

Revised Consensus Strategy for Avoiding Duplicative Reporting of Water Diversion and Use in the Legal Delta (Revised Consensus Strategy)

February 22, 2022

During 2020, the Office of the Delta Watermaster (ODWM) consulted with several members of the Delta water use reporting community (including reclamation districts, large farming organizations, agents, engineers, and water lawyers) to discuss the problem of duplicative reporting, as outlined in the attached Problem Statement (updated only through February of 2021). A consensus approach to addressing the duplicative reporting problem emerged from these *ad hoc* group discussions. Preliminary analysis by the ODWM suggests that approximately 65% of eligible water right holder/claimants adopted the Consensus Approach when reporting their diversion and use for calendar year 2020:

- Water users in the Delta voluntarily reported water diversion and use under their most senior water right/claim before reporting diversion under any available more junior right (usually a license).
- When all water diversions for use within a place of use (POU) could be accommodated within the senior right/claim (usually a riparian or pre-1914 claim), then licensees reported a nominal (e.g., '1') acre-foot diverted for the junior licensed right covering the same place and purpose of use.
- Water users individually, voluntarily and without waiving any rights, adopted this approach for Reports of Licensee filed by April 1, 2021 and for Supplemental Statements of Diversion and Use filed by July 1, 2021. Reporting under this method encouraged coordination between license holders and constituent senior water right holders/claimants.
- Voluntary adoption of this Consensus Approach significantly reduced duplicative reporting of calendar year 2020 water diversion and use within the Delta. Reported direct diversions in the Legal Delta dropped nearly 50%, from about 2.82 million acre-feet in CY2019 to about 1.45 million acre-feet in CY2020 (although a portion of that reduced use may be attributable to improved measurement and/or to conservation actions taken in response to drought conditions in 2020).
- Although analysis of CY2020 water use data is continuing, the results of widespread voluntary adoption of the Consensus Approach suggest the following:
 - Adoption was most prevalent within the boundaries of the Central and South Delta Water Agencies, likely because those agencies guided their constituents toward no-risk, voluntary adoption.
 - Interviews with several license holders who did not adopt the Consensus Approach revealed several common issues, including:
 - Limited understanding of the duplicative reporting problem;
 - Lack of awareness of the proposed voluntary approach to eliminating duplicative reporting;
 - Fear that reporting only nominal diversion and use under a License could result in either reduction or elimination of the right to divert under the License, including perceived risk of forfeiture;

- Challenges coordinating between Licenses and Statements;¹
- Confusion in determining the best ways to respond to electronic forms in the Water Board’s Report Management System;
- Turnover among individuals filing Reports of Licensees and Statements of Diversion and Use; and
- Uncertainty about how to appropriately cross-reference associated Licenses and Statements.

Based on these preliminary lessons from the CY 2020 reporting cycle (reports filed, generally, in April and July of 2021), **ODWM proposes to extend the voluntary Revised Consensus Strategy for preparing water use reports by Delta diverters covering the transition nine-month stub period (January 1, 2021 through September 30, 2022).**² Reports of water use for the stub period are due by April 1, 2022.³

Guidance for voluntary adoption of this Revised Consensus Strategy:

- Report best estimate of actual water diversion and use under the most senior water right/claim available (typically, riparian claims reported under one or more Statements);
- Report only nominal diversion and use under the License(s) covering the same POU as the related Statements during each of the months when the License(s) is/are in season and in priority (i.e., not curtailed);
- In the Additional Remarks section of the Report of Licensee, explain the voluntary adoption of this Revised Consensus Strategy to coordinate reporting, and list the Statements under which water diversion and use for the overlapping POU is being reported.
- Some reporters may feel more comfortable by adding a reciprocal note in the Additional Remarks section of their Statements to cross-reference the voluntary adoption of this Revised Consensus Strategy and to identify the License which shares the POU.
- Although Additional Remarks can be tailored to fit circumstances of each report (so consult with your water lawyer), the ODWM offers the following as a possible template:

In cooperation with other water users and at the encouragement of the Office of the Delta Watermaster, [Licensee/Claimant] has voluntarily adopted the **Revised Consensus Strategy for Avoiding Duplicative Reporting of Water Diversion and Use in the Legal Delta** [and to avoid “masking” senior claims]. The Revised Consensus Strategy is posted on

¹ Some diverters chose to report all water use under their licenses when the licenses were in season and not curtailed. These diverters reported water use outside the season covered by the license under their riparian or pre-1914 claims in their Statements. However, in the event of curtailment of the license, the diversions would simply switch over to the underlying more senior claims. This approach avoided duplicative reporting but—contrary to the Consensus Approach—masked the underlying demand, thus distorting the picture of Delta water use. This approach proved particularly challenging in applying the curtailment methodology developed by the Division of Water Rights during the exceptional drought of 2021.

² Pursuant to budget trailer bill SB 155, all water use reports will transition to reporting use on a water year (rather than calendar year or irrigation year) basis.

³ SB 155 also consolidates due dates for reports, regardless of the underlying water right. Therefore, both Reports of Licensees and Statement of Water Diversion and Use are due at the same time: April 1 for the transition stub period; February 1 in future years. For more information on implementation of SB 155 see https://www.waterboards.ca.gov/water_issues/programs/delta_watermaster/docs/reportingduedates.pdf

the website of the Watermaster. The Revised Consensus Strategy builds on insight gained from review of reports of water use filed in prior periods by a wide range of diverters throughout the Legal Delta. [Licensee/Claimant]'s adoption of the Revised Consensus Strategy is without prejudice to any water right or claim; more specifically, reporting under the Revised Consensus Strategy may not be interpreted as evidence limiting, abandoning, waiving, forfeiting, or failing to exercise any water right or claim of [Licensee/Claimant]. The place of use served by this [License/Claim] is also served by water rights/claims under the following [License/Statements]:

1. S0xxxxx or A0xxxxx
2. S0xxxxx of A0xxxxx

Problem Statement: Duplicate Reporting of Water Diversion and Use in the Delta

by Lindsay Kammeier, PE

[updated to February 1, 2021]

Summary: Many water diversions in the Delta are routinely double counted in annual reports to the State Water Resources Control Board (Water Board). Double counting water diversions makes understanding actual water demand difficult and makes it more difficult for the Water Board to manage the water rights system to protect priority, particularly in periods of shortage.

Delta Water Rights

There are over 1,000 miles of waterways in the Delta, an area of reclaimed “swamp and overflowed” lands. So, it is no surprise that riparian water right claims dominate the area. There are also widespread claims of pre-1914 water rights (not licensed by the Water Board) throughout the Delta. Many of these claimants of riparian and/or pre-1914 rights also divert under “junior” post-1914 licenses that were issued by the Water Board and its predecessor, the State Water Commission. These licenses were issued to both individual landowners and reclamation districts that represent entire reclaimed islands surrounded by levees. Some of the licenses benefit land that already claimed a riparian water right, resulting in some parcels having both an unadjudicated but apparently valid riparian claim and a licensed water right issued directly to their property or to the reclamation district for their island. This is a “belt and suspenders” approach to water rights: the pre-existing riparian claim, which is inherently limited to the riparian parcel as the place of use (POU) allows that land to divert from the contiguous water course as much natural flow as can be beneficially used thereon. Theoretically, where natural flow is always available to meet the riparian’s beneficial uses, there is no need to also have a license, because a valid riparian right is sufficient to meet the demand for that property. However, because most riparian claims have never been adjudicated, seeking a licensed right was thought to add reliability to the water supply.

Because most pre-1914 claims have also never been adjudicated, many diverters claim that parcels patented before December 19, 1914 and continuously irrigated since then have “overlapping” pre-1914 water rights and riparian water rights.⁴ Because annual diversion and use under riparian and pre-1914 claims are both reported in the same “Supplemental Statement” form, there is no double counting of this water. The issue of double counting the diversion and use of the same water—often from the same points of diversion (PODs), for the same use, on the same POUs—arises because the same water is reported both in Reports of Licensee and in one or more Supplemental Statements.

Water Diversion Reporting

Water diversions are reported to the Water Board on an annual basis. Reports of Licensee (permit, license, registration, and certificate water rights) are statutorily required to be filed by April 1st of the year following water use (i.e., water use for calendar year 2020 is to be reported by April 1, 2021). These Reports of Licensee are completed in the Water Board’s electronic Report Management System (RMS)

⁴ See Overlap Memo.

by the license-holder or legal representative. Supplemental Statements reporting water use under non-licensed water right claims are statutorily required to be filed by July 1 of the year following the water use (i.e., water use for calendar year 2020 is reported by July 1, 2021).⁵ These Supplemental Statements are completed, also in the RMS, by the claimant or legal representative. Often, duplication is an innocent result of the different due dates and the lack of coordination between two different reporters. However, even when the same reporting entity both holds a license and claims a riparian and/or pre-1914 water right, the same water may be reported twice, sometimes with an explicit comment in both forms acknowledging that the two reports duplicate, essentially “double counting,” the actual water use.

Duplicate Reporting

Duplicate reporting is when the same water diversions are reported under both a license (due by April 1) and a riparian or pre-1914 claim (due by July 1). Holland Tract provides an example. All parcels on Holland Tract were subdivided in such a way that each parcel retained contiguity to a natural water course since patent; thus, all parcels present an apparently valid, though unadjudicated, riparian claim. The reclamation district for Holland Tract (RD 2025) was granted a license (License 001571) to divert water from the beginning of March through the end of October with a 1922 priority date. RD 2025 reports all water use on Holland Tract during the license period by April 1 of the following year. Individual riparian claimants on Holland Tract report their water diversions during the previous year by July 1. Often, this results in at least a portion of the same water being reported twice: once under the license and again under the Supplemental Statement.

However, even when the same reporting entity both holds a license and claims an unlicensed senior water right, the same water may be reported twice, sometimes with an explicit comment in both forms acknowledging that the two reports duplicate, essentially “double counting,” the actual water use. See Banta Carbona Irrigation District’s (BCID) 2020 Report of Licensee (A001933 and A005248) and 2020 Supplemental Statement (S000495). Similarly, McDonald Island RD 2030’s 2020 Report of Licensee (A002956) includes language acknowledging the duplication but does not include similar language on RD 2030’s Supplemental Statements (S021849 and S021850), or on other Supplemental Statements for McDonald Island.

Holland Tract, BCID and McDonald Island are only three ready examples of duplicate water use reporting that is pervasive throughout the Delta. Below is a list of what appear to be the primary ways water use in the Delta is currently reported. Some of these methods try to avoid double counting while others embrace it.

1. Method No. 1 (**duplicative**)
 - a. Report all water diversions during the prior calendar year in the Report of Licensee due by April 1.
 - b. Report all (the same) water diversions in one or more Supplemental Statements covering the same POU as the license by July 1.

⁵ The Water Board is considering seeking legislation to conform the due dates and reporting periods for all water use. The potential shift would use the water year (October 1 to September 30) as the uniform reporting period and February 1 as the uniform due date.

- c. Do not include a note in either report informing the Water Board that it should not add the licensed amounts and the riparian or pre-1914 claim amounts to obtain total diversions for the POU.
2. Method No. 2 (**duplicative**)
 - a. Report all water diversions during the prior calendar year in the Report of Licensee due by April 1.
 - b. Report all (the same) water diversions in one or more Supplemental Statements covering the same POU as the license by July 1.
 - c. Include a note in one or both reports informing the Water Board that it should not add the license amounts and the statement amounts to obtain total diversions and use for the place of use. [The apparent BCID and McDonald Island approach.]
 3. Method No. 3 (**not duplicative**)
 - a. Report water diversions by April 1 in the Report of Licensee for water diverted at times when the license was available during the prior calendar year.
 - b. Report water diversions outside of the license availability period of the prior calendar year in the Supplemental Statements due by July 1.
 - c. Include a note informing the Water Board of this reporting methodology. [This is the apparent Holland Tract approach, which fails to make clear that, in a shortage when the junior license is curtailed, the same annual demand will be reported under the available riparian claim. Thus, this approach “masks” a portion of the actual senior demand in the system.]
 4. Method No. 4 (**not duplicative**)
 - a. Record nominal ones (‘1’) as the diversions under the Report of Licensee by April 1.
 - b. Report all water diversions during the prior calendar year in the Supplemental Statements due by July 1.
 - c. Include a cross-referencing note in the Report of Licensee (with or without a similar note in the Supplemental Statements) explaining that water use is reported under the most senior water right available to its exhaustion but maintaining nominal reported use under the license to avoid the risk of forfeiture for non-use. [This is the Delta Watermaster’s preferred approach, because it accurately indicates the actual senior demand while maintain a tracking record for the license.]
 5. Method No. 5 (**not duplicative**) (variation on Method 4)
 - a. Switch back and forth between reporting primarily under the license (with nominal use under the riparian and/or pre-1914 claims) and primarily under the riparian and/or pre-1914 claims (with nominal use under the license) to avoid any consecutive five-year period without reported diversions and use for both the licensed right and the riparian and/or pre-1914 claims.
 - b. Include a note informing the Water Board of this reporting methodology.

There are problems with all five methods listed.

The first two methods explicitly double count water diversions, inflating apparent water use in the Water Board’s RMS. Method No. 3 reports maximum exercise of the licensed right but does not fully reflect the actual riparian or pre-1914 demand that would appear only in shortage periods when the

license is curtailed and all water will be diverted under the riparian and/or pre-1914 claims. Method No. 4 ensures that all senior water demand (whether riparian or pre-1914) is fully reported and recognized in aggregated RMS data. **This method is viable only if the water user community is comfortable that reporting token amounts of diversion under the license will not result in forfeiture.** Method No. 5 is confusing to both the Water Board and reporters. In some years it will fully record riparian and pre-1914 demand for a specific reporter, and only record junior (licensed) water demand in other years. While it avoids duplication, it shares the same shortcoming as Method No. 3 because, for many years, the actual riparian or pre-1914 demand will not be fully reflected in the Water Board's RMS.

None of the current reporting methods (1) avoids double counting, (2) fully reflects riparian and pre-1914 water demand, and (3) protects licenses from risk of forfeiture.

Benefits of Accurate Reporting

The water user community needs accurate reporting to responsibly manage water use during droughts within California's dual and unreconciled riparian and priority allocation systems. User reports to the Water Board must accurately quantify senior and junior demand to responsibly manage water use during drought, a prerequisite for protecting water rights priority.

Proposed Solution to Duplicative Reporting

As noted above, the Office of the Delta Watermaster prefers Method No. 4 (report all water use under the most senior available claim and report a token 1 acre-foot of diversion under the license to avoid risk of forfeiture). In order to induce non-duplicative reporting, the Water Board may be willing to stipulate or to otherwise assure that reporting token water use under the overlapping license will not be construed as evidence of non-exercise of the license and will not provide a basis for claim of forfeiture of the license. Diverters who voluntarily agree to report under Method No. 4 would not face licensee jeopardy for adopting that method for at least five consecutive years (the minimum forfeiture period for non-exercise). Therefore, many diverter representatives propose adopting Method No.4 (or some close variant) for reports due in 2021 to evaluate impact without agreeing to follow that procedure in successive years, pending further assurance of non-jeopardy to their licenses.

Potential Delta Community Impact to Proposed Solution

Water Board staff (from both the Office of the Delta Watermaster and the Division of Water Rights) will work with the Delta community to ensure that experience with the voluntary adoption of Method No.4 is reflected in any formal guidance or regulation developed to reduce the incidence of duplicative reporting, including possible mechanisms to avoid negatively impact water rights or claims.