed to: Phone: 916-341-5342

Top of Form

Enter the Statement Number associated with this report (e.g., S012345). If you are reporting for multiple water rights, please use a separate web submission for each Statement Number.

**Statement Number:** * | Location of Water Right (County): Alameda

Adjudication Name: | Adjudication Diversion No.

**Primary Owner:***

Mailing Address:

City: , State: California , Zip:

Telephone:* 000-000-0000

Email:*

**Person Filing This Form:** *

Mailing Address:

City: , State: California , Zip:

Telephone: * 000-000-0000

Email:*

**(Required*)**

Continue to Part 2

Revised February 4, 2015

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The California Water Boards include the State Water Resources Control Board and nine Regional Boards
The State Water Board is one of five environmental entities operating under
the authority of the California Environmental Protection Agency
Cal/EPA | ARB | CalRecycle | DPR | DTSC | OEHHA | SWRCB

For illustration purposes only; actual submittal must be done online.

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## Part 2

Statement Number: s
Primary Owner: s,
Address: , City: , County: Alameda,
State: CA, Zip: ,
Phone: s, EMail: s,

**Use of Water (select your primary consumptive use only. If power generation is your primary use, select "Power Generation" and do not include other incidental uses.) Completion of this section is required.**

- Municipal — Population Served
- Domestic — Number of People Served
- Stockwatering — Number of Stock
- Irrigation — Acres Irrigated
- Power Generation — Is all water diverted for power generation returned to the source with no storage? Yes | No

  If No, please describe your power operation and what months and percentage of water diverted, on average, is collected to storage:

- Other (describe):

**Basis of Right Claimed and Supporting Documentation (Completion of one or all three of the following sections below is required, if they apply to your diversion.)**

**Riparian Right**

Riparian Patent Date:

Parcel Number(s) for Property Served under Riparian Right (list all, separated by commas, or if large entity provide a service area map identifying all property served under this right):

000-0000-000-0000,

Has your parcel been severed from the riparian watercourse but the riparian claim preserved through title?

Yes | No

If yes, you must provide copy of deed.

Patent maps may be obtained at:
http://www.glorecords.blm.gov/
(opens in a new tab/window).

- Check if you are providing the attachments listed below. Please note: The attachments must be filed electronically at SWRCB-2014informational-order@waterboards.ca.gov with the subject header as follows, "Subject: S012345 Riparian Claim Supporting Documents" where S012345 is replaced with your Statement Number.

- Copy of Patent
- Patent Map
- Parcel or Property Map
- Copy of Title preserving riparian claim (If Applicable)

**Pre-1914 Right**

Pre-1914 Right: Priority Date being claimed 1914 | Year that water was first used 2014

Parcel Number(s) for Property Served under Pre-1914 (list all, separated by commas, or if large entity provide a service area map identifying all the properties served under this right):

Has the pre-1914 right being claimed been used continuously since first use? Yes | No or Unknown

If No or Unknown, indicate the time periods that the pre-1914 claim was not used or that the use was unknown.

- Check if you are providing the attachments listed below. Please note: The attachments must be filed electronically at SWRCB-2014informational-order@waterboards.ca.gov with the subject header as follows, "Subject: S012345 Pre-1914 Claim Supporting Documents" where S012345 is replaced with your Statement Number.

- County and Parcel Number Served or Map of Service Area
- Copy of Appropriation filed with County
- Signed declaration or evidence supporting continuous use

**Water Supply Contract (if applicable)**

Who do you have a water supply contract with? USBR | DWR

Name of other provider:

Contract No.

Amount (Acre-feet) authorized to divert under this contract:

Amount (Acre-Feet) authorized to be diverted in 2014?

Amount (Acre-Feet) projected for 2015?

Continue to Part 3

Please remember to submit your required attachments (if required) to SWRCB-2014informational-order@waterboards.ca.gov

For Riparian Claim Attachments, please indicate "S012345 Riparian Claim Supporting Documents" in the email subject line, where S012345 is replaced with your statement number.

- Copy of Patent
- Patent Map
- Parcel or Property Map
- Copy of Title preserving riparian claim (If Applicable)

For Pre-1914 Claim Attachments, please indicate "S012345 Pre-1914 Claim Supporting Documents" in the email subject line, where S012345 is replaced with your statement number.

- County and Parcel Number Served or Map of Service Area
- Copy of Appropriation filed with County
- Signed declaration or evidence supporting continuous use

State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95814-2000

SWRCB-2014informational-order@waterboards.ca.gov

Questions: 916-341-5342
Fax: 916-341-5400

For illustration purposes only, actual submittal must be done online.

## Part 3 - Monthly Diversion Amounts and Basis for Diversions (water right claim or contract)

Statement Number: s
Primary Owner: s,
Address: , City: , County: Alameda,
State: CA, Zip: ,
Phone: s, EMail: s,

Primary Use of Water:

**Instructions**: For the water right Statement associated with this report, please record the amount of water you diverted under a water right claim or under a contract. In the first table, please do the following: 1) Select the basis for the diversion for each month (i.e., riparian and/or pre-1914); 2) Record the amount diverted to storage or directly diverted and the maximum rate of diversion for each month in 2014, and 3) Record your projected monthly diversion amounts for 2015. In the second table, if you also diverted water under a water supply contract, please record any amount diverted in excess of underlying water right as water diverted under a contract for each month in 2014, if any. Please note that the units for reported and projected diversion amounts are fixed as 'acre-feet', therefore, please ensure that diversion amounts that are in other units are converted to 'acre-feet' prior to submitting the data. Maximum rate of diversion must be in units of 'cubic feet per second.

| 1 acre-foot = 325851.43 U.S. gallons (gal) | To convert, enter a value in one box, then click in the other box to see the result. Do not use comma separators. |
|---|---|
| | 100000 gal = 0.31 acre-feet |

### 2014 MONTHLY STATEMENT DIVERSIONS AND 2015 MONTHLY PROJECTED STATEMENT DIVERSIONS

**ENTER ONLY NUMERIC VALUES, DO NOT INCLUDE UNITS, AND DO NOT LEAVE ANY FIELD BLANK. IF NO DIVERSION OR PROJECTED DIVERSION FOR A GIVEN MONTH, ENTER ZERO (0). PLEASE NOTE THAN BLANK FIELDS OR ANY ENTRY WITH NON-NUMERIC CHARACTERS WILL APPEAR AS ZERO (0) AFTER SUBMITTAL.**

Do Not use comma separators. Do Not report the same value for Riparian and Pre-1914
For each month in 2015, record your projected montly diversion amounts under the water rights claim(s) of your Statement.

| Month | Water Right Type | 2014 Diversion to Storage (acre-feet) | 2014 Direct Diversion acre-feet | 2014 Maximum Rate of Diversion cubic feet per second | 2015 Projected Diversion to Storage acre-feet | 2015 Projected Direct Diversion acre-feet |
|---|---|---|---|---|---|---|
| January: | Riparian: | | | | | |
| | Pre1914: | | | | | |
| February: | Riparian: | | | | | |
| | Pre1914: | | | | | |
| March: | Riparian: | | | | | |
| | Pre1914: | | | | | |
| April: | Riparian: | | | | | |
| | Pre1914: | | | | | |
| May: | Riparian: | | | | | |
| | Pre1914: | | | | | |
| June: | Riparian: | | | | | |
| | Pre1914: | | | | | |
| July: | Riparian: | | | | | |
| | Pre1914: | | | | | |
| August: | Riparian: | | | | | |
| | Pre1914: | | | | | |
| September: | Riparian: | | | | | |
| | Pre1914: | | | | | |
| October: | Riparian: | | | | | |
| | Pre1914: | | | | | |
| November: | Riparian: | | | | | |
| | Pre1914: | | | | | |
| December: | Riparian: | | | | | |
| | Pre1914: | | | | | |

For illustration purposes only, actual submittal must be done online.

**Water Transfer Section:**

Was any water diverted under this Statement transferred in 2014? Yes No

If yes, please state quantity transferred in acre-feet: (AF)

Transfer occurred from Day, Month, TO Day, Month.

This transfer was approved by: State Water Board, DWR, USBR.

## 2014 MONTHLY WATER SUPPLY CONTRACT DIVERSION AMOUNTS (ACRE-FEET)

**ENTER ONLY NUMERIC VALUES, DO NOT INCLUDE UNITS, AND DO NOT LEAVE ANY FIELD BLANK. IF NO CONTRACT WATER DIVERSION FOR A GIVEN MONTH, ENTER ZERO (0). PLEASE NOTE THAT BLANK FIELDS OR ANY ENTRY WITH NON-NUMERIC CHARACTERS WIL APPEAR AS ZERO (0) AFTER SUBMITTAL.**

| January | February | March | April | May | June |
|---|---|---|---|---|---|
| | | | | | |
| July | August | September | October | November | December |
| | | | | | |

Bottom of Form

**When ready to submit, click the button below.**

Submit Form

Revised January 14, 2015, January 18, January 26, January 30

State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95814-2000

SWRCB-2014informaitonal-order@waterboards.ca.gov
Questions: 916-341-5342
Fax: 916-341-5400

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# EXHIBIT B

# Exhibit B

## Specific SWRCB Additional Order Supporting Data Form Comments

Technical Comments

Need clear link from main SWRCB website or from EWRIMS to reporting form.

Order for Additional Information should have live link to site with more information regarding the order and to the Online Reporting Form.

Need to be able to save information and come back to form.

Should be able to return to prior sections of the form; if this is done now, the entered information is deleted.

Need to be able to upload supporting documents to the form.

Need to be able to print the completed form for diverter's records.

Need to be able to access multiple diversions with same owner and mailing address information.

Form questions should be numbered for reference and discussion purposes.

Form should be attached to existing statement rather than a completely separate form.

Unclear what supporting documentation is required versus optional for supporting documents regarding riparian and pre-1914 rights.

Substantive Comments

*Part 2*

Questions re severance and continuous use do not explain legal/property right implications of the possible answers.

Severance and nonuse not directly alleged by Complaints; response/documentation should be required only if there is some evidence of severance and nonuse for a particular diversion.

Regarding severance, there are other means besides a deed whereby the riparian right may be retained, but could take additional time to establish.

Unclear why patent, patent map and parcel maps are necessary; statements of diversion contain maps showing location of diversions already.

**Exhibit B**

BLM website does not consistently provide more than the patent date; depending on the parcel, may only receive copies of patents and patent maps only by mail after sending in form/check also by mail; documents are not consistently available for each parcel.

For Water Supply Contract amounts in the NDWA there is not a set number of acre-feet

*Part 3*

Monthly statements should allow overlap between water right types without double/triple counting for Board's water supply planning purposes, which should be based on net use.

Consumptive use estimates would be more useful for water supply planning purposes.

Due to the fact that diversion metering is not best available technology for most diversions in the Delta for determining water use, monthly use will typically be a consumptive use estimate, as has been provided in the Statements of Diversion.

Suggestions

Remove questions regarding severance and nonuse.

Include total diversion/use columns or rows so it is clear what the entire amount of water used and planned to be used is.

Clarify what attachments are required, keeping in mind attachments do not help with near-term water supply management decisions.

If attachments are required, more time will be needed; suggest 60 days.