

VIA EMAIL

February 3, 2016

Hearing Officer Frances Spivy-Weber
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Re: The West Side Irrigation District Cease and Desist Order Hearing

Dear Hearing Officer Spivy-Weber:

With this letter The West Side Irrigation District serves the following documents in accordance with the February 1, 2016 Procedural Ruling:

1. Amended and Consolidated Motion for Summary Judgment and Motions to Dismiss.
2. Statement of Undisputed Material Facts.
3. Written Testimony of Jack Alvarez.

The Procedural Ruling indicates:

... we will allow BBID And WSID to each submit one document in their respective proceedings that includes a motion (or motions, if the parties choose to style their requests a separate motions) to dismiss or for summary judgment, any supporting memorandum or brief, all of which must not exceed twenty pages in length *in total*.

It is not clear from this statement whether or not WSID can file its Statement of Undisputed Material Facts. WSID is filing its separate statement of Material Facts based upon California Code of Civil Procedure Section 437c(b)(1), which states that any Motion for Summary Judgment:

... shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. **The supporting papers shall include a separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion.**

Ms. Frances Spivy-Weber

February 3, 2016

Page 2 of 4

and Rule 3.1350 of the California Rules of Court:

(c) Documents in support of motion

Except as provided in Code of Civil Procedure section 437c(r) and rule 3.1351, the motion must contain and be supported by the following documents:

* * *

(2) Separate statement of undisputed material facts in support of [*moving party's*] motion for summary judgment or summary adjudication or both;

(d) Separate statement in support of motion

(1) The Separate Statement of Undisputed Material Facts in support of a motion must separately identify:

(A) Each cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion; and

(B) Each supporting material fact claimed to be without dispute with respect to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion.

(2) The separate statement should include only material facts and not any facts that are not pertinent to the disposition of the motion.

(3) The separate statement must be in the two-column format specified in (h). The statement must state in numerical sequence the undisputed material facts in the first column followed by the evidence that establishes those undisputed facts in that same column. Citation to the evidence in support of each material fact must include reference to the exhibit, title, page, and line numbers.

Very truly yours,



JEANNE M. ZOLEZZI

Attorney-at-Law

cc: Attached Service List

**SERVICE LIST OF PARTICIPANTS
 THE WEST SIDE IRRIGATION DISTRICT
 CEASE AND DESIST ORDER HEARING
 (October 8, 2015)**

<p>DIVISION OF WATER RIGHTS Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 Andrew.Tauriainen@waterboards.ca.gov</p>	<p>THE WEST SIDE IRRIGATION DISTRICT Jeanne M. Zolezzi Karna Harrigfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com kharrigfeld@herumcrabtree.com jkrattiger@herumcrabtree.com</p>
<p>STATE WATER CONTRACTORS Stephanie Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org</p>	<p>WESTLANDS WATER DISTRICT Daniel O'Hanlon Rebecca Akroyd Kronick Moskovitz Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 dohanlon@kmtg.com rakroyd@kmtg.com Philip Williams of Westlands Water District pwilliams@westlandswater.org</p>
<p>SOUTH DELTA WATER AGENCY John Herrick, Esq. 4255 Pacific Ave., Suite 2 Stockton, CA 95207 jherrlaw@aol.com Dean Ruiz Harris, Perisho & Ruiz, Attorneys at Law 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hprlaw.net</p>	<p>CENTRAL DELTA WATER AGENCY Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli & McDaniel ngmplcs@pacbell.net dantejr@pacbell.net</p>
<p>CITY AND COUNTY OF SAN FRANCISCO Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 jonathan.knapp@sfgov.org</p>	<p>SAN JOAQUIN TRIBUTARIES AUTHORITY Valerie Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 vkincaid@olaughlinparis.com</p>
<p>CALIFORNIA DEPARTMENT OF WATER RESOURCES Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 robin.mcginnis@water.ca.gov</p>	<p>BYRON BETHANY IRRIGATION DISTRICT Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 dkelly@somachlaw.com</p>

**SERVICE LIST OF PARTICIPANTS
 BYRON-BETHANY IRRIGATION DISTRICT
 ADMINISTRATIVE CIVIL LIABILITY HEARING
 (October 22, 2015)**

<p>DIVISION OF WATER RIGHTS Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 Andrew.Tauriainen@waterboards.ca.gov</p>	<p>BYRON BETHANY IRRIGATION DISTRICT Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 dkelly@somachlaw.com</p>
<p>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Su;ntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com</p>	<p>CITY AND COUNTY OF SAN FRANCISCO Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 jonathan.knapp@sfgov.org Robert E. Donlan Ellison, Schneider & Harris L.L.P. 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 (916) 447-2166 red@eslawfirm.com</p>
<p>CENTRAL DELTA WATER AGENCY Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli & McDaniel ngmplcs@pacbell.net dantejr@pacbell.net</p>	<p>CALIFORNIA DEPARTMENT OF WATER RESOURCES Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 robin.mcginnis@water.ca.gov</p>
<p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rjmorat@gmail.com</p>	<p>SAN JOAQUIN TRIBUTARIES AUTHORITY Valerie Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 vkincaid@olaughlinparis.com lwood@olaughlinparis.com</p>
<p>STATE WATER CONTRACTORS Stephanie Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org</p>	<p>SOUTH DELTA WATER AGENCY John Herrick, Esq. 4255 Pacific Ave., Suite 2 Stockton, CA 95207 jherrlaw@aol.com Dean Ruiz Harris, Perisho & Ruiz, Attorneys at Law 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hprlaw.net</p>

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PROOF OF SERVICE

I, PEGGY GARCIA, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 5757 Pacific Avenue, Suite 222, Stockton, California 95207. On the date set forth below, I served the following document(s):

- 1. COVER LETTER TO HEARING OFFICER FRANCES SPIVY-WEBER, STATE WATER RESOURCES CONTROL BOARD;
- 2. REVISED NOTICE OF INTENT;
- 3. UPDATED EXHIBIT LIST;
- 4. COMBINED MOTION FOR SUMMARY JUDGMENT AND MOTIONS TO DISMISS;
- 5. STATEMENT OF UNDISPUTED MATERIAL FACTS; and
- 6. WRITTEN TESTIMONY OF JACK ALVAREZ.

- BY U.S. MAIL with the United States Postal Service in a sealed envelope, with postage thereon fully prepaid.
- BY ELECTRONIC MAIL (EMAIL) - By sending the document(s) to the person(s) at the email address(es) listed below.

SEE SERVICE LIST OF PARTICIPANTS

- BY FEDERAL EXPRESS/OVERNIGHT MAIL in a sealed envelope, with postage thereon fully prepaid. [Code Civ. Proc., §§ 1013(c), 2015.5.]
- BY PERSONAL SERVICE/HAND DELIVERY.
- BY FACSIMILE at approximately _____m. by use of facsimile machine telephone number (209) 472-7986. I caused the facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration. The transmission was reported as complete and without error. [Cal. Rule of Court 2008 and 2003(3).]

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: February 3, 2016

PEGGY GARCIA

Draft Cease and Desist Order
 Against
 The West Side Irrigation District

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)
Rick Martinez	WSID Water Use	10 min	NO
Jack Alvarez	WSID Water Use	10 min	NO
Susan Paulsen, Ph.D., P.E.	Water Availability and Delta Hydrodynamics	30 min	YES
Tom Burke, P.E.	Water Availability and Delta Hydrodynamics	20 min	YES
Nick Bonsignore, P.E.	Water Availability Analysis	20 min	YES
Greg Young, P.E.	Water Availability Analysis	20 min	YES
Kathy Mrowka	Water Availability	10 min	NO
Brian Coats	Water Availability	10 min	NO
Jeff Yeazel	Water Availability	10 min	NO
John O'Hagan	Water Availability	10 min	NO
Stephen NemethDWR	Full Natural Flow	15 min	NO
Michael George	Water Availability	10 min	NO
Tom Howard	Water Availability	10 min	NO

Exhibit Identification Index
REVISED February 3, 2016
 BBID ACL/WSID CDO Hearings

Participants: West Side Irrigation District, South Delta Water Agency, Central Delta Water Agency

Exhibit ID Number	Phase	Exhibit Description	Status of Evidence (for Hearing Team use Only)		
			Introduced	Accepted	By Official Notice
WSID0001	Phase 1, WSID2	Map of WSID intake canal facilities			
WSID0002	Phase 1, WSID2	Map of WSID with canals			
WSID0003	Phase 1, WSID2	Map of WSID POD and City of Tracy Discharge			
WSID0004	Phase 1, WSID2	Second Map of WSID with canals			
WSID0005	Phase 1, WSID2	WSID License 1381			
WSID0006	All	Department of Public Works Bulletin No. 21-B dated 1929			
WSID0007	All	October 9, 1933 State of California Department of Public Works letter			
WSID0008	All	DWR Water Supervisor's Report for 1931			
WSID0009	Phase 1, WSID2	July 1985 License 1381 Inspection Report			
WSID0010	All	DWR Sacramento-San Joaquin Delta Atlas			
WSID0011	WSID2	August 1924 Report on Drainage prepared by Thomas H. Means Engineering			
WSID0012	WSID2	2010 Drainage Agreement between the Tracy and WSID			
WSID0013	WSID2	Tracy November 2012 Citywide Storm Drainage Master Plan			
WSID0014	WSID2	1937 California Lands deed to WSID			

Exhibit ID Number	Phase	Exhibit Description	Status of Evidence (for Hearing Team use Only)		
			Introduced	Accepted	By Official Notice
WSID0015	WSID2	1947 Costa deed to WSID			
WSID0016	WSID2	1948 NBID deed to WSID			
WSID0017	WSID2	September 21, 1998 WSID letter to SWRCB			
WSID0018	WSID2	September 25, 1998 WSID letter to SWRCB			
WSID0019	WSID2	Tracy NPDES permit			
WSID0020	1, WSID2	Excel spreadsheet submitted by Tracy to SWRCB			
WSID0021	WSID2	April 2011 City of Tracy Urban Water Management Plan			
WSID0022	WSID2	May 6, 2014 Tracy Resolution 2014-165			
WSID0023	WSID2	The 2014 Agreement between WSID and Tracy			
WSID0024	WSID2	March 3, 2015 Tracy Resolution 2015-033			
WSID0025	WSID2	The 2015 Agreement between WSID and Tracy			
WSID0026	WSID2	July 7, 2015 termination letter from Tracy to WSID			
WSID0027	WSID2	Legislative Intent Declaration			
WSID0028	WSID2	Reclamation districts map, San Joaquin County, 4- 22-2015			
WSID0029	Phase 1	DWR-Delta Overview			
WSID0030	Phase 1	SLDMWA-Exchange Contractors Agreement 2015			
WSID0031	Phase 1	USGS Watershed Boundary Dataset Report			
WSID0032	Phase 1	DWR FNF Powerpoint			

Exhibit ID Number	Phase	Exhibit Description	Status of Evidence (for Hearing Team use Only)		
			Introduced	Accepted	By Official Notice
WSID0033	Phase 1	1995 Settlement Agreement in New Don Pedro FERC Proceeding			
WSID0034	Phase 1	USBR Settlement Contractors letter 4-21-2015			
WSID0035	Phase 1	NCWA Sacramento Valley District map			
WSID0036	Phase 1	Appendix to Drought '77 - Dry Year Program - March 1978			
WSID0037	Phase 1	GCID District map			
WSID0038	Phase 1	Bulletin_168 (1978)			
WSID0039	Phase 1	Butte WD - drought letter 2015			
WSID0040	Phase 1	DWR Bulletin 132-09			
WSID0041	Phase 1	DWR Feather River Final Settlement Agreement			
WSID0042	Phase 1	DWR California Central Valley Unimpaired Flow Data Report (May 2007)			
WSID0043	Phase 1	CH2M-hill MBK Sacramento Valley Water Efficiency Report			
WSID0044	Phase 1	Sacramento Valley Regional Water Management Plan Annual Update 2010-11			
WSID0045	Phase 1	SRSC SVRWMP Update Submittal Letter - January 7 2013			
WSID0046	Phase 1	USBR Environmental Assessment for SRSC water use extension			
WSID0047	Phase 1	Madera ID_SBx7-7_2013-12-18			

Exhibit ID Number	Phase	Exhibit Description	Status of Evidence (for Hearing Team use Only)		
			Introduced	Accepted	By Official Notice
WSID0048	Phase 1	Turlock ID Final AWMP 12-11-2012			
WSID0049	Phase 1	Merced ID Ag Water Management Plan Final			
WSID0050	Phase 1	Grasslands Bypass Project Monthly Report Master 2015 Jan-Jun final			
WSID0051	Phase 1	Oakdale ID 2012 AWMP			
WSID0052	Phase 1	S. San Joaquin ID Final 2012 AWMP 2012			
WSID0053	Phase 1	USBR-Water Management Planner 2014			
WSID0054	Phase 1	MID map			
WSID0055	Phase 1	20150610_sacsjcombined .xlsx			
WSID0056	Phase 1	SSJID AWMP 2015			
WSID0057	Phase 1	1969 Joint Board - DWR Agreement			
WSID0058	Phase 1	DWR Unimpaired Inflow Report			
WSID0059	WSID2	Kathy Bare deposition transcript			
WSID0060	Phase 1, WSID2	Written Testimony of Rick Martinez			
WSID0061	Phase 1	A011900 2013 Report of Licensee			
WSID0062	Phase 1	A011900 2014 Report of Licensee			
WSID0063	Phase 1	A011900 license			

Exhibit ID Number	Phase	Exhibit Description	Status of Evidence (for Hearing Team use Only)		
			Introduced	Accepted	By Official Notice
WSID0064	Phase 1	S014982 2013 Supplemental Statement Of Water Diversion And Use			
WSID0065	Phase 1	S014982 2014 Supplemental Statement Of Water Diversion And Use			
WSID0066	Phase 1	S014982			
WSID0067	Phase 1	S014983 2013 Supplemental Statement Of Water Diversion And Use			
WSID0068	Phase 1	S014983 2014 Supplemental Statement Of Water Diversion And Use			
WSID0069	Phase 1	S014983			
WSID0070	Phase 1	SWRCB GIS map			
WSID0071	Phase 1	City of Stockton MUD MOMR June 2015			
WSID0072	Phase 1	City of Stockton MUD MOMR June 2013			
WSID0073	Phase 1	City of Stockton MUD MOMR June 2014			
WSID0074	Phase 1	City of Turlock ww0088 maps			
WSID0075	Phase 1	City of Turlock ww0088 petition			
WSID0076	Phase 1	Drought 77 - 1-24-14			
WSID0077	Phase 1	Final Wastewater Master Plan February 2012			
WSID0078	Phase 1	Maxwell A011957 SWRCB GIS map			

Exhibit ID Number	Phase	Exhibit Description	Status of Evidence (for Hearing Team use Only)		
			Introduced	Accepted	By Official Notice
WSID0079	Phase 1	2015 IO Actual Demands.xlsx			
WSID0080	Phase 1	Maxwell Irrigation 2013 REPORT OF LICENSEE			
WSID0081	Phase 1	Maxwell Irrigation District I004644 a011957			
WSID0082	Phase 1	Meridian 2013 report of licensee			
WSID0083	Phase 1	Meridian 2014 report of licensee			
WSID0084	Phase 1	Meridian A009737 SWRCB GIS map			
WSID0085		WY 2014-2015 CDEC Supply Tables.xlsx			
WSID0086	Phase 1	Meridian I007160 a009737			
WSID0087	Phase 1	MID Return Flows to Rivers, 2000-2015			
WSID0088	Phase 1	MID 2015 AWMP Final			
WSID0089	Phase 1	WDR for Mountain House r5-2013-0004			
WSID0090	Phase 1	Order no. R5-2009-0010			
WSID0091	Phase 1	S007368 2013 supplemental statement of water diversion and use			
WSID0092	Phase 1	S007368			
WSID0093	Phase 1	SWRCB UW supplier data 120115			
WSID0094	Phase 1	Wastewater Utility Master Plan 2012			
WSID0095	Phase 1	Woodland Final 2010			
WSID0096	All	DWR June 1969 Memorandum Report_The Delta & the SWP			

Exhibit ID Number	Phase	Exhibit Description	Status of Evidence (for Hearing Team use Only)		
			Introduced	Accepted	By Official Notice
WSID0097	All	Water Right Decision 100			
WSID0098	All	Water Right Decision 1379			
WSID0099	All	Written Testimony of Karna Harrigfeld			
WSID0100	All	NDWA Contract			
WSID0101	All	Map of FNF Stations and Legal Delta Boundary (Bonsignore Figure 2A)			
WSID0102	All	Map of FNF and UF Watersheds (Bonsignore Figure 2J)			
WSID0103	All	Map of Sacramento San Joaquin Watershed and Legal Delta Boundary			
WSID0104	Phase 1	Map of Locations of Water Rights Used in Demand Analysis Sacramento Watershed (Deposition Exhibit 9)			
WSID0105	Phase 1	Map of Locations of Water Rights Used in Demand Analysis San Joaquin Watershed (Deposition Exhibit 80)			
WSID0106	Phase 1	2015 San Joaquin River Basin Supply/Demand Chart dated April 21, 2015 (Deposition Exhibit 43)			
WSID0107	Phase 1	2015 Sacramento River Basin Supply/Demand Chart dated 4/29/2015 (Deposition Exhibit 10)			
WSID0108	Phase 1	2015 Sacramento River Basin Supply/Demand Chart dated May 1, 2015 (Deposition Exhibit 30)			

Exhibit ID Number	Phase	Exhibit Description	Status of Evidence (for Hearing Team use Only)		
			Introduced	Accepted	By Official Notice
WSID0109	Phase 1	Demand Summary from May 1, 2015 Excel spreadsheet (Deposition Exhibit 31)			
WSID0110	Phase 1	2015 Combined Sacramento San Joaquin River Senior Supply/Demand Chart dated June 10, 2015 (Deposition Exhibit 85)			
WSID0111	Phase 1	2015 Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand Chart from June 10, 2015 file (Deposition Exhibit 28)			
WSID0112	Phase 1	Senior Demand Summary from June 10, 2015 Excel spreadsheet (Deposition Exhibit 29)			
WSID0113	Phase 1	May 21, 2015 SWRCB staff emails (Deposition Exhibit 48)			
WSID0114	Phase 1	May 22-26, 2015 SWRCB staff emails (Deposition Exhibit 49)			
WSID0115	Phase 1	June 2, 2015 Email Mrowka to Kostyrko (Deposition Exhibit 51)			
WSID0116	Phase 1	June 12, 2015 SWRCB staff Emails (Deposition Exhibit 70)			
WSID0117	Phase 1	June 21, 2015 Email from Kostyrko to Evoy (Deposition Exhibit 50)			
WSID0118	Phase 1	Department of Public Works Water Supervisors Report for Year 1931 (Deposition Exhibit 86)			

Exhibit ID Number	Phase	Exhibit Description	Status of Evidence (for Hearing Team use Only)		
			Introduced	Accepted	By Official Notice
WSID0119	Phase 1	Sacramento Basin Charts with WRUDS 2015-05-01.xlsx			
WSID0120	Phase 1	20150610_sacprorated.xlsx			
WSID0121	All	Written Testimony of Nicholas F. Bonsignore, P.E.			
WSID0122	All	Expert Report of Nicholas F. Bonsignore, P.E.			
WSID0123	All	Written Testimony of Thomas Burke, P.E.			
WSID0124	All	Expert Report of Thomas Burke, P.E.			
WSID0125	WSID2	Technical Memorandum of Thomas Burke, P.E. re WSID Diversions			
WSID0126-0149		Intentionally omitted			
WSID0150	All	Deposition of Brian Coats			
WSID0151	All	Deposition of Jeffrey Yeazel			
WSID0152	All	Deposition of Katherine Mrowka			
WSID0153	All	Deposition of John O'Hagan vol. 1			
WSID0154	All	Deposition of John O'Hagan vol. 2			
WSID0155	All	Deposition of Thomas Howard vol. 1			
WSID0156	All	Deposition of Thomas Howard vol. 2			
WSID0157	All	Deposition of Michael George			
WSID0158	All	Written Testimony of Jack Alvarez			

1 JEANNE M. ZOLEZZI, State Bar No. 121282
2 KARNA E. HARRIGFELD, State Bar No. 162824
3 JANELLE KRATTIGER, State Bar No. 299076
4 **HERUM\CRABTREE\SUNTAG**
5 5757 Pacific Avenue, Suite 222
6 Stockton, CA 95207
7 Telephone: (209) 472-7700

8 Attorneys for
9 The West Side Irrigation District

10 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

11 ENFORCEMENT ACTION ENFO1949
12 DRAFT CEASE AND DESIST ORDER
13 REGARDING UNAUTHORIZED
14 DIVERSIONS RO THREATENED
15 UNAUTHORIZED DIVERSIONS OF
16 WATER FROM OLD RIVER IN SAN
17 JOAQUIN COUNTY

18) WRITTEN TESTIMONY
19) OF JACK ALVAREZ

20) Hearing Date: March 21, 2016
21) Hearing Officer: Frances Spivy-Weber

22 **INTRODUCTION**

23 1. My name is Jack Alvarez, and I submit this written testimony on behalf of The
24 West Side Irrigation District (“**WSID**” or “**District**”).

25 2. I am a member of the Board of Directors of WSID, and have served on the Board
26 since 1994 and am very familiar with its jurisdictional area, facilities, water right and operations.
27 I am currently the President of the Board of Directors, and have held that position since February
28 1997.

1 3. WSID is a California irrigation district, located in San Joaquin County, and
2 includes 6,345.86 acres of agricultural land within its boundaries.

3 4. The District holds water right License 1381, originally issued on September 29,
4 1933 and amended on August 19, 2010 (“**License**”). A true and correct copy of the License is
5 provided as **EXHIBIT WSID0005**.

6 5. License 1381 has a priority date of April 17, 1916, and authorizes the direct
7 diversion of 82.5 cubic feet per second (“**cfs**”) from Old River in San Joaquin County from (1)
8 about April 1 to October 31 of each year for irrigation and (2) from April 1 to October 31 of each
9 year for municipal, domestic and industrial uses.

WSID CDO/BBID

1 6. In 1929 the Department of Public Works issued Bulletin No. 21, which discussed
2 WSID diversions and confirmed that the water diverted by WSID pursuant to its License is
3 “largely return flow from diversions farther upstream and water reaching the San Joaquin Delta
4 from Sacramento River through Georgiana Slough and other inter-delta channels.” I obtained a
5 copy of the report from the Department of Water Resources (“DWR”), the successor of the
6 Department of Public Works. DWR posts historic reports on its website at
7 <http://www.water.ca.gov/waterdatalibrary/docs/historic/bulletins.cfm>. A true and correct copy
8 of Department of Public Works Bulletin No. 21 dated 1929 is provided as **EXHIBIT**
9 **WSID0006**, see pages 156-158.

10 7. The License was issued in 1933 documenting the maximum amount of water
11 found to have been put to beneficial use in the years 1930, 1931 and 1932, as acknowledged in
12 that October 9, 1933 letter to WSID from the State of California Department of Public Works. A
13 true and correct copy of the October 9, 1933 letter is provided as **EXHIBIT WSID0007**. A true
14 and correct copy of Table 38 of the Sacramento San Joaquin Water Supervisor’s Report,
15 Department of Public Works Bulletin No. 23 dated August 1932 is provided as **EXHIBIT**
16 **WSID0008**. I obtained a copy of the Water Supervisor’s Report from DWR’s website at
17 <http://www.water.ca.gov/waterdatalibrary/docs/historic/bulletins.cfm>.

18 8. WSID and its diversion facilities on Old River are located in the Sacramento-San
19 Joaquin Delta. A true and correct copy of the Sacramento-San Joaquin Delta Atlas prepared by
20 the California Department of Water Resources is provided as **EXHIBIT WSID0010**. I obtained
21 a copy of the Delta Atlas from DWR’s website at
22 <http://baydeltaoffice.water.ca.gov/DeltaAtlas/index.cfm>. See page 4 for a map of the Delta,
23 showing the location of Old River. See also **EXHIBITS WSID0001, WSID0002, WSID0003**
24 and **WSID0004** for maps of the WSID boundaries. These maps accurately reflect the District’s
25 boundaries and diversion facility location.

26 9. The WSID License file at the State Water Resources Control Board contains a
27 copy of the State Water Resources Control Board staff’s July 18, 1985 Report of Inspection of
28 the WSID Facilities on file with the State Water Resources Control Board, a true and correct

1 copy of which is provided here as **EXHIBIT WSID 0009**. In that inspection report, the State
2 Board explained:

3 a. water moves slowly in the flat gradient channel which is affected by tides
4 of about 4 feet;

5 b. the channel is from 4 feet to 8 feet deep depending on tides; and

6 c. the quality of Old River water diverted by WSID in the intake channel is
7 poor, running from 800 to 1000 total dissolved solids.

8 10. There is a drainage canal located in WSID called the Bethany Drain. The location
9 of the Bethany Drain is accurately depicted on **EXHIBITS WSID0001, WSID0002, WSID0003**
10 and **WSID0004**.

11 11. The Bethany Drain collects irrigation return water through tile drains from
12 landowners within WSID, shallow groundwater from tile drains, and municipal drainage from
13 lands within the City of Tracy and discharges that return water directly into WSID's intake
14 channel. My understanding of the operation of Bethany Drain is based on personal experience
15 over the last 20 years negotiating the agreements related to the operations of the Bethany Drain
16 on behalf of WSID.

17 12. The Bethany Drain is exclusively owned, operated and maintained by WSID, and
18 WSID maintains exclusive control over the Bethany Drain from its origination within the District
19 boundaries along its entire course, until it discharges into the WSID intake canal. Title to the
20 Bethany Drain was obtained by WSID over time, from the 1930's and 1940's. True and correct
21 copy of three deeds to portions of the Bethany Drain that exemplify the deeds held by WSID for
22 the Bethany Drain are attached hereto as **EXHIBITS WSID0014, WSID0015** and **WSID0016**.
23 These deeds are official records of the district and are true and correct copies of public records
24 recorded in San Joaquin County.

25 13. The history and original purpose of the Bethany Drain is explained in a WSID
26 business record obtained from Naglee-Burk Irrigation District, maintained by the district since
27 1924, and produced here as **Exhibit WSID0011**, which contains a true and correct copy of an
28

1 August 1924 Report on Drainage prepared by Thomas H. Means Engineering for the Naglee-
2 Burk Irrigation District (“**Drainage Report**”).

3 14. The Drainage Report confirms that drainage is needed within WSID to protect
4 lands from high water tables, and notes that in 1924 water stood at less than 4 feet from the
5 surface within WSID. See **EXHIBIT WSID0011** at pages 14 - 19.

6 15. Municipal discharges into the Bethany Drain are allowed pursuant to a contract
7 between the City of Tracy and WSID, as well as other similar contracts between WSID and other
8 municipal and industrial properties. A true and correct copy of the 2010 Drainage Agreement
9 between the City of Tracy and The West Side Irrigation District is provided as **EXHIBIT**
10 **WSID0012**. The other drainage agreements between WSID and others are similar in form.

11 16. A map of the City’s drainage system, its relationship to WSID drains, and other
12 drainage information is included in the City of Tracy November 2012 Citywide Storm Drainage
13 Master Plan, a true and correct copy of which is provided as **EXHIBIT WSID0013**, see pages
14 1.15, 1.18, 2.1 and 2.3, and Figures 1.4 and 2.3. This Master Plan document was officially
15 adopted by the City of Tracy City Council, is maintained by the City as an official document and
16 business record of the City, and was obtained from the City of Tracy website at
17 http://www.ci.tracy.ca.us/documents/Final_Storm_Drainage_Master_Plan.pdf.

18 17. WSID discharges its drain water from the Bethany Drain into the WSID intake
19 channel with the express intention of recapturing the water at its diversion pumps. This practice
20 has continued for many years with the full knowledge of the State Water Resources Control
21 Board.

22 18. By letter dated September 21, 1998, WSID notified State Water Board that it
23 “obtains a substantial amount of water through recycled tail water from district irrigation, and
24 from neighboring districts.” A true and correct copy of a September 21, 1998 letter from WSID
25 to the State Water Resources Control Board is provided as **EXHIBIT WSID0017**. This letter is
26 maintained as a business record of WSID.

27 19. By letter dated September 25, 1998, WSID again notified the State Water Board
28 that “it is our position that this [Bethany Drain] water is not subject to appropriation because it

1 does not reach a natural watercourse. The water is pumped from a man-made canal.
2 Consequently, WSID has the right to use this water without a permit from the State Water
3 Resources Control Board. As such, WSID does not need to divert such water under the terms of
4 its License, it does not need to file a new appropriation, and it does not need to provide the Board
5 with copies of agreements entitling it to use this water.” A true and correct copy of that
6 September 25, 1998 letter is provided as **EXHIBIT WSID0018**. This letter is maintained as a
7 business record of WSID.

8 **CITY OF TRACY WASTEWATER**

9 20. The City of Tracy operates a wastewater treatment plant and discharges treated
10 wastewater effluent to Old River, a water of the United States, pursuant to Order R5-2012-0115
11 (NPDES Permit CA0079154) issued by the Central Valley Regional Water Quality Control
12 Board. A true and correct copy of NPDES Permit CA0079154, obtained from the State Water
13 Board website at [http://www.waterboards.ca.gov/rwqcb5/board_decisions/adopted_orders/
14 san_joaquin/r5-2012-0115.pdf1](http://www.waterboards.ca.gov/rwqcb5/board_decisions/adopted_orders/san_joaquin/r5-2012-0115.pdf1) is provided as **EXHIBIT WSID0019**.

15 21. The City discharges approximately 9 million gallons per day ("mgd"), which is
16 equivalent to 14 cfs, on a substantially continuous basis into Old River upstream from the
17 District's point of diversion under License 1381. A true and correct copy of an excel spreadsheet
18 submitted by the City of Tracy to the State Water Resources Control Board summarizing
19 discharges from its wastewater treatment plant, as provided by the State Water Board
20 Prosecution Team in its November 3, 2015 response to a Public Records Act Request submitted
21 by WSID is provided as **EXHIBIT WSID0020**.

22 22. The City obtains water supplies from three sources: (1) South San Joaquin
23 Irrigation District water delivered from the Stanislaus River (typically the majority of the City's
24 supply); (2) United States Bureau of Reclamation water delivered from the Delta-Mendota
25 Canal; and (3) local groundwater wells (typically the smallest portion of the City's supply). The
26 City's treated wastewater discharges are foreign in source and/or foreign in time to the Old River
27 flow. These sources are explained in the April 2011 City of Tracy Urban Water Management
28 Plan, a copy of which is provided as **EXHIBIT WSID0021**. This Plan was formally adopted by

1 the City of Tracy and is an official record and business record of the City of Tracy, and was
2 obtained from the City of Tracy website at [http://www.ci.tracy.ca.us/documents/
3 Urban_Water_Management_Plan_2011.pdf](http://www.ci.tracy.ca.us/documents/Urban_Water_Management_Plan_2011.pdf).


4 23. On May 6, 2014, the City Council adopted Resolution 2014-165, authorizing the
5 City to enter into a Wastewater Revocable License Agreement with WSID (“2014 Agreement”)
6 for the sale of treated wastewater from the City’s wastewater treatment plant. The 2014
7 Agreement provided that WSID may divert all of the City’s wastewater discharges from April 1,
8 2014 through October 31, 2014, estimated to be approximately 14 cfs, equivalent to 27.8 acre-
9 feet per day, on a continuous basis. A true and correct copy of Resolution 2014-165 is provided
10 as **EXHIBIT WSID0022**. A true and correct copy of the 2014 Agreement is provided as
11 **EXHIBIT WSID0023**.

12 24. On March 3, 2015, the Tracy City Council adopted Resolution 2015-033,
13 authorizing the City to enter into a Wastewater Revocable License Agreement with WSID
14 (“2015 Agreement”) for the sale of treated wastewater from the City’s wastewater treatment
15 plant. The 2015 Agreement provided that WSID may divert all of the City’s wastewater
16 discharges from April 1, 2015 through October 31, 2015, estimated to be approximately 14 cfs,
17 equivalent to 27.8 acre-feet per day, on a continuous basis. A true and correct copy of
18 Resolution 2015-033 is provided as **EXHIBIT WSID0024**. A true and correct copy of the 2015
19 Agreement is provided as **EXHIBIT WSID0025**.

20 25. WSID did not provide the City with a written Commencement Notice and WSID
21 did not purchase or divert wastewater from the City under the 2015 Agreement. On July 7, 2015
22 the City terminated the 2015 Agreement. A true and correct copy of the July 8, 2015 Letter from
23 the City of Tracy notifying WSID of the termination is provided as **EXHIBIT WSID0026**.

24 I declare under penalty of perjury under the laws of the State of California that the
25 foregoing is true and correct.

26 Executed this ____ day of February, 2016 in Tracy, California.

27
28 
JACK ALVAREZ

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9 Attorneys for THE WEST SIDE IRRIGATION DISTRICT

10 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

11 ENFORCEMENT ACTION ENFO1949
12 DRAFT CEASE AND DESIST ORDER
13 REGARDING UNAUTHORIZED
14 DIVERSIONS OR THREATENED
15 UNAUTHORIZED DIVERSIONS OF
16 WATER FROM OLD RIVER IN SAN
17 JOAQUIN COUNTY

18)
19) **MOTION FOR SUMMARY JUDGMENT,**
20) **OR IN THE ALTERNATIVE, SUMMARY**
21) **ADJUDICATION; MOTION TO DISMISS**
22) **BASED UPON VIOLATION OF DUE**
23) **PROCESS; MOTION TO DISMISS –**
24) **METHOD OF DETERMINING WATER**
25) **AVAILABILITY IS AN UNLAWFUL**
26) **UNDERGROUND REGULATION;**

27) Hearing Date: March 21, 2016

28) Hearing Officer: Frances Spivy-Weber

1 The West Side Irrigation District (“**WSID**”) hereby moves (1) for summary judgment or,
2 alternatively, for summary adjudication of the Enforcement Action ENF01949 (“**Enforcement**
3 **Action**”) against it because (a) there was sufficient water in 2014 and 2015 to support diversions
4 under WSID’s License 1381, (b) WSID may legally divert wastewater from the City of Tracy
5 (“**City**”) under Contract without a water right permit or a petition for change under Water Code
6 §1211, and (c) WSID may legally divert its drain water from its Intake Channel without a water
7 right permit after it is commingled with water from Old River; (2) to dismiss the Enforcement
8 Action because it violates WSID’s due process rights as multiple members of the Prosecution
9 Team have served as advisors to the State Water Resources Control Board (“**Water Board**”) for
10 over two years, of which Hearing Officer Spivy-Weber (“**Hearing Officer**”) is a member, both
11 prior to and during the pendency of the Enforcement Action; and, finally (3) to dismiss the
12 Enforcement Action because the Water Board’s method for determining water availability

1 constitutes an unlawful underground regulation in violation of the Administrative Procedures Act
2 (“**APA**”).

3 **I. FACTUAL BACKGROUND**

4 **A. WSID WATER RIGHTS**

5 WSID holds water right License 1381 (“**License**”), with a priority date of April 17, 1916,
6 for direct diversion of 82.5 cubic-feet per section (“**cfs**”) from Old River from about April 1 to
7 October 31 of each year. UMF ¶¶1, 2. The WSID diversion point is located on Old River in the
8 tidally influenced Delta. UMF ¶6. There is always water in the channels of the Delta because
9 they are below sea level. UMF ¶7. At any given time, the Delta holds approximately 1.2 million
10 acre-feet of water. UMF ¶8. Water flows into the Delta with the tide from the West as well as
11 from east side tributary streams. UMF ¶9. Inflow from the tributary streams, once having entered
12 the Delta, will reside in the Delta for up to several months during dry periods. UMF ¶10.

13 WSID diverts water through a dredged intake channel off of Old River, which is
14 approximately 1.5 miles long. (“**Intake Canal**”). UMF ¶5. The water diverted by WSID from
15 Old River is “largely return flow from diversions father upstream and water reaching the San
16 Joaquin delta from Sacramento River through Georgiana Slough and other inter-delta channels”.
17 UMF ¶3. Water moves slowly in the flat gradient Intake Canal, which is affected by tides of
18 about 4 feet, and the depth in the Intake Canal varies from 4 feet to 8 feet deep depending on
19 tides. UMF ¶11.

20 WSID’s License was issued in 1933 based upon the water placed to beneficial use in
21 1930, 1931 and 1932. UMF ¶4. In 1931 the majority of the water at the WSID point of diversion
22 during the irrigation season was from the Sacramento River and had entered the Delta in the
23 prior three months. UMF ¶12. Similarly, in 2015, the majority of the water at the WSID point of
24 diversion during the irrigation season was from the Sacramento River and had entered the Delta
25 in the prior three months. UMF ¶13.

26 The State Water Project and Central Valley Project, constructed after 1931, have altered
27 flow patterns in the Delta. UMF ¶14. By storing water in the winter and spring and releasing it
28 through the Delta in the summer, the Projects reduce the percentage of Sacramento River water

1 that reaches the Delta in the winter and spring months and increase the percentage of Sacramento
2 River water that reaches the Delta in the summer and fall months. UMF ¶15. Under either
3 circumstance, however, water is always available to WSID’s during the irrigation season because
4 of the nature of residence time and tidal influence in the Delta. UMF ¶16.

5 **B. CITY OF TRACY TREATED WASTEWATER**

6 The City of Tracy operates a wastewater treatment plant and discharges approximately 9
7 million gallons per day (“**mgd**”) of treated wastewater effluent, equivalent to 14 cfs, on a
8 substantially continuous basis into Old River, just upstream from the District’s point of diversion
9 under License 1381. UMF ¶¶27, 28. The City obtains water supplies from three sources: (1)
10 South San Joaquin Irrigation District water from the Stanislaus River; (2) United States Bureau
11 of Reclamation water delivered from the Delta-Mendota Canal; and (3) local groundwater wells,
12 as such the City’s treated wastewater discharges are foreign in source and/or foreign in time to
13 the Old River flow. UMF ¶29, 30. The City and WSID entered into agreements in both 2014 and
14 2015 for WSID to divert the City’s wastewater. UMF ¶¶31, 32, 33, 34. WSID diverted some of
15 the City’s wastewater in 2014 and none of the City’s wastewater in 2015. UMF ¶¶26, 40.

16 **C. WSID TAILWATER DISCHARGE**

17 WSID owns and controls the Bethany Drain, which runs through its jurisdictional area.
18 UMF ¶21. The Bethany Drain collects drainage water from various sources, including, but not
19 limited to: (1) irrigation return flows from Old River License diversions, (2) shallow
20 groundwater from tile drains from lands within the district, and (3) by contract, municipal
21 drainage from lands within the City of Tracy (“**Drainage Water**”). UMF ¶¶17, 18, 19, 20.
22 WSID controls the Drainage Water in the Bethany Drain, which is foreign in both source and
23 time to the Old River flow, and discharges directly into WSID’s intake channel immediately
24 upstream of WSID’s diversion pumps. UMF ¶¶17, 21. WSID does not intend to abandon water
25 discharge from the Bethany Drain into the intake channel; rather the intention of the discharge is
26 to enable WSID to pump the water at its diversion pumps. UMF ¶22.

27 Because the District’s intake channel is open to Old River, drain water from the Bethany
28 Drain may commingle with Old River water in the intake channel. UMF ¶23. Discharges of

1 water from the Bethany Drain into the intake channel are measured. UMF ¶24. In 2015 WSID
2 operated its diversion pump to pump out of the Intake Canal the same amount of water that was
3 discharged into the Intake Canal from the Bethany Drain, and at no time after May 21, 2015 did
4 WSID’s diversions from the intake channel exceed the inflow into the intake channel from the
5 Bethany Drain. UMF ¶25.

6 **D. SWRCB WATER AVAILABILITY DETERMINATIONS IN 2015**

7 On May 1, 2015 the SWRCB determined there was no water available for diversion
8 under the License, UMF ¶¶35, 36, 37, a determination based on a spreadsheet methodology that
9 compared supply and demand on a watershed wide basis. UMF ¶38. This methodology did not
10 consider water available to WSID at its point of diversion, the tidal effect in the Delta, or the fact
11 that tributary flow from prior months was still present in the Delta and available for WSID to
12 divert due to Delta hydrodynamics and residence time. UMF ¶39.

13 **II. LEGAL STANDARD – MOTION FOR SUMMARY JUDGMENT**

14 A motion for summary judgment shall be granted if (1) there is no triable issue as to any
15 material fact, and (2) the moving party is entitled to judgment as a matter of law. CCP §437c(c).
16 An issue of fact becomes one of law and loses its “triable” character if the undisputed facts leave
17 no room for a reasonable difference of opinion. *Ostayan v. Serrano Reconveyance Company, et*
18 *al.* (2000) 77 Cal.App.4th 1411, 1418. Summary judgment is appropriate where there is no merit
19 to the action. CCP §437c(a).

20 Additionally, a party may move for summary adjudication as to one or more causes of
21 action in the alternative to summary judgment if it contends there is no merit to that cause of
22 action. CCP §437c(f). A defendant has met his burden of showing that there is no merit to a
23 cause of action if that party has proved that one or more elements of the cause of action cannot
24 be established, or that there is a complete defense to that cause of action. CCP §437c(p)(2). Once
25 the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of
26 one or more material facts exists as to that cause of action or a defense thereto. *Id.* The plaintiff
27 may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of
28 material fact exists but, instead, shall set forth the specific facts showing that a triable issue of

1 material facts exists as to that cause of action or a defense thereto. *Id.*

2 **III. ARGUMENT – MOTION FOR SUMMARY JUDGMENT**

3 **A. WSID IS ENTITLED TO JUDGMENT AS A MATTER OF LAW REGARDING**
4 **WATER AVAILABILITY**

5 The primary source of water available to WSID to divert at its point of diversion on Old
6 River in the summer of 2015 was Sacramento River water that had entered the Delta in prior
7 months. UMF ¶13. Sacramento River water has historically been a source of supply available to
8 WSID under its License. UMF ¶3. The SWRCB completely ignored this primary source in its
9 analysis of water availability. UMF ¶39. No reasonable person could find that the SWRCB’s
10 water availability analysis credible given this omission. The Prosecution Team cannot meet its
11 burden to establish that no water was available to divert for WSID after May 1, 2015.

12 **B. WSID’S DIVERSION OF WASTEWATER UNDER CONTRACT WITH THE**
13 **CITY OF TRACY IS PROPER AS A MATTER OF LAW**

14 The City holds title to its treated wastewater (Water Code §1210). The City may use a
15 natural watercourse to convey the treated wastewater (Water Code §7075). The City can also
16 agree to allow WSID to divert the water by contract, without SWRCB application, because the
17 diversion does not cause any measurable decrease in flow in the watercourse. (Water Code
18 §1211(b)). Further, because the treated wastewater is not abandoned by the City, it is not subject
19 to appropriation, and no water right permit is required for its diversion.

20 1. **The City holds title to its treated wastewater.** The City holds exclusive title to
21 its treated wastewater. See Water Code §1210:

22 The owner of a waste water treatment plant operated for the purpose of treating wastes
23 from a sanitary sewer system shall hold the exclusive right to the treated waste water as
24 against anyone who has supplied the water discharged into the waste water collection and
25 treatment system. . .”

26 2. **The City may use Old River to convey its treated wastewater.** Because the
27 City’s wastewater is not abandoned, and not subject to appropriation in Old River, the City can
28 convey that water through Old River and WSID can divert it under contract at its point of
29 diversion downstream as authorized by Water Code §7075, which provides: “Water which has
30 been appropriated may be turned into the channel of another stream, mingled with its water, and

1 then reclaimed; but in reclaiming it the water already appropriated by another shall not be
2 diminished". *Emphasis added.* By conveying the wastewater in Old River under contract, the
3 City is not abandoning the water. State Water Board Decision D 1602 at pp. 5 - 6, citing *Burnett*
4 *v. Whitesides* (1860) 15 Cal. 35.

5 3. **No SWRCB permit is required because WSID's diversion of the water does**
6 **not decrease the flow in the watercourse.** Water Code Section 1211 provides:

7 (a) Prior to making any change in the point of discharge, place of use, or purpose of use
8 of treated wastewater, the owner of any wastewater treatment plant shall obtain approval
9 of the board for that change. . .

10 (b) Subdivision (a) does not apply to changes in the discharge or use of treated
11 wastewater that do not result in decreasing the flow in any portion of a watercourse.

12 Section (b) of Water Code Section 1211 was added to State Water Code in 2001 at the request of
13 the State Water Board, which asserted: "Where there is no threat to instream flows or third party
14 water-right holders, requiring [State Water Board] review is an unnecessary burden on
15 wastewater reclamation." UMF ¶44.

16 The Prosecution Team has not put forth any credible evidence that diversion of the City's
17 wastewater by WSID decreases the flow of a watercourse. The Prosecution Team did not take
18 any measurements of flow at the WSID point of diversion, or downstream in either direction.
19 UMF ¶41. Instead the Prosecution Team simply assumed that a diversion of 14 cfs by WSID
20 resulted in a corresponding reduction in flow. UMF ¶42. By contrast, WSID's operator did not
21 observe any change in flow in Old River at any time in 2014 when diversions of City of Tracy
22 wastewater were being made under contract, and WSID's expert conducted a scientific study
23 using scientifically accepted Delta modeling tools to determine that no measurable decrease in
24 flow or water levels results from WSID's diversion of 8 to 14 cfs. UMF ¶¶26, 43.

25 4. **A separate water right is not required to divert the City's wastewater from**
26 **Old River because the City has not abandoned the wastewater such that it would be subject**
27 **to appropriation.** As a matter of law, WSID can divert the City's wastewater pursuant to
28 contract without classifying the diversion of that water as a diversion under WSID's license or

1 being required to obtain a new appropriative permit because the water remains appropriated and
2 is not abandoned. Only water flowing in a natural channel not being applied to beneficial use or
3 not otherwise appropriated, is available for appropriation. Wat. Code Sec. 1201. “Although
4 appropriative rights can attach to any unappropriated water flowing in a stream, previously
5 appropriated water only becomes unappropriated if it is abandoned”. State Water Resources
6 Control Board Order No. WR 97-05 at pp. 27-28. “Unappropriated water does not include water
7 being used by others under paramount rights”. State Water Board Decision D1635 at p. 26.

8 The City’s treated wastewater was previously appropriated, has remained under the
9 City’s control, and is being conveyed to WSID under contract; thus the water is being applied to
10 beneficial use and remains appropriated. At no time has it reverted to unappropriated water or
11 stopped being applied for a beneficial use. It is also irrelevant that the City previously abandoned
12 the water into the river. “. . . [A]n appropriator . . . that has abandoned water in the past, causing
13 an artificial flow of water, may cease to abandon water as it increases its use of water.” State
14 Water Board Order WR 97-05 at p. 28, citing *Stevens v. Oakdale Irrigation District* (1939) 13
15 Cal.2d 343. An importer of foreign water (the City) is under no legal obligation to continue to
16 import and abandon water for the use of another. See State Water Board Decision D1602 at p. 4;
17 State Water Board Order WR 95-9 at pp. 18-19; *Haun v. De Vours* (1950) 97 Cal.App.2d 841,
18 218 P.2d 996.)

19 Here, the Prosecution Team admits the City obtains water supplies from three sources:
20 (1) South San Joaquin Irrigation District water delivered from the Stanislaus River (typically the
21 majority of the City’s supply); (2) United States Bureau of Reclamation water delivered from the
22 Delta-Mendota Canal; and (3) local groundwater wells (typically the smallest portion of the
23 City’s supply), and that the City’s treated wastewater discharges are foreign in source and/or
24 foreign in time to the Old River flow. UMF ¶29.

25 The City ceased to abandon the return water and instead chose to dispose of the water
26 through formal written contract, a practice approved by the State Water Board (*See* Order WR
27 95-9 *supra*, citing *Haun v. DeVours* (1950) 97 Cal.App.2d 841). “The intention not to abandon
28 the water turns the stream channel into a mere means of conveyance”. State Water Board

1 Decision D 334, at p. 18, citing Weil, *Water Rights in the Western States*, 3rd Edition, Vol. 1, pp.
2 37 and 38. “The intent to recapture is essential, and without it, the water is abandoned; and as
3 previously set forth, cannot be reclaimed again claimants on the stream, existing at the time the
4 recapture is attempted”. State Water Board Decision D 334, *supra*, citing Weil. By entering into
5 this contract to sell its treated wastewater to WSID, the City established its intention to cease
6 abandoning its wastewater and allow WSID to recapture it.

7 Water Code §§1485 and 1486 provide that specified producers of wastewater “*may*
8 file an application for a permit to appropriate” that water. *Emphasis added*. This language is
9 permissive and not mandatory, and does not impose a requirement upon any diverter to obtain a
10 permit. State Water Board Decision D 851 succinctly states at page 11: “While under his control
11 the applicant’s drainage water is his to use and a permit to appropriate same would avail him
12 nothing,” while Water Right Order 2004-0004 adds: “Water that is appropriated and is flowing
13 in a channel under the control of its appropriator is not subject to appropriation by others”, at p.
14 5, citing *Stevens, supra* at p. 352.

15 **C. WSID’S DIVERSION OF DRAINAGE WATER FROM ITS INTAKE CANAL IS**
16 **AUTHORIZED BY CALIFORNIA CASE LAW AND WATER CODE SECTION**
17 **7075.**

18 **1. California Law Expressly Allows WSID to Commingle its Drainage Water**
19 **with Water in Old River and to Recapture That Water.** There is no dispute that drainage
20 water from WSID’s Bethany Drain enters the WSID Intake Canal, briefly commingles with
21 water from Old River present in the Intake Canal, and then is pumped out of the Intake Canal at
22 WSID’s point of diversion. The Water Board provides no evidence that the quality of the water
23 being discharged from the Bethany Drain is any different from the quality of water in the Intake
24 Canal that WSID pumps - but even if there were, it would not matter. Under these facts, the law
25 is clear that WSID can pump a quantity of water equal to its Bethany Drain discharges without a
26 separate water right permit because it is simply maintaining control of and conveying its own
27 drainage water.

28 The State Water Board has expressly recognized this right for DWR and USBR: “By
their export pumping, DWR and the USBR are turning water into the channels of the San

1 Joaquin River, *commingling it, and then reclaiming it*, as [Section 7075] authorizes”. State
2 Water Board Order WR 89-8 at p. 25. *Emphasis added*. Water Code §7075 codifies a long line of
3 California cases clarifying a party’s right to convey water through a natural watercourse,
4 commingle it, and recapture it downstream. The seminal case on recapture, decided before the
5 Civil War, is *Butte Canal and Ditch Co. v. Vaughn* (1858) 11 Cal. 143, in which the Supreme
6 Court first upheld the right of a prior appropriator to convey, commingle and recapture water
7 using a natural watercourse. The *Butte* court was not persuaded by an allegation, remarkably
8 similar to the assertion advanced by this Prosecution Team, that an appropriator could be injured
9 by such commingling by injuring the quality of the water in the natural stream *Id.* at p. 148.

10 **2. The Fact that WSID’s Drainage Water Derives from Several Sources Has No**
11 **Bearing on WSID’s Right to Recapture.** After the May 1, 2015 curtailment, WSID’s Drainage
12 Water derived from two sources: (1) shallow groundwater from tile drains from landowners
13 within WSID, and (2) by contract, municipal drainage from lands within the City of Tracy. UMF
14 ¶¶17, 18, 19. WSID takes title to these flows when they enter the Bethany Drain, which is owned
15 and controlled by WSID. UMF ¶21. The majority of the flow in the Bethany Drain is derived
16 from tile drain discharges installed widely in the district in the late 1950’s to drain lands of
17 shallow groundwater standing less than 4 feet from the surface, to allow irrigation. UMF ¶18.

18 “One who brings water into a watershed may retain a prior right to the same after
19 permitting others to use the water for irrigation.” Hutchings, *California Law of Water Rights*
20 (1956) at p. 399, discussing *Los Angeles v. Glendale, supra*. The only water within the Bethany
21 Drain not deriving from directly from WSID landowners is municipal runoff under contract with
22 the City of Tracy and other municipal landowners. The City retains the prior right to use of its
23 drain water even after use by its municipal customers, and may then transfer that right of use to
24 WSID. Hutchings continues:

25 It is competent for the producer of return flow from foreign water to dispose of the same
26 by contract prior to abandonment of the flow. Appropriative rights that have attached to
27 waters abandoned of the flow. *Haun v. De Vours* (1950) 97 Cal.App.2d 841, 844.
28 Appropriative rights that have attached to waters abandoned in the past are not infringed
by such acts, for such rights are always subject to the right of the importer to sell or

1 otherwise dispose of the surplus water before abandoning it. If after the termination of the
2 agreement the water is again abandoned, it comes thereupon under the appropriative
rights theretofore established.

3 WSID is entitled to recapture all Drainage Water within the Bethany Drain because it is foreign
4 water comprised of shallow groundwater from WSID landowners or contractually obtained
5 municipal drainage¹.

6 **3. The Fact that the Bethany Drain Travels Outside the WSID Boundaries Has**
7 **no Bearing on WSID’s right to Recapture.** The Drainage Water within the Bethany Drain
8 remains under WSID’s control at all times while it is in the drain, regardless of whether the
9 Bethany Drain is inside or outside of the WSID boundaries. The location of travel or recapture of
10 the Drainage Water is not a relevant factor in determining WSID’s right to recapture that water.
11 *City of Los Angeles v. City of Glendale, supra* at pp. 76 – 78 and *City of Los Angeles v. City of*
12 *San Fernando, supra* at pp. 264- 264 each confirms that so long as WSID retains the physical
13 ability to recapture the imported water after it is commingled with native water, it is not
14 obligated to recapture the water before the water physically leaves the boundaries of the entity.
15 *See Slater, 1-7 California Water Law and Policy* (2015) §7.07.

16 This exact issue was conclusively decided in *Stevens v. Oakdale Irrig. Dist. supra*:

17 There are cases where even after a foreign flow has left the land and control of its
18 producer, he has been permitted to recapture it from the second stream, when it has been
19 shown that such recapture was a part of his original project, and the water was discharged
20 into the stream, not simply to be rid of it, but for the express purpose of retaking at a
21 lower point. Where the recapture occurs before the foreign flow passes from the lands
22 and control of the producer there can be no doubt of his right to make temporary use of a
23 channel traversing his property, so long as normal conditions on the stream are not
24 injuriously affected thereby. In such case the stream bed merely serves the purpose of the
25 drainage ditch which might be constructed were no natural channel available. (See
Hoffman v. Stone, 7 Cal. 46; *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143 [70 Am.
26 Dec. 769]; *E. C. Horst Co. v. New Blue Point Min. Co.*, supra, at p. 636; 26 Cal. Jur., p.
143 et seq.; Kinney on Irrigation and Water Rights, 2d ed., vol. 2, p. 1457 et seq.; Wiel
on Mingling of Waters, supra.)

27 at pp. 352 – 353.

28 ¹ Ms. Mrowka testified in her deposition that water in the Bethany Drain came from “districts outside the districts
boundary” (Testimony of Kathy Mrowka at p. 75 lines 11 – 12). While historically WSID accepted drainage from
other districts, currently no drainage from other districts flow into the Bethany Drain. UFM ¶20.

1 **V. FACTUAL SUMMARY – MOTION TO DISMISS (DUE PROCESS)**

2 **A. PROSECUTION TEAM**

3 The designated Prosecution Team in the Enforcement Action includes Kathy Mrowka
4 and Michael George, who have both submitted testimony in support of the Prosecution Team.
5 EXHIBITS WR-7, WR-21, September 1, 2015 *Notice of Public Hearing and Pre-Hearing*
6 *Conference*. John O’Hagan directly supervises Ms. Mrowka at her position at the Water Board.
7 EXHIBIT WR-7 at p. 23, lines 3-5, p. 25, lines 11-12, p. 162, lines 12-13.

8 Prior to initiating the Draft Cease and Desist Order that is the basis for the Enforcement
9 Action (“CDO”), Ms. Mrowka’s boss, Mr. O’Hagan, submitted a lengthy declaration to a
10 Superior Court supporting the State Board’s opposition to a temporary restraining order sought
11 by WSID. In this declaration Mr. O’Hagan testified that WSID was violating its water permit
12 and insufficient water was available for WSID to exercise its water right permit. His opinion is
13 based on essentially the same arguments, methodology and evidence that Ms. Mrowka now
14 relies on in this Enforcement Action to reach the same conclusion as her boss.

15 **B. SEPARATION OF FUNCTIONS**

16 The September 1, 2015 *Notice of Public Hearing and Pre-Hearing Conference* issued by
17 the Water Board discussed the separation of functions being imposed in the Enforcement
18 Proceeding:

19 The prosecution team is separated from the hearing team and is prohibited from having ex
20 parte communications with any members of the State Water Board and any members of the
21 hearing team regarding substantive issues and controversial procedural issues within the
22 scope of this proceeding. This separation of functions also applies to the supervisors of each
23 team. (Gov. Code, §§ 11430.10-11430.80.)

22 **C. ENFORCEMENT ACTION AND KEY ISSUES**

23 While the CDO is dated July 16, 2015, the Prosecution Team has acknowledged that
24 Enforcement Action against WSID began on March 22, 2015. EXHIBITS WR-7 at p. 4 and WR-
25 21 at p. 1. The key issue in Phase I of the Enforcement Action is water availability. December
26 16, 2015 *Procedural Ruling: Request to Consolidate The West Side Irrigation District and*
27 *Byron-Bethany Irrigation District hearings and Motion for Continuance of the West Side*
28 *Irrigation District hearing.*

1 **D. ADVISORY ROLE**

2 Ms. Mrowka, her supervisor John O’Hagan, and Mr. George, have played a continuing
3 and extensive advisory role to the Water Board regarding water availability methodology and
4 enforcement since the beginning of 2014, and continuing without interruption through at least
5 August of 2015. In 2015 alone this advisory role included, but was not limited to, the following
6 twelve events:

- 7 1. Mr. O’Hagan advised the Water Board on water availability on January 6, 2015.
8 EXHIBIT BBID305, 306.
- 9 2. Mr. O’Hagan advised the Water Board on water availability on January 20, 2015.
10 EXHIBIT BBID307, 308.
- 11 3. Mr. O’Hagan advised the Water Board on water availability on February 3, 2015.
12 EXHIBIT BBID309, 310.
- 13 4. Ms. Mrowka advised the Water Board on water availability on February 17, 2015.
14 EXHIBIT BBID311, 312.
- 15 5. Mr. O’Hagan advised the Water Board on water availability on April 21, 2015.
16 EXHIBIT BBID315, 316.
- 17 6. Mr. O’Hagan advised the Water Board on water availability on May 5, 2015.
18 EXHIBIT BBID317, 318.
- 19 7. Ms. Mrowka advised the Water Board on water availability on May 19, 2015.
20 EXHIBIT BBID319, 320.
- 21 8. Mr. George advised the Water Board on water availability on June 2, 2015.
22 EXHIBIT BBID325, 326.
- 23 9. Ms. Mrowka advised the Water Board on water availability on June 16, 2015,
24 including an update on curtailment specifically against WSID. EXHIBIT
25 BBID305, 306.
- 26 10. Ms. Mrowka advised the Water Board on water availability on July 7, 2015.
27 EXHIBIT BBID329, 330.

1 11. Ms. Mrowka advised the Water Board on water availability on July 21, 2015.
2 EXHIBIT BBID331, 332.

3 12. Mr. O’Hagan, Mr. George and Ms. Mrowka advised the Water Board on water
4 availability and enforcement on August 4, 2015. EXHIBIT BBID333, 334.

5 These advisory actions occurred at meetings and workshops of the Water Board, and involved
6 not only presentations to, but extensive discussion with Water Board Members, explaining
7 exactly how water availability is determined, how curtailments are imposed, how enforcement is
8 conducted. The discussion includes questions by Water Board Members, and response and
9 explanations by Ms. Mrowka, Mr. George and Mr. O’Hagan. Through these interactions human
10 nature and common sense inform us that the Water Board built trust in the methodology utilized
11 by the Prosecution Team and their supervisors to determine water availability.

12 This interaction between Prosecution Team staff and their supervisors is not limited to
13 Water Board meetings. There have been additional *ex parte* communications through electronic
14 messages before and after the Enforcement Action was initiated. For example:

15 1. An April 2, 2015 email from John O’Hagan to Water Board Member Dorene
16 D’Adamo and Tom Howard responding to questions regarding water available and explaining
17 the Prosecution Team’s calculations of and methodology for water availability determinations.

18 2. A May 19, 2015 email from Kathy Mrowka to Water Board Executive Staff and
19 Water Board Member Dorene D’Adamo providing an update on modeling runs regarding water
20 availability.

21 3. A June 17, 2015 email from Kathy Mrowka to Water Board Executive Staff and
22 Water Board Member Felicia Marcus providing detailed information on water availability and
23 curtailments.

24 4. A June 25, 2015 email from Caren Trgovich of Water Board Executive Staff,
25 asking John O’Hagan to respond to Water Board Member Dorene D’Adamo requesting Mr.
26 O’Hagan to explain to Board Member D’Adamo how enforcement actions are taken.

27 5. A May 1, 2015 email from John O’Hagan to Water Board Executive Staff
28 explaining the Prosecution Team’s rationale for curtailment.

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VI. LEGAL STANDARD – MOTION TO DISMISS (DUE PROCESS)

The Government Code mandates very specific procedures when agencies conduct adjudicative proceedings. Specifically, the Code requires “[t]he adjudicative function...be separated from the investigative, prosecutorial, and advocacy functions within the agency...” [the] “presiding officer is subject to disqualification for bias, prejudice, or interest...” [and, lastly,] “[e]x parte communications shall be restricted...” Cal. Gov. Code § 11425.10(a)(4)-(5), and (8). The California Supreme Court recently opined on the potential for Due Process violations in Enforcement Proceedings. *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731. Generally, the court summarized:

[i]n construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature... In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions [in a given adjudicative proceeding] and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias.” (Id. at p. 741.)

The rule articulated by the Supreme Court is clear and straightforward: if an agency scrupulously follows rules compelling an internal separation of prosecutorial and hearing teams then the agency enjoys a meaningful presumption of impartiality. However, when the “rules mandating an agency’s internal separation of functions” is not scrupulously followed, then no presumption of impartiality is present, and under the *Morongo* court’s rationale, allowing an attorney to act as both an advisor and prosecutor is the type of “specific evidence demonstrating actual bias” or “a combination of circumstances creating an unacceptable risk of bias” and produces a Due Process violation.

Additionally, the Code narrowly limits acceptable *ex parte* communications. Under §11430.30, a communication that is otherwise prohibited from an employee of an agency to the hearing officer is permissible if: “[t]he communication is for the purpose of assistance and advice to the presiding officer from a person who *has not* served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage...” and when the “communication is for the purpose of advising the presiding officer concerning any of the following matters in an

1 adjudicative proceeding that is not prosecutorial in character: [[t]he advice involves a technical
2 issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available
3 to, the presiding officer, provided the content of the advice is disclosed on the record and all
4 parties are given an opportunity to address it..." Cal. Gov. Code § 11430.30(a) & (c)(1)
5 (underlining added).

6 The Code does not differentiate between types or categories of employees. Any employee
7 serving in an advisory role cannot then serve in a prosecutorial, advocacy, or investigative role in
8 the same case or a factually related case. The Code therefore applies to both technical staff and
9 legal staff, and requires screening of that staff pursuant to the APA. Here the *ex parte*
10 communications do not cohere to the limitations expressed by Section 11430.30.

11 **VII. ARGUMENT – MOTION TO DISMISS (DUE PROCESS)**

12 Impermissible staff actions contaminate the enforcement process, infect the hearing
13 officer and disable the agency's ability to proceed with this enforcement action because it
14 impossible to conclude there is not a risk of bias as determined by the statutory factors. Indeed
15 these statutory factors do not require actual bias of a hearing officer when an agency has not
16 maintained an ethical wall between its hearing and prosecutorial personnel. When there is
17 evidence that staff functions were collapsed, then Due Process safeguards mandate that the risk
18 of bias is too great to proceed.

19 **A. DUE PROCESS PROHIBITS STAFF FROM SIMULTANEOUSLY ACTING AS AN**
20 **ADVISOR AND A PROSECUTOR TO A DECISION-MAKER IN PROCEEDINGS**
21 **THE SAME OR DIRECTLY RELATED PROCEEDINGS**

22 The law is clear that "due process requires fair adjudicators in courts and administrative
23 tribunals alike." *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1024. While
24 administrative agencies have some discretion in structuring adjudicative proceedings,

25 [T]hey may not disregard certain basic precepts. One fairness principle directs that in
26 adjudicative matters, one adversary should not be permitted to bend the ear of the
27 ultimate decision maker or the decision maker's advisers in private. Another directs that
28 the functions of prosecution and adjudication be kept separate, carried out by distinct
individuals.

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1 *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40
2 Cal.4th 1, 5.

3 to comply with these requirements and satisfy Constitutional protections, the Water
4 Board's policy and practice, as identified in its Hearing Notice, is intended to "wall off" and
5 separate prosecutorial and advisory staff functions, assigning some employees to an enforcement
6 team and others to a hearing team:

7 The prosecution team is separated from the hearing team and is prohibited from having
8 ex parte communications with any members of the State Water Board and any members
9 of the hearing team regarding substantive issues and controversial procedural issues
within the scope of this proceeding. This separation of functions also applies to the
supervisors of each team.

10 Hearing Notice at p. 3. In this instance the Water Board staff did not follow its own policy and
11 procedure.

12 *Morongo* does not constitute controlling legal precedent over this dispute for two reasons.
13 First, it involved the issue of whether, in a Water Board administrative proceeding, constitutional
14 due process is violated when Water Board prosecution staff simultaneously serves as an advisor
15 to the Water Board in an unrelated matter. Here, members of the Prosecution Team, and their
16 supervisor, have and continue to serve as advisors to Water Board members and Hearing Team
17 members and supervisors **in the same matter**, and on the very key issues involved in that matter.

18 The *Morongo* court concluded that because an agency attorney's concurrent advisory role
19 was in an *unrelated matter*, there was no threat of actual bias on the part of the decision maker;
20 thus the circumstances did not reach a constitutionally intolerable situation. The *Morongo* court
21 emphasized the fact that there was no evidence that the staff attorney had ever acted in **both**
22 **advisory and prosecutorial capacities in that case or any other single adjudicative proceeding.**
23 Thus *Morongo* teaches us that Board staff would be found to have improper undue influence
24 over the Water Board or a Hearing Officer if: (1) they acted in both advisory and prosecutorial
25 capacities in the **same case**, or **in a single adjudicative proceeding**; and/or (2) the Board
26 regarded the staff member as **a sole or primary advisor**.

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1 This fully describes the situation here. In this Enforcement Action we have precisely this
2 Constitutional infirmity, members of the Prosecution Team Michael George and Kathy Mrowka,
3 and Ms. Mrowka's supervisor John O'Hagan, have acted in both advisory and prosecutorial
4 capacities in the same Enforcement Action, in a single adjudicative proceeding both prior to
5 March of 2015 through the present day. Under the rule and factors identified in *Morongo*, the
6 Water Board staff conduct produces an impermissible risk of bias resulting in violation of
7 WSID's Due Process rights. *Morongo* adopted a presumption of non-bias in favor of agencies
8 that scrupulously segregate prosecutorial and hearing personnel and functions. That did not
9 happen here making the presumption unavailable to the State Board.

10 **B. WATER BOARD PROSECUTION TEAM STAFF AND THEIR SUPERVISORS**
11 **HAVE ACTED AS ADVISORS TO THE WATER BOARD EXTENSIVELY AND**
12 **REPEATEDLY DURING THE PENDENCY OF THE INVESTIGATION AND**
13 **ENFORCEMENT AGAINST WSID.**

14 The Water Board concedes that the duty to impose internal separation of functions to
15 insure Due Process was not followed when preparing and issuing the WSID CDO. Rather:

16 You indicated that the dividing line would be when the decision is made to issue a
17 complaint or issue a draft cease and desist order. And I think you're well aware of it -- so
18 there are no implications drawn by folks outside of the room -- that is when you indicated
19 that the teams separated. In fact, that separation occurs before then. Nobody who has
20 been involved in the investigation can serve in an advisory capacity to the Board. And
21 that is not just the Board members, obviously. That is the staff advising the Board.

22 Exhibit BBID334 at p. 16, lines 6-16. Statement of Water Board Chief Counsel Michael Lauffer,
23 August 4, 2015 Water Board Meeting.

24 According to Michael George, Water Board staff began investigating WSID in March of
25 2015 with a "field visit" to the WSID service area. EXHIBIT WR-21 at p. 2. The investigation
26 continued uninterrupted, intending to target WSID as a "test case" for Water Board enforcement.
27 EXHIBIT WR-21 at pp. 2-3. Additional site investigations occurred in May, 2015, and targeted
28 correspondence from the Water Board was sent to WSID through May and June of 2015.
EXHIBIT WR-21 at pp. 3-4. As Ms. Mrowka stated in her testimony: "the Division began
investigating WSID's potential threatened unauthorized [diversions] following a citizen
complaint received in March, 2015." EXHIBIT WR-7 at p. 4.

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1 At the August 4, 2015 Water Board meeting, John O’Hagan stated:

2 **[A]s an item comes up, there is an ethical wall that is built, that there is no**
3 **communication between the advisory team and the prosecution team in any cases**
4 **because of the rules of law. And we want to make sure that integrity is maintained.**
5 **So we know very well who is on each side of the wall and we ensure the**
6 **communication is not met in between those when a case comes before hearing.**

7 EXHIBIT BBID334 at p. 14 lines 3-10 (bolding added). However, Mr. O’Hagan’s subsequent
8 actions, combined with Ms. Mrowka’s actions, severely undercut and impeach his statements, as
9 evidenced by the email communications between him and members of the Water Board
10 Executive Office, and between Ms. Mrowka and members of the Water Board Executive Office.
11 In this Enforcement Action, the required impenetrable “ethical wall” was neither built nor
12 observed.

13 As a consequence of failing to separate the prosecution and adjudicative functions, after
14 applying the statutory factors, it is inescapable that the staff action disables the agency from
15 conducting an enforcement hearing consistent with Due Process principles and accordingly the
16 risk of bias in the absence of Due Process safeguards is too high. The Hearing Officer, as part of
17 the Water Board, has listened to and been advised by members of the Prosecution Team and their
18 supervisor about how the Division of Water Rights determined water availability in 2015,
19 listened to the members of the Prosecution Team explain its methodology, and how that
20 methodology was changed and “improved.” There is no question that human nature responds to
21 such continued and extensive contact with a bias in favor of the prosecution team, bolsters the
22 team’s credibility over contested issues and fact and law, and enhances an inherent trust that
23 these actions are genuine, valid, and legal. A post-hoc cure for collapsing these competing
24 functions is not available or effective. The staff action infected the process in a manner that
25 cannot be fixed in this context. The damage to WSID’s ability to obtain a fair hearing from the
26 Water Board with this Prosecution Team is irreparable, and the protections flowing from the Due
27 Process Clause are cut off.

28 **VIII. MOTION TO DISMISS – UNDERGROUND REGULATION**

The basis for the Enforcement Action is the Water Board’s assertion that there was
insufficient water available to support diversion under WSID’s License 1381. In prosecuting the

1 Enforcement Action, the Water Board’s Prosecution Team relies on the water availability
2 analysis set forth in the Draft Cease and Desist Order. (WR-1, ¶35.) The methodology used by
3 the Water Board to determining water availability was not adopted in accordance with the
4 procedures required by the APA. Therefore, the Water Board’s actions violate the APA,
5 constitute an unlawful underground regulation and, cannot be used as a basis for the
6 Enforcement Action.

7 **IX. ARGUMENT – MOTION TO DISMISS (UNDERGROUND REGULATION)**

8 WSID hereby incorporates the legal arguments and assertions set forth in the Motion to
9 Dismiss filed concurrently by Byron-Bethany Irrigation District in this proceeding regarding
10 ENFORCEMENT ACTION ENF01951 – ADMINISTRATIVE CIVIL LIABILITY
11 COMPLAINT REGARDING UNAUTHORIZED DIVERSION OF WATER FROM THE
12 INTAKE CHANNEL TO THE BANKS PUMPING PLANT (FORMERLY ITALIAN
13 SLOUGH) IN CONTRA COSTA COUNTY MOTION TO DISMISS ADMINISTRATIVE
14 CIVIL LIABILITY PROCEEDING – STATE WATER RESOURCES CONTROL BOARD’S
15 METHOD OF DETERMINING WATER AVAILABILITY IS AN UNLAWFUL
16 UNDERGROUND REGULATION.

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X. CONCLUSION

WSID respectfully requests that the Hearing Officer:

1. Grant Summary Judgment in favor of WSID and against the Prosecution Team, as the Prosecution Team cannot establish that WSID’s diversions were or threaten to be unauthorized;
2. Grant its motion to dismiss in light of the violations of WSID’s due process; and
3. Grant its motion to dismiss in light of the invalidity of the Water Board’s methodology for determining water availability, which provides the sole basis for the Enforcement Action.

Date: February 3, 2016

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 10 THE WEST SIDE IRRIGATION DISTRICT

11 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

12 ENFORCEMENT ACTION ENFO1949)
 13 DRAFT CEASE AND DESIST ORDER) **WSID’S SEPARATE STATEMENT OF**
 14 REGARDING UNAUTHORIZED) **UNDISPUTED MATERIAL FACTS IN**
 15 DIVERSIONS RO THREATENED) **SUPPORT OF ITS MOTION FOR**
 16 UNAUTHORIZED DIVERSIONS OF) **SUMMARY JUDGMENT**
 17 WATER FROM OLD RIVER IN SAN)
 18 JOAQUIN COUNTY) Filed concurrently with WSID’s Motion for
 19) Summary Judgment, or Alternatively, for
 20) Summary Adjudication.
 21)
 22) Hearing Date: March 21, 2016
 23) Hearing Officer: Frances Spivy-Weber

24 The West Side Irrigation District (“**WSID**”) respectfully submits this separate Statement
 25 of Undisputed Material Facts, together with references to supporting evidence, in support of its
 26 Motion for Summary Judgment, or Alternatively for Summary Adjudication (“**Motion**”).

UNDISPUTED MATERIAL FACT	SUPPORTING EVIDENCE
1. The District holds water right License 1381 (“ License ”), originally issued on September 29, 1933 and amended on August 19, 2010.	EXHIBIT WSID0158, Declaration of Jack Alvarez at ¶4.
2. License 1381 has a priority date of April 17, 1916, and authorizes the direct diversion of 82.5 cubic-feet per section (“ 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.	EXHIBIT WSID0005, License 1381, as amended. EXHIBIT WSID0060, Declaration of Rick Martinez at ¶4. EXHIBIT WSID0158, Declaration of Jack Alvarez at ¶5.
3. In 1929 the Department of Public Works	EXHIBIT WSID0158, Declaration of Jack

1	confirmed that the water diverted by WSID pursuant to its license is “largely	Alvarez at ¶6.
2	return flow from diversions farther	EXHIBIT WSID 0006, Department of Public
3	upstream and water reaching the San	Works Bulletin No. 21-B at p. 157.
4	Joaquin Delta from Sacramento River	
5	through Georgiana Slough and other inter-	
6	delta channels.	
7	4. The License was issued in 1933	EXHIBIT WSID0158, Declaration of Jack
8	documenting the maximum amount of	Alvarez at ¶7.
9	water found to have been put to beneficial	EXHIBIT WSI0007, October 9, 1933 letter
10	use in the years 1930, 1931 and 1932, as	from State of California Department of
11	documented in the Sacramento San	Public Works.
12	Joaquin Water Surveyor’s records.	EXHIBIT WSID0008, 1931 Sacramento-San
13		Joaquin Water Supervisor’s Report. Table
14		39.
15	5. Water is diverted by WSID through an	EXHIBIT WSID0060, Declaration of Rick
16	intake canal about 1.5 miles long, as	Martinez at ¶5.
17	depicted on the map attached as	
18	EXHIBIT A.	
19	6. WSID’s point of diversion under its	EXHIBIT WSID0010, DWR Delta ATLAS
20	License is located on Old River, within	at p. 10.
21	the legal delta.	EXHIBIT BBID384 at pp. 18, 20.
22	7. There is always water in the channels of	EXHIBIT BBID384 at p. 23.
23	the Delta because they are below sea	
24	level.	
25	8. At any given time, the Delta holds	EXHIBIT BBID384 at pp. 5, 38.
26	approximately 1.2 million acre feet of	
27	water.	
28	9. Water flows into the Delta with the tide	EXHIBIT BBID384 at pp. 3-5, 20, 22.
29	from the West as well as from the east	
30	side tributary streams.	
31	10. Inflow from the tributary streams, once	EXHIBIT BBID384 at pp. 5, 38-40.
32	having entered the Delta, will reside in the	
33	Delta for up to several months during dry	
34	periods.	
35	11. Water moves slowly in WSID’s flat	EXHIBIT WSID0060, Declaration of Rick
36	gradient channel which is affected by	Martinez at ¶6.
37	tides of about 4 feet; the channel is from 4	EXHIBIT WSID0158, Declaration of Jack
38	feet to 8 feet deep depending on tides; and	Alvarez at ¶9.
39	the quality of Old River water diverted by	EXHIBIT WSID0009, July 18, 1985
40	WSID in the intake channel is poor,	Inspection Report
41	running from 800 to 1000 total dissolved	
42	solids.	
43	12. In 1931 the majority of the water at the	EXHIBIT BBID384 at pp. 11-13, 83-87, 91-
44	WSID point of diversion during the	95.
45	irrigation season was from the Sacramento	

1	River and had entered the Delta in the prior three months.	
2	13. In 2015, the majority of the water at the WSID point of diversion during the irrigation season was from the Sacramento River and had entered the Delta in the prior three months.	EXHIBIT BBID384 at pp. 15-16, 47-49.
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5	14. The State Water Project and Central Valley Project, constructed after 1931, have altered flow patterns in the Delta.	EXHIBIT BBID384 at pp. 9, 24-26.
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7	15. By storing water in the winter and spring and releasing it through the Delta in the summer, the Projects reduce the percentage of Sacramento River water that reaches the Delta in the winter and spring months and increase the percentage of Sacramento River water that reaches the Delta in the summer and fall months.	EXHIBIT BBID384 at pp. 14, 24-26.
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12	16. Water is always available at WSID's diversion point during the irrigation season because of the nature of residence time and tidal influence in the Delta.	EXHIBIT BBID384 at p. 4.
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14	17. The Bethany Drain collects irrigation return water through tile drains from landowners within WSID, shallow groundwater from tile drains from landowners within WSID, and municipal drainage from lands within the City of Tracy and discharges that return water directly into WSID's intake channel.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶12.
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19	18. The majority of the flow in the Bethany Drain is derived from tile drain discharges installed widely in the district in the late 1950's to drain lands of shallow groundwater standing less than 4 feet from the surface, to allow irrigation.	EXHIBIT WSID0158, Declaration of Jack Alvarez at pp. 3-4.
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23	19. Municipal discharges into the Bethany Drain are made by various contracts with the City of Tracy and other landowners within the City.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶13.
24		
25	20. There are no sources of water into the Bethany Drain from outside of the WSID.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶14.
26		
27	21. The Bethany Drain is owned by WSID, and WSID maintains control over the Bethany Drain from its origination within the district boundaries along its entire	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶15.
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1	course until it discharges into the intake canal.	
2	22. WSID does not intend to abandon water discharge from the Bethany Drain into the intake channel; rather the intention of the discharge is to enable WSID to pump the water at its diversion pumps.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶16.
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5	23. Because the District's intake channel is open to Old River, drain water from the Bethany Drain may commingle with Old River water in the intake channel.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶17.
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8	24. Discharges of water from the Bethany Drain into the intake channel are measured by a weir which is four feet in height concrete wall installed approximately 340 feet upstream of the Bethany Drain outfall into the intake channel.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶18.
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12	25. At no time after May 1, 2015 did WSID's diversions from the intake channel exceed the inflow into the intake channel from the Bethany Drain.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶19.
13		
14	26. WSID staff did not observe any change in flow in Old River at any time in 2014 when diversions of City of Tracy wastewater were being made under contract.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶19.
15		
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17	27. 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.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶23. EXHIBIT WSID0019, Order R5-2012-0115 (NPDES Permit CA0079154) issued by the Central Valley Regional Water Quality Control Board. EXHIBIT WR-1, Draft Cease and Desist Order at ¶2.
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23	28. 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.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶24. EXHIBIT WR-1, Draft Cease and Desist Order at ¶2.
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27	29. The City obtains water supplies from three sources: (1) South San Joaquin Irrigation District water delivered from the Stanislaus River (typically the	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶25. EXHIBIT WR-1, Draft Cease and Desist Order at ¶3.
28		

1	majority of the City's supply); (2) United States Bureau of Reclamation water delivered from the Delta-Mendota Canal;	
2	and (3) local groundwater wells (typically the smallest portion of the City's supply).	
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4	30. The City's treated wastewater discharges are foreign in source and/or foreign in time to the Old River flow.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶25. EXHIBIT WSID0158, Declaration of Jack Alvarez at ¶22. EXHIBIT WR-1, Draft Cease and Desist Order at ¶3.
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8	31. On May 6, 2014, the City Council adopted Resolution 2014-165, 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.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶27. EXHIBIT WR-1, Draft Cease and Desist Order at ¶8. EXHIBIT WSID 0022, Resolution 2015-165
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12	32. 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.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶27. EXHIBIT WR-1, Draft Cease and Desist Order at ¶8. EXHIBIT WSID0023, 2014 Agreement
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16	33. On March 3, 2015, the Tracy 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.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶28. EXHIBIT WR-1, Draft Cease and Desist Order at ¶14. EXHIBIT WSID0025, 2015 Agreement
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20	34. 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.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶28. EXHIBIT WR-1, Draft Cease and Desist Order at ¶14. EXHIBIT WSID0025, 2015 Agreement
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24	35. On May 1, 2015, the State Water Board issued a "Notice of Unavailability of Water an Immediate Curtailment for Those Diverting Water in the Sacramento River Watershed and Sacramento-San Joaquin Delta with a Post-1914 Appropriative Right" ("May 21 Unavailability Notice").	EXHIBIT WR-1, Draft Cease and Desist Order at ¶17. EXHIBIT WR-34, May 1, 2015 Unavailability Notice
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28	36. The May 1 Unavailability Notice notified	EXHIBIT WR-1, Draft Cease and Desist

1	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.	Order at ¶17. EXHIBIT WR-34, May 1, 2015 Unavailability Notice
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5	37. The May 1 Unavailability Notice was intended to apply to License 1381.	EXHIBIT WR-1, Draft Cease and Desist Order at ¶17. EXHIBIT WR-34, 35, May 1, 2015 Unavailability Notice
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8	38. The May 1 Unavailability Notice was based upon a spreadsheet methodology that compared supply and demand on a watershed wide basis.	EXHIBIT WSID0152 at p. 33 ¶¶2-4, p. 45, ¶¶1-8.
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10	39. This spreadsheet methodology did not consider water available to WSID at its point of diversion, the tidal effect in the Delta, or the fact that tributary flow from prior months was still present in the Delta and available for WSID to divert due to Delta hydrodynamics and residence time.	EXHIBIT WSID0152 at p. 32 ¶¶23-25, p. 33 ¶¶1-25, p. 34 ¶¶1-3, p. 46 ¶¶10-24, p. 91 ¶¶6-16.
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14	40. The District did not provide the City with a written Commencement Notice or purchase wastewater from the City under the 2015 Agreement.	EXHIBIT WSID0060, Declaration of Rick Martinez at ¶29.
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17	41. The Prosecution Team did not take any measurements of flow at the WSID point of diversion, or downstream in either direction.	EXHIBIT WSID0152 at p. 92 ¶¶1-22, p. 93 ¶¶15-20.
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19	42. Instead the Prosecution Team simply assumed that a diversion of 14 cfs by WSID resulted in a corresponding reduction in flow.	EXHIBIT WSID0152 at p. 92 ¶¶1-22, p. 93 ¶¶15-20.
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22	43. By contrast, WSID's expert conducted a scientific study using scientifically accepted Delta modeling tools to determine that no measurable decrease in flow or water levels results from WSID's diversion of 8 to 14 cfs.	EXHIBIT WSID0123 at ¶12. EXHIBIT WSID0125 at p. 2.
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25	44. Section (b) of Water Code Section 1211 was added to State Water Code in 2001 at the request of the State Water Board, which asserted: "Where there is no threat to instream flows or third party water-right holders, requiring [State Water	EXHIBIT WSID 0027, September 6, 2001 Enrolled Bill Report at p. 557.
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Board] review is an unnecessary burden on wastewater reclamation.”	
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Date: February 2, 2016

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A California Professional Corporation



By: _____
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The West Side Irrigation District