

REVISED*
STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER WR 2015-0024-DWR

ORDER FOR ADDITIONAL INFORMATION

In the Matter of Diversion of Water by

**WEST SIDE IRRIGATION DISTRICT
LICENSE 1381**

SOURCE: Old River tributary to San Joaquin River
COUNTY: San Joaquin

1. On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014, declaring a State of Emergency to exist in California due to severe drought conditions.
2. Also on January 17, 2014, the State Water Board issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice). The 2014 Shortage Notice alerts water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
3. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency due to drought conditions, to strengthen the state's ability to manage water and habitat effectively in drought conditions.
4. On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), which notified all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. The State Water Board subsequently notified the most senior right holders in stages as water became available to serve their rights, and by November 19, 2014, had notified all right holders of availability for all diversions in the Sacramento and San Joaquin River watersheds.
5. On January 23, 2015, the State Water Board issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice). The 2015 Shortage Notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities.
6. On March 17, 2015, the State Water Board amended and re-adopted emergency regulations regarding Informational Order authority during drought (California Code of Regulations, title 23, amending section 879, subdivision (c)). The regulations were reviewed by the Office of Administrative Law and went into effect on March 27, 2015. The regulations establish requirements for water right holders to provide information in specific circumstances.
7. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order) to strengthen the state's ability to manage water and habitat effectively in drought conditions and

***All changes highlighted in red. New text is shown in bold, deletions shown in strike out.**

called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the on-going severe drought conditions present urgent challenges across the state including water shortages for municipal use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions persist.

8. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014 Proclamation, April 25, 2015 Proclamation, and Executive Orders B-26-14 and B-28-14 remain in full force and effect.
9. The Executive Order, at Paragraph 10, provides in part that "[t]he Water Board shall require frequent reporting of water diversion and use by water right holders, conduct inspections to determine whether illegal diversions or wasteful and unreasonable use of water are occurring, and bring enforcement actions against illegal diverters and those engaging in the wasteful and unreasonable use of water."
10. On April 2, 2015, the State Water Board issued another notice warning that due to drought conditions, there would likely be insufficient water available to serve all water rights.
11. On April 23, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with Post-1914 Appropriative Rights" (April 23 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. This notice was mailed to all post-1914 appropriate water rights holders in the San Joaquin River watershed located upstream of the confluence of the Mossdale Bridge and the San Joaquin River. Post-1914 appropriative water right holders having rights to the San Joaquin River but located in the Delta below Mossdale Bridge did not receive this notice because the conservative analysis used for determining water availability suggested that Sacramento River flows were still available for some Delta Diverters.
12. On May 1, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento River Watershed and Sacramento-San Joaquin Delta with a Post-1914 Appropriative Right" (May 1 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the Sacramento River and Sacramento-San Joaquin Delta watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions.
13. West Side Irrigation District (WSID or District) holds water right License 1381, originally issued on September 29, 1933, and amended on August 19, 2010. License 1381 has a priority date of April 17, 1916, and authorizes the direct diversion of 82.5 cubic-feet per second (cfs) from Old River in San Joaquin County from (1) about April 1 to October 31 of each year for irrigation, and (2) from April 1 to October 31 of each year for municipal, domestic and industrial uses. The maximum amount diverted under License 1381 shall not exceed 27,000 acre-feet per year. The District's annual Report of Licensee for the years 2007 through 2013 indicate that it diverted an average of 22,543 acre-feet per year under License 1381 during that period. The District does not hold or claim any other appropriative or riparian water rights.
14. License 1381 is subject to the May 1 Unavailability Notice.
15. On May 14, 2015, the District submitted an online Certification Form indicating that the District's alternate sources of water during the 2015 period include contract water purchased from the City of Tracy's wastewater treatment plant and diversions under Statement of Water Diversion and Use (Statement) S000495, owned by Banta-Carbona Irrigation District.

16. On May 18, 2015, staff from the Office of the Delta Watermaster inspected the District's pumping station located in Tracy, California. Staff observed that two of the District's smaller pumps were running. The pump station operator (Mr. Rick Martinez) indicated that the District was pumping captured tail water runoff from Bethany Drain at an estimated 8 cfs in order to divert that tailwater to farmers within the District's boundaries.
17. The District's Bethany Drain ~~is located~~ **discharges into the** ~~an~~ Old River **intake channel just** upstream from the District's pumping station. **The District's map supporting License 1381 filed with the Division identifies other drains**, such that the District is not directly recapturing the tail water. Instead, the District is diverting intermingled tail water and Old River water. Given that there is insufficient water available to satisfy License 1381 at its date of priority, the District has no right to divert Old River Water under current conditions. Although the District may reclaim the return flows from its diversions, subject to certain restrictions, such re-diversion is based solely on use of the District's recapture of its own return flows, without addition of water from Old River, nor by enhancing the water quality of the return flows by diluting them in Old River. Therefore, WSID's diversion of intermingled tail water and Old River water is an unauthorized diversion of water.
18. On June 12, 2015, the State Water Board issued a "Notice of Unavailability of Water and Need for Immediate Curtailment for Those Diverting Water in the Sacramento-San Joaquin Watersheds and Delta with a Pre-1914 Appropriative Claim Commencing During or After 1903" (June 12 Unavailability Notice), which notifies all holders of pre-1914 appropriative water rights with a priority date of 1903 or later within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their water rights, with some minor exceptions for non-consumptive uses. The June 12 Notice applies to Statement S000495.
19. An appropriative water right is required in order to divert any **foreign** water from a water course, including to divert treated wastewater that has been discharged into a surface stream. The City of Tracy does not hold an appropriative water right allowing the downstream diversion of its wastewater discharges into Old River. Diversion of water under the District's appropriative water right (License 1381) is currently unauthorized because there is insufficient water in the system to serve its priority, and, therefore, its License cannot be the basis for diverting the City's wastewater discharges.
20. The City has not sought or obtained approval of the State Water Board for either the 2014 Agreement or the 2015 Agreement (together, Agreements) under Water Code section 1211. Implementation of the Agreements requires such approval because the Agreements contemplate changes in the discharge or use of treated wastewater that would result in decreasing the flow downstream in Old River. Specifically, under the Agreements, the City would cease abandoning its wastewater discharges in order to sell those discharges to the District, which would divert the flows downstream.
21. On July 7, 2015, WSID's counsel submitted a letter to the Executive Director of the State Water Board rescinding WSID's May 14, 2015, Certification. The July 7 letter indicates that WSID may resume pumping at any time.
22. On July 15, 2015, the State Water Board issued a Clarification to the Unavailability Notices indicating that, to the extent that any of the notices described above contain language that may be construed as an order requiring water right holders to curtail diversions under affected water rights, that language has been rescinded. Similarly, any language requiring affected water right holders to submit curtailment certification forms has been rescinded.
23. Water Code section 183 authorizes the State Water Board, among other things, to conduct any investigations in any part of the state necessary to carry out the Board's powers.

24. Water Code section 1051 authorizes the State Water Board, among other things, to investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water to determine whether water is being appropriated in accordance with the laws of the State.
25. Pursuant to California Code of Regulations, title 23, section 879, subdivision (c):
- (1) *The Deputy Director may issue an informational order, as provided in paragraph (2), in any of the following circumstances:*
 - (A) *Upon receipt of a complaint that staff determines to merit investigation alleging interference with a water right by a water right holder, diverter or user;*
 - (B) *Where a water right holder, diverter or user asserts a right to divert under a pre-1914 or riparian right in response to an investigation, curtailment order or any notice of curtailment, and no Statement of Water Diversion and Use for such right was on file with the Board as of January 17, 2014;*
 - (C) *Where a water right holder, diverter or user responds to an investigation, curtailment order or any notice of curtailment by asserting a right to divert under a contract or water transfer for which the Board has not approved a change petition and for which no record had been previously filed with the Board; or*
 - (D) *Upon receipt of information that indicates actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversions of water by any water right holder, diverter or user.*
 - (2) *The Deputy Director may issue an order under this article requiring a water right holder, diverter or user to provide additional information related to a diversion or use described in (c)(1), including the claim of right; property patent date; the date of initial appropriation; diversions made or anticipated during the current drought year; basis of right and amount of a water transfer not subject to approval of the Board or Department of Water Resources; or any other information relevant to authenticating the right or forecasting use and supplies in the current drought year.*
 - (3) *Any party receiving an order under this subdivision shall provide the requested information within thirty (30) days. The Deputy Director may grant additional time for submission of information supporting the claim of right upon substantial compliance with the 30-day deadline and a showing of good cause.*
 - (4) *The failure to provide the information requested within 30 days or any additional time extension granted is a violation subject to civil liability of up to \$500 per day for each day the violation continues pursuant to Water Code section 1846.*
 - (5) *Orders issued under previous versions of this subdivision shall remain in effect and shall be enforceable as if adopted under this version. The provisions of Article 12 of this Chapter (commencing with section 768) shall govern petitions for reconsideration of orders issued under this subdivision.*
26. Section 879, subdivision (c), and the Executive Order supplement the State Water Board's general investigatory authority under Water Code sections 183 and 1051.
27. Drought management of water rights is necessary to ensure that water to which senior water right holders are entitled is actually available to them, which requires that some water remain in most streams to satisfy senior demands at the furthest downstream point of diversion of these senior water rights. The Unavailability Notices reflect the State Water Board's determination that the existing water available in the affected Sacramento River and Sacramento-San Joaquin Delta watersheds is insufficient to meet the demands of diverters with appropriative water right permits or licenses with the effected priority dates. Continued diversion when there is no water available under the priority of the water right constitutes unauthorized water diversion and use. Unauthorized diversion is subject to enforcement. (Water Code § 1052.).
28. Section 879, subdivision (c)(1)(D) authorizes the Deputy Director to issue orders requiring additional information in various circumstances, including upon receipt of information that indicates actual or threatened unlawful diversions of water by any water right holder.

29. The circumstances described above indicate that WSID is diverting, or is threatening to divert, water in excess of that available to serve License 1381, without a valid basis of right.
30. To determine whether unauthorized diversions have occurred or are threatening to occur, the State Water Board needs additional information described below.
31. Recipients of information orders issued pursuant to Section 879(c) may petition the State Water Board for reconsideration. (Water Code § 1122; 23 CCR §§ 768 et seq., 879(c)(5).)

IT IS HEREBY ORDERED:

1. This Order is issued on the date shown below. All submittal requirements are based on the effective date of this Order.
2. WSID shall provide the following information for water diversions that are conducted under any basis of right:
 - (A) The monthly amounts of water diverted and the basis of right allowing for the diversions for each month beginning July 2014 **through June 2015 October 2014, and April 2015 through July 2015**, and the anticipated monthly amount of water to be diverted and the basis of right each month in 2015 beginning with **July August** 2015. For direct diversion, the diversion information shall include the total amount of water diverted in the month and the maximum rate of diversion for each month. For ~~storage~~, the diversion information, ~~requested to~~ identify the method used to determine the **diversion** amounts reported. ~~(Wat. Code § 5103(e)) and the primary use of water.~~ This information shall be ~~filed electronically at:~~ **submitted by email to: swrcb-drought-availability@waterboards.ca.gov**
 - (B) Identification and location of the point of diversion (POD) 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. This information is an attachment to the report filed in (A) and must be ~~filed electronically and mailed~~ **submitted by email to: swrcb-drought-availability@waterboards.ca.gov**
 - (C) The daily diversion amount for each day starting with **May-August** 1, 2015, shall be submitted by the fifth (5th) day of each succeeding month until the drought proclamations and orders described beginning in Paragraph 1 above are rescinded. This information shall be submitted as an electronic spreadsheet via email to:
swrcb-drought-availability@waterboards.ca.gov
 - (D) **Identification and location of all the point(s) of discharge of WSID's tile drains into the Old River Intake Channel above WSID's Pumping Plant, Old River, and Tom Paine Slough¹, including the daily discharge amounts at each location for each month beginning July 2014 through July 2015. For each point of discharge, identify the method used to determine the discharges relied upon to support the corresponding diversion amounts. This information shall be submitted as an electronic attachment via email to: swrcb-drought-availability@waterboards.ca.gov. WSID shall also submit, in the same format and to the same email address, the daily discharge amounts for each point of discharge for each month beginning with August 2015 by the fifth (5th) day of each**

¹ Tom Paine Slough is shown on map on file with State Water Board.

succeeding month until the drought proclamations and orders described beginning in Paragraph 1 above are rescinded.

3. WSID is required to submit the information requested. Failure to comply with this Order subjects the party to enforcement action including, but not limited to, civil liability of up to \$500 per day for each day the violation continues pursuant to Water Code section 1846.
4. Reservation of Enforcement Authority and Discretion: Nothing in this Order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law, including, but not limited to, the authority to bring enforcement against diverters for unauthorized diversion or use in violation of Water Code section 1052.

STATE WATER RESOURCES CONTROL BOARD



*Barbara Evoy, Deputy Director
Division of Water Rights*

Dated: August 7, 2015