

State Water Resources Control Board

JUL 16 2015

Mr. Jack Alvarez, President  
West Side Irrigation District  
1320 N. Tracy Blvd  
Tracy, CA 95376

CERTIFIED MAIL 7003 1680 000 2965 9497

Karna Harrigfeld  
Herum Crabtree Suntag  
5757 Pacific Avenue, Suite 222  
Stockton, CA 95207

CERTIFIED MAIL 7003 1680 0000 2965 9503

**ENFORCEMENT ACTION ENF01949 - DRAFT CEASE AND DESIST ORDER REGARDING UNAUTHORIZED DIVERSIONS OR THREATENED UNAUTHORIZED DIVERSIONS OF WATER FROM OLD RIVER IN SAN JOAQUIN COUNTY**

Dear Mr. Alvarez and Ms. Harrigfeld:

Enclosed is a draft Cease and Desist Order (CDO) issued to West Side Irrigation District (WSID). This letter serves as notice to WSID of the intent of the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) to proceed with this enforcement action.

**You have 20 days from receipt of this notice to act or face additional enforcement without further notice. This matter requires your immediate attention.**

**VIOLATION DESCRIPTION**

The violation is described in the enclosed draft CDO.

**CEASE AND DESIST ORDER**

WSID may be subject to a CDO pursuant to Water Code section 1831, subdivision (d)(1), which authorizes the State Water Board to issue a Cease and Desist Order in response to a violation or threatened violation of the prohibition against unauthorized diversion of water.

If you disagree with the facts or time schedules for the corrective actions set forth in the CDO, you may request a hearing before the State Water Board. **Your request for a hearing must be in writing, signed by you or on your behalf, and mailed or hand-delivered to ensure receipt by the State Water Board within 20 days from the date you receive this notice.** You may mail your written hearing request to: State Water Resources Control Board, Division of Water Rights, Attn: Enforcement Section, P.O. Box 2000, Sacramento, CA 95812-2000.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | [www.waterboards.ca.gov](http://www.waterboards.ca.gov)

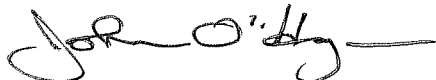
You may hand-deliver your written hearing request to: State Water Resources Control Board, Division of Water Rights, Records Unit, 1001 I Street, 2nd Floor, Sacramento, CA 95814.

If you request a hearing, a hearing will be scheduled before the State Water Board or a designated hearing officer. Prior to the hearing, you will be required to submit any written testimony and other evidence you would like the State Water Board to consider. You will be notified of the hearing date and the submittal deadlines as soon as they are scheduled.

If you fail to come into compliance or request a hearing within 20 days of the date you receive this notice, the State Water Board will adopt the CDO. If you fail to comply with the adopted CDO, the State Water Board may consider additional enforcement of the CDO without further notice. Such enforcement may include the imposition of administrative civil liability of up to **\$10,000 for each day of noncompliance**, or referral to the Attorney General for further action. **Due to the high penalty fines for noncompliance, it is urgent you respond within 20 days of receiving this notice.**

If you have any questions regarding this CDO, please contact Kathy Mrowka, Manager, Enforcement Section at (916) 341-5363 or [Kathy.Mrowka@waterboards.ca.gov](mailto:Kathy.Mrowka@waterboards.ca.gov); or Andrew Tauriainen, Senior Staff Counsel, Office of Enforcement, at (916) 341-5445 or [Andrew.Tauriainen@waterboards.ca.gov](mailto:Andrew.Tauriainen@waterboards.ca.gov).

Sincerely,



John O'Hagan, Assistant Deputy Director  
Division of Water Rights

Enclosures: 1) Draft Cease and Desist Order

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

**DIVISION OF WATER RIGHTS**

**ORDER WR 2015 –00XX-DWR**

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**CEASE AND DESIST ORDER**

In the Matter of Unauthorized Diversion by

**WEST SIDE IRRIGATION DISTRICT**

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SOURCES: Old River tributary to San Joaquin River

COUNTY: San Joaquin

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West Side Irrigation District (WSID or District) is violating or is threatening to violate California Water Code section 1052, which prohibits the unauthorized diversion or use of water. Water Code section 1831 authorizes the State Water Resources Control Board (State Water Board or Board) to issue a Cease and Desist Order (CDO) requiring WSID to cease such violations or threatened violations.

On {Date}, and in accordance with the provisions of Water Code section 1834, the State Water Board, Division of Water Rights (Division) provided notice of the CDO against WSID for the violation and threatened violation of the prohibition against unauthorized diversion and use of water. State Water Board Resolution 2012-0029 authorizes the Deputy Director for Water Rights to issue a notice of cease and desist, and when a hearing has not been timely requested, issue a CDO in accordance with Water Code section 1831, et seq. The Deputy Director for Water Rights has redelegated this authority to the Assistant Deputy Director for Water Rights pursuant to Resolution 2012-0029.

The State Water Board, or its delegee, finds that:

1. The 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.
2. The City of Tracy (City) operates a wastewater treatment plant and discharges treated wastewater effluent to Old River, a water of the United States, pursuant to Order R5-2012-0115 (NPDES Permit CA0079154) issued by the Central Valley Regional Water Quality Control Board. The City discharges approximately 9 million gallons per day (mgd), which is equivalent to 14 cfs, on a substantially continuous basis into Old River upstream from the District's point of diversion under License 1381.
3. The NPDES Permit allows the treatment plant to accept wastewater from the City and up to

850,000 gallons per day, equivalent to about 1.3 cfs, from the Leprino Foods Company. The City obtains water supplies from three sources: 1) South San Joaquin Irrigation District (SSJID) water delivered from the Stanislaus River (typically the majority of the City's supply); 2) United States Bureau of Reclamation water delivered from the Delta-Mendota Canal; and 3) local groundwater wells (typically the smallest portion of the City's supply). The City serves as water supplier to Leprino Foods Company. Therefore, the City's treated wastewater discharges are foreign in source and/or foreign in time to the Old River flow.

4. Until 2014, the City abandoned the wastewater treatment plant discharge to Old River. Abandoned foreign flows are subject to appropriation downstream.
5. 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.
6. 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.
7. 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.
8. On May 6, 2014, the City Council adopted Resolution 2014-065, authorizing the City to enter into a Wastewater Revocable License Agreement with the District (2014 Agreement) for the sale of treated wastewater from the City's wastewater treatment plant. The 2014 Agreement provides that the District may divert all of the City's wastewater discharges from April 1, 2014 through October 31, 2014, estimated to be approximately 14 cfs, equivalent to 27.8 acre-feet per day, on a continuous basis, at a purchase price of \$30.00 per acre-foot. The 2014 Agreement contemplates that the District would commence water diversions by providing the City with a written Commencement Notice, after which the parties would coordinate weekly on the amount of City wastewater available for diversion. Under the 2014 Agreement, the City would provide monthly discharge totals to the District, triggering payment within 15 days.
9. 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 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. The 2014 Unavailability Notice applies to License 1381.
10. On June 9, 2014, the District submitted an online Certification Form in response to the 2014 Unavailability Notice indicating that its alternate source of water during the period was contract water purchased from the City's wastewater treatment plant and water collected from its own tile drains.
11. The District's 2014 Certification Form indicates that the District purchased wastewater from the City under the 2014 Agreement.
12. On November 12, 2014, the State Water Board temporarily lifted the 2014 Unavailability Notice for pre-1954 permits and licenses, including License 1381.
13. 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.

14. On March 3, 2015, the City Council adopted Resolution 2015-033, authorizing the City to enter into a Wastewater Revocable License Agreement with the District (2015 Agreement) for the sale of treated wastewater from the City's wastewater treatment plant. The 2015 Agreement provides that the District may divert all of the City's wastewater discharges from April 1, 2015 through October 31, 2015, estimated to be approximately 14 cfs, equivalent to 27.8 acre-feet per day, on a continuous basis, at a purchase price of \$30.00 per acre foot. The 2015 Agreement contemplates that the District would commence water diversions by providing the City with a written Commencement Notice, after which the parties would coordinate weekly on the amount of City wastewater available for diversion. The City would provide monthly discharge totals to the District, triggering payment within 15 days.
15. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order) to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the 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. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014, Proclamation, April 25, 2015, Proclamation, and Executive Orders B-26-14 and B-28-14, remain in full force and effect. On April 2, 2015, the State Water Board issued another notice warning that notices of unavailability of water were likely to be issued soon.
16. 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 Mosssdale 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 Mosssdale 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. Therefore, even though WSID's License 1381 authorizes diversions from Old River tributary to San Joaquin River, it did not receive the April 23 Unavailability Notice.
17. 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. The May 1 Unavailability Notice applies to License 1381.
18. 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 May 1 Unavailability Notice reflects the State Water Board's determination that the existing water available in the Sacramento River and Sacramento-San Joaquin Delta watersheds is insufficient to meet the demands of diverters with appropriative water right permits or licenses with a priority date of 1914 and later. 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. (Wat. Code § 1052.)

19. The State Water Board determines the availability of water for water rights of varying priorities in any watershed by comparing the current and projected available water supply with the total water right diversion demand.
20. To determine water availability, the Board relies upon the full natural flows of watersheds calculated by the Department of Water Resources (DWR) for certain watersheds in its Bulletin 120 and in subsequent monthly updates. "Full natural flow," or "unimpaired runoff," represents the natural water production of a river basin, unaltered by upstream diversions, storage, storage releases, or by export or import of water to or from other watersheds. The full natural flow amount is different than the measured stream flows at the given measurement points because the measured flows may be higher or lower due to upstream operations. Forecasted flow data is uncertain, so DWR provides the data in the form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the forecasted supply will occur. The exceedance is simply the percent of the time that the actual flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows with a 90 percent probability, or in other words, there is a ten percent or less chance of actual conditions turning out to be this dry or drier. In April and early May, the State Water Board used the 90% and 99% exceedance amounts for its analyses due to low flow conditions. DWR's daily natural flow calculations are also used in the analysis.
21. To determine water demand, the State Water Board relies on information supplied by water right holders on annual or triennial reports of water diversion and use required to be true and accurate to the best of the knowledge of the diverters. The Board also incorporates 2014 diversion data submitted pursuant to Order WR 2015-0002. All reported monthly water diversion data is compiled by watershed, type of right and priority dates. The Board performs quality control checks and removes obvious errors, excess reporting, removes demand for direct diversion for power, and makes additional changes based on stakeholders' input. The corrected demand data includes the 2014 reported data for 90% of the watershed demand plus, for the remaining diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion demands are grouped into water right types (riparian, pre-1914 and post-1914 rights).
22. The State Water Board consistently adjusts the water availability and demand analyses based on new information obtained from stakeholders, or adjustments to projected flows from the DWR. State Water Board staff reviews this information and provides revisions to its data set and graphs that are all shown on the Watershed Analysis website ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/)).
23. The State Water Board's Watershed Analysis website provides updated graphical summations and spreadsheets containing supporting analysis of the availability and demand analyses. The graphical summations show priorities with monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian and depicted above the riparian demand. The monthly amounts are averaged into cubic feet per second for graphical purposes. See, for example, the combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/sacsjombined.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/sacsjombined.pdf)). The Watershed Analysis website also provides graphical summations of the Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/docs/sacpro rated.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/sacpro rated.pdf)).
24. This analysis shows that by May 1, 2015, available supply was insufficient to meet the demands of post-1914 appropriative rights throughout the Sacramento River and San Joaquin River watersheds and the Delta.

25. 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's wastewater treatment plant and diversions under Statement of Water Diversion and Use (Statement) S000495, owned by Banta-Carbona Irrigation District.
26. The District's 2015 Certification Form indicates that the District has purchased or may purchase wastewater from the City under the 2015 Agreement.
27. 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.
28. The District's Bethany Drain is located on Old River upstream from the District's pumping station, 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.
29. 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.
30. An appropriative water right is required in order to divert any water from a water course, including to divert treated wastewater that has been discharged into a surface stream. The City 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.
31. 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.
32. 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.
33. 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 you to curtail diversions under your affected water right, that

language has been rescinded. Similarly, any language requiring affected water right holders to submit curtailment certification forms has been rescinded.

34. Water Code section 1052, subdivision (a) provides that "the diversion or use of water subject to this division other than as authorized in this division is a trespass." The circumstances described above indicate that the District is violating, or is threatening to violate, the prohibition set forth in Section 1052 against the unauthorized diversion or use of water. Thus, the District may be subject to a CDO pursuant to Water Code section 1831, subdivision (d)(1).
35. This enforcement action is based on lack of available water supply under the priority of the right. The Unavailability Notices were issued for the purpose of advising the public and water diverters of the lack of available water under the priority of the rights identified in each notice; the notices are not the basis for this enforcement action.

**IT IS HEREBY ORDERED**, pursuant to sections 1831 through 1836 of the Water Code, that West Side Irrigation District immediately cease and desist the unauthorized diversion and threatened unauthorized diversion of water from Old River until:

1. City of Tracy Wastewater Diversions
  - a. Either the City of Tracy or West Side Irrigation District can demonstrate a valid appropriate right under which the District may divert treated wastewater discharged by the City into Old River, **and**
  - b. The State Water Board approves a wastewater change petition for the sale of treated wastewater discharged by the City of Tracy into Old River and diversion by West Side Irrigation District for use within the District's boundaries.
2. Intermingled Tail Water Diversions from Old River and any Diversion under License 1381.
  - a. The State Water Board determines that there is sufficient water in the system to support beneficial use at the priority of License 1381.

#### **Consequences of Non-Compliance**

In the event the District fails to comply with the requirements of this Order, the District shall be in violation of this CDO and subject to additional enforcement, which may include the imposition of administrative civil liability pursuant to Water Code section 1845. Violation of a CDO issued during a period for which the Governor has issued a proclamation of state of emergency based on drought conditions is subject to the imposition of administrative civil liability, pursuant to Water Code section 1845, subdivision (b)(1)(A) in the amount not to exceed \$10,000 for each day in which the violations occurs, or referral to the Attorney General to take further injunctive enforcement actions as described in Water Code section 1845, subdivision (a):

**Upon the failure of any person to comply with a cease and desist order issued by the Board, pursuant to this chapter, the Attorney General, upon request of the Board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction.**

#### **Compliance with Future Directives of Division**

The District shall comply with any written directive of the Assistant Director for Water Rights regarding any corrective action until such time as the State Water Board issues a water right permit, if necessary, and approves a wastewater change petition.



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 the District for unauthorized diversion or use of water in violation of Water Code section 1052.

**Regulatory Changes**

Nothing in this Order shall excuse the District from meeting any more stringent requirements that may be imposed hereafter by applicable legally binding legislation, regulations, or water right permit requirements.

**Compliance with Other Regulatory Requirements**

Nothing in this Order shall excuse the District from meeting any additional regulatory requirement that may be imposed by other local, state, or federal regulatory entities for corrective actions taken by the District to comply with this Order.

**Exemption from CEQA**

This is an action to enforce the laws and regulations administered by the State Water Board. The State Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations.

STATE WATER RESOURCES CONTROL BOARD

*John O'Hagan, Assistant Deputy Director  
Division of Water Rights*

Dated: