

CITY AND COUNTY OF SAN FRANCISCO



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June 3, 2016

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Re: 6/7/16 BOARD MEETING (Comments on Agenda Item 9, Consideration of a proposed Order dismissing the Administrative Civil Liability Complaint against Byron-Bethany Irrigation District and dismissing the Draft Cease and Desist Order against the Westside Irrigation District – Contra Costa County and San Joaquin County).

Dear Ms. Townsend:

This office represents the San Francisco Public Utilities Commission (“SFPUC”), operator of the Hetch Hetchy Regional Water System (“RWS”). On behalf of the SFPUC and the City and County of San Francisco (“San Francisco”), we submit the following comments on Agenda Item 9 on the State Water Resource Control Board’s (“SWRCB”) June 7, 2016 Agenda, regarding “Consideration of a proposed Order dismissing the Administrative Civil Liability Complaint against Byron-Bethany Irrigation District and dismissing the Draft Cease and Desist Order against the Westside Irrigation District – Contra Costa County and San Joaquin County”). These comments are submitted in accordance with Title 23, California Code of Regulations sections 647.3 and 649, *et seq.* of the State Water Board’s regulations.

San Francisco supports dismissal of the administrative civil liability (“ACL”) complaint against Byron-Bethany Irrigation District (“BBID”), and dismissal of the draft cease and desist order (“CDO”) against Westside Irrigation District (“WSID”), as provided in the Draft Proposed Order dated May 26, 2016 (“Proposed Order”). However, San Francisco respectfully submits that the conclusion reached in the Proposed Order, “that the Board is authorized to impose penalties [against pre-1914 appropriators, like BBID] pursuant to Water Code section 1052¹ when a diversion is made when water is unavailable under the priority of the diverter’s claimed right,” is inconsistent with established appellate case law.² Thus, San Francisco urges that Section 3 of the Proposed Order be deleted in its entirety from the SWRCB’s decision.

¹ All further statutory references are to the California Water Code unless otherwise specified.

² Proposed Order at 9.

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Jeanine Townsend
State Water Resources Control Board
Page 2
June 3, 2016

I. Contrary to the Conclusion Reached in the Proposed Order, the SWRCB Was Not Authorized to Take Enforcement Action Under Water Code Section 1052 Against BBID by Issuing the ACL Complaint.

A. As the Proposed Order Recognizes, Water Code Section 1052(a) Does Not Apply to the Diversion of Water Consistent with a Valid Pre-1914 Appropriative Water Right.

As the Proposed Order recognizes, Water Code section 1052's prohibition against the unauthorized diversion or use of water only applies to "water subject to this division."³ The "division" referenced in subsection (a) of section 1052 is division 2 of the Water Code. Part 2 of division 2 of the Water Code provides a comprehensive scheme for the appropriation of water. All water subject to appropriation under this statutory scheme "is water subject to the provisions of division 2."⁴ (*People v. Shirokow* (1980) 26 Cal.3d 301, 306.) Pre-1914 appropriative and riparian water rights are not subject to these statutory appropriation procedures, (*id.* at 309), and thus pre-1914 and riparian water right holders "need neither a permit nor other governmental authorization to exercise their water rights," (*Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879, 889, *as modified on denial of reh'g* (Oct. 14, 2014), *review denied* (Dec. 17, 2014) (citing *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 428–429).) As stated in the Proposed Order, "[d]ivisions made under these preexisting rights are not subject to Division 2 of the Water Code because the diversions were authorized by prior law and do not require a permit from the Board."⁵ It therefore follows, as previously explained by the SWRCB, that diversion of water as authorized under a valid pre-1914 appropriative right would not be subject to enforcement pursuant to Water Code section 1052. *In the Matter of the Threat of Unauthorized Diversion and Use of Water by Thomas Hill, Steven Gomes, and Millview County Water District*, Order WR 2011-0016, October 18, 2011, 2011 WL 5375142, at *13.

B. The Proposed Order is at Odds with the Court of Appeal's Decisions in *Young* and *Millview*.

The Proposed Order cites *Young* and *Millview* in support of the conclusion that the SWRCB was authorized to take enforcement action under Water Code section 1052 against BBID by issuing the ACL complaint. However, the conclusory analysis presented in the Proposed Order directly contravenes the Court of Appeal's reasoning in *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, *as modified* (Sept. 20, 2013) and *Millview* because it ignores the fundamental limitation placed on the SWRCB's authority to enforce Water Code section 1052's prohibition against the unauthorized diversion or use of water in cases involving pre-1914 rights by these decisions.⁶

³ Proposed Order at 7 (*citing* Wat. Code, § 1052(a)).

⁴ See also *Pre-Hearing Brief on Identified Legal Issues by the City and County of San Francisco* ("San Francisco Opening Brief") January 25, 2016, attached hereto as Exhibit 1, at 2-3.

⁵ Proposed Order at 7.

⁶ San Francisco provided a detailed analysis of the Court of Appeal's reasoning in *Young* and *Millview* in its Opening Brief at 3-5; see also *Pre-Hearing Brief by the City and County of San Francisco in Response to the Prosecution Team's Pre-Hearing Brief of Legal Issues and Byron-*

Jeanine Townsend
State Water Resources Control Board
Page 3
June 3, 2016

Young and *Millview* held that section 1052 only applies in cases involving pre-1914 rights if water is not lawfully diverted under the pre-1914 right, or is in excess of such right, and therefore is subject to appropriation under the SWRCB's permitting authority: "only water diverted under a valid pre-1914 water right is protected from such regulation; a permit is required to divert water appropriated pursuant to a claimed pre-1914 water right that was never perfected, or has been forfeited, or is otherwise invalid." (*Millview*, 229 Cal.App.4th at 894 (citing *Young*, 219 Cal.App.4th at 404).) "Unauthorized diversion includes not merely the diversion of water under a claimed but invalid pre-1914 right, *but also diversion beyond the proper scope of a valid pre-1914 right*, whether because the diversion exceeds the maximum perfected amount of water under the right or because an intervening forfeiture has reduced the proper scope." (*Id.* at 895 (emphasis added).) Accordingly, the SWRCB can enforce section 1052 against a water right holder with a validly established pre-1914 right only if water is allegedly being diverted beyond the proper scope of the right, *i.e.*, because the right – or some portion thereof – was never perfected, water is being diverted in excess of the right, or the right has been reduced or lost due to forfeiture, and thus, the water diverted is subject to the SWRCB's permitting authority over unappropriated water. (*Id.* at 894-895.)

The three situations referenced in *Young* and *Millview* involve problems with the claimed pre-1914 right, or the exercise of the right, that limit the quantity of water that the water right holder is entitled to divert under the water right. Critically, in each of these three situations, the pre-1914 water right holder is not entitled to divert the full amount claimed. The water that is supposed to remain in the stream – that the pre-1914 water right holder is not entitled to divert – is considered unappropriated water which is subject to the SWRCB's permitting authority. For example, if a water right holder claims she has a pre-1914 right that allows her to divert 100 cubic feet per second ("cfs") but, in fact, the right was only perfected for 75 cfs, then the SWRCB can sustain an enforcement proceeding against her under section 1052 because her diversion of the additional 25 cfs would constitute the diversion of unappropriated water.⁷ In order to divert the additional 25 cfs she would need a permit. (*Millview*, 229 Cal.App.4th at 894 (citing *Young*, 219 Cal.App.4th at 404).) Similarly, if a water right holder diverts 100 cfs but her pre-1914 right only entitles her to divert 75 cfs, then the State Water Board can sustain an enforcement proceeding against her under section 1052 because her diversion of the 25 cfs in excess of her right would, again, constitute the diversion of unappropriated water.⁸ Lastly, if a

Bethany Irrigation District's Motion to Dismiss, February 22, 2016 ("San Francisco Responsive Brief"), attached hereto as Exhibit 2, at 2.

⁷ This fact pattern appeared in *Millview*. See *Millview*, 229 Cal.App.4th at 886-888, 899 (although the record showed that the water district had diverted as much as 1,174.75 acre-feet per year ("afa") under its pre-1914 right in recent years, the State Water Board determined the district's predecessor in interest of the right had never perfected the claim for more than 243 afa and the Court affirmed). See also *Young*, 219 Cal.App.4th at 404 (citing Water Code § 1202(b) (wherein the Court explained that under section 1202(b) "unappropriated water includes . . . water subject to a pre-1914 right but that was not perfected by putting the water to beneficial use with due diligence.")).

⁸ This fact pattern appeared in *Young*. See *Young*, 219 Cal.App.4th at 402 (where the Court explained that the State Water Board had determined that the diverter had demonstrated a valid right to only a portion of the diversion at issue, and thus, was restricted to only diverting 77.7 cfs,

Jeanine Townsend
State Water Resources Control Board
Page 4
June 3, 2016

pre-1914 water right holder originally possessed a right to divert 100 cfs but was subsequently found to have forfeited a portion of her right, *e.g.*, 25 cfs, due to an extended period of non-use, then the SWRCB can sustain an enforcement proceeding against her under section 1052 because her diversion of the additional 25 cfs would constitute the diversion of unappropriated water.⁹ In all three of these situations the SWRCB's enforcement authority under section 1052 depends on whether the water at issue is unappropriated water subject to its permitting authority. (*Young*, 219 Cal.App.4th at 404; *Millview*, 229 Cal.App.4th at 894-895). Further, any such enforcement proceedings would be focused on determining the scope and extent of the water right itself.

There is a material distinction between situations in which a problem with a claimed pre-1914 appropriative right, or the exercise of that right, results in unappropriated water – where a permit would be required to divert such water – and the alleged unavailability of water under a diverter's priority of right – where a more senior water right holder(s) is allegedly entitled to divert and/or use the water at issue during the period in question. In the former situation, the SWRCB may exercise its enforcement authority under section 1052 against the water right holder of the claimed pre-1914 right because “a permit *is* required to divert water appropriated pursuant to a claimed pre-1914 water right that was never perfected, or has been forfeited, or is otherwise invalid.” (*Millview*, 229 Cal.App.4th at 894 (citing *Young*, 219 Cal.App.4th at 404)). In the latter situation, under the Court's reasoning in *Young* and *Millview*, the SWRCB cannot exercise its enforcement authority under section 1052 because a more senior water right holder(s) is allegedly entitled to divert and/or use the water at issue during the subject period, and thus, that water, by definition, cannot be considered unappropriated water. (Wat. Code, § 1201 (emphasis added) (defining unappropriated water as “[a]ll water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon . . . or otherwise appropriated”); Wat. Code, § 1202 (declaring that “unappropriated water” includes, among other things, “[a]ll water which has never been appropriated”).) This was the fact pattern in the enforcement proceeding against BBID.¹⁰

The Proposed Order suggests that in the latter situation – where water is allegedly unavailable under a diverter's priority of right because a more senior water right holder(s) is entitled to divert and/or use it during the period in question – that the water at issue would somehow be subject to the SWRCB's permitting authority:

Certainly, the diversion of unappropriated water is a diversion subject to the permitting and licensing requirements of Division 2, and diversion of unappropriated water without a permit is a trespass. *But any diversion made without a pre-existing basis of right is subject to the permitting authority of the Board*; whether or

the extent of the diverter's riparian and pre-1914 right that had been substantiated during hearings before the agency).

⁹ *Young*, 219 Cal.App.4th at 404 (citing Wat. Code, § 1240) (explaining that “[u]nappropriated water includes water . . . for which a right had been perfected by putting the water to use under a pre-1914 right but where the use later ceased.”).

¹⁰ San Francisco provided a detailed explanation of why the SWRCB cannot enforce the ACL complaint against BBID under section 1052, *i.e.*, because the water at issue in the enforcement proceeding is not subject to the SWRCB's permitting authority, in its Opening Brief at 5-7.

Jeanine Townsend
 State Water Resources Control Board
 Page 5
 June 3, 2016

not the water diverted is available for appropriation is a secondary matter.¹¹

The SWRCB cannot issue a permit to divert water that a senior water right holder is already entitled to divert. If a pre-1914 water right holder (Jane) diverts water when it is unavailable under her priority of right because a more senior water right holder (Sam) is entitled to divert it during the same period, Jane could not obtain a permit to divert the water at issue because Sam would already be entitled to divert it by virtue of his senior pre-1914 appropriative or riparian right, and that is precisely why the water is unavailable to Jane. The assertion to the contrary in the Proposed Order not only directly contravenes the Court of Appeal's reasoning in *Young* and *Millview*, but also contradicts the definition of unappropriated water in the Water Code itself. (*Millview*, 229 Cal.App.4th at 894 (citing *Young*, 219 Cal.App.4th at 404); Wat. Code, §§ 1201, 1202).

Further, the Proposed Order asserts that the ACL complaint against BBID "is no different" than the enforcement actions involved in *Young* and *Millview* without even attempting to explain how the Court of Appeal's reasoning in these decisions could support such an assertion.¹² As the Proposed Order notes, *Young* involved "an action for diversion without a basis of right" and *Millview* involved "a diversion in excess of a perfected right."¹³ Thus, the Proposed Order acknowledges that neither *Young* nor *Millview* address the question of whether diversion when water is unavailable under a valid pre-1914 or riparian right – because it is allegedly entitled to a more senior water right holder(s) – is a diversion outside the scope of such a right yet concludes – without a supporting citation to either of these decisions – that "*we see no relevant distinction between the Board's authority to prevent the diversion of water that is not authorized because it is in excess of the quantity, place of use, or purpose of use of a diverter's right, and a diversion that is not authorized because water is not available under a diverter's priority of right. Any of these diversions is outside of the scope of the water right.*"¹⁴ San Francisco respectfully submits that this conclusory legal analysis is untenable and should not be relied on by the SWRCB in issuing its Order in the instant enforcement proceedings.

C. The Proposed Order Mischaracterizes the Legal Analysis Presented by BBID, San Francisco and Other Parties Regarding the Parameters of the SWRCB's Enforcement Authority Under Section 1052.

Additionally, the Proposed Order mischaracterizes the legal analysis presented by BBID, San Francisco, and other parties regarding the parameters of the SWRCB's enforcement authority under section 1052, and, more specifically, the proper interpretation of the Court of Appeal's decisions in *Young* and *Millview* by stating,

The interpretation suggested by BBID would authorize the Board to take enforcement action against illegal diversions when surplus water is available, but not when all of the available natural flow is needed to satisfy more senior rights. By this reading, the Board

¹¹ Proposed Order at 10 (emphasis added).

¹² Proposed Order at 10.

¹³ *Id.* at 10 (citing *Young*, 219 Cal.App.4th 397; *Millview*, 229 Cal.App.4th 879).

¹⁴ Proposed Order at 10 (emphasis added).

Jeanine Townsend
State Water Resources Control Board
Page 6
June 3, 2016

can enforce the priority system during wet years when there is no shortage in supplies, but is unable to do so during an historic drought when there may be insufficient supplies even for the most senior right holders.¹⁵

Under *Young* and *Millview*, whether the SWRCB can enforce section 1052 against a pre-1914 water right holder is dependent on whether there are certain problems with the establishment, scope or extent of the claimed right, or the exercise of the right, *e.g.*, because some portion of the right was never perfected, and has absolutely nothing to do with hydrology. In each of the three situations discussed above the result of the problem with the claimed pre-1914 right is that the water right holder is not entitled to divert the full amount that she claims and the water that is supposed to remain in the stream – that she is not entitled to divert – is considered unappropriated water which is subject to the SWRCB’s permitting authority. In short, if there is a deficiency with the right itself, as identified in the *Young* and *Millview* cases, then the SWRCB can exercise its enforcement authority under section 1052 regardless of whether it is a wet or dry year. San Francisco respectfully submits that this “absurd result” argument is demonstrably false and should not be included in the legal analysis supporting the SWRCB’s Order.

II. Conclusion

San Francisco appreciates this opportunity to comment and thanks the Hearing Officers in the BBID and WSID enforcement proceedings and the SWRCB staff for their efforts.

Very truly yours,

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/s/

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Enclosures

¹⁵ Proposed Order at 11.

Exhibit 1

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7 Attorneys for the City and County of San Francisco

8
9 BEFORE THE CALIFORNIA

10 STATE WATER RESOURCES CONTROL BOARD

11 In the Matter of ENFORCEMENT ACTION
ENF01951 – ADMINISTRATIVE CIVIL
12 LIABILITY COMPLAINT REGARDING
UNAUTHORIZED DIVERSION OF
13 WATER FROM THE INTAKE CHANNEL
TO THE BANKS PUMPING PLANT
14 (FORMERLY ITALIAN SLOUGH) IN
CONTRA COSTA COUNTY

PRE-HEARING BRIEF ON IDENTIFIED
LEGAL ISSUES BY THE CITY AND COUNTY
OF SAN FRANCISCO

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES ii

INTRODUCTION..... 1

ARGUMENT 2

 I. Water Code Section 1052 Does Not Authorize the State Water Board’s
 Enforcement of the Administrative Civil Liability Complaint Against BBID
 Because the Water at Issue is Not Subject to the State Water Board’s
 Permitting Authority. 2

 A. Water Code Section 1052(a) Does Not Apply to the Diversion of
 Water Consistent with a Valid Pre-1914 Appropriative Water
 Right. 2

 B. In Cases Involving Pre-1914 Rights, the State Water Board’s
 Enforcement Authority Under Water Code Section 1052 Depends
 on Whether the Water at Issue is Unappropriated Water Subject
 to Its Permitting Authority..... 3

 C. The State Water Board Cannot Enforce the ACL Against BBID
 Under Water Code Section 1052 Because the Water at Issue is
 Not Subject to the State Water Board’s Permitting Authority..... 5

TABLE OF AUTHORITIES

State Cases

California Farm Bureau Federation v. State Water Resources Control Bd.
(2011) 51 Cal.4th 4212

Millview County Water District v. State Water Resources Control Board
(2014) 229 Cal.App.4th 8792, 3, 4, 5, 6, 7

People v. Shirokow
(1980) 26 Cal.3d 3012

Young v. State Water Resources Control Board
(2013) 219 Cal.App.4th 3973, 4, 5, 7

State Statutes & Codes

Water Code

§ 1052 1, 2, 3, 5, 6

§ 1052(a).....2, 5

§ 1052(b).....2

§ 10555, 6

§ 1055(a).....2

§ 12012, 3, 4, 6

§ 12023, 6

§ 1202(b).....3, 4

§ 12253

§ 12403

§ 18314

§ 1831(d)(1)2, 3

State Water Board Decisions

*In the Matter of Draft Cease and Desist Order Against Unauthorized Diversions
by Woods Irrigation Company, Order No. WR 2011-0005, February 1, 2011,
2011 WL 684674.....2*

*In the Matter of the Threat of Unauthorized Diversion and Use of Water by
Thomas Hill, Steven Gomes, and Millview County Water District,
Order WR 2011-0016, October 18, 2011, 2011 WL 53751423*

Other Materials

Appellant State Water Resources Control Board’s Opening Brief,
Dianne E. Young, et al., v. State Water Resources Control Board,
2012 WL 5024308 (Cal.App. 3 Dist.),.....3, 4

INTRODUCTION

1
2 The City and County of San Francisco (San Francisco) submits this brief in response
3 to the Hearing Officer's October 30, 2015 *Ruling on Motion for Protective Order and Other*
4 *Procedural Issues in the Matter of the Administrative Civil Liability Complaint Issued Against*
5 *Byron-Bethany Irrigation District* (Ruling) that requested briefing on the following legal issues:
6 "[w]hether, and in what circumstances: (1) does the State Water Resources Control Board
7 have the authority to curtail, and (2) does Water Code section 1052 apply to diversions made
8 under claim of a pre-1914 or riparian water right?" The Ruling states that the briefing "should
9 address the extent to which these legal issues are or are not relevant to and determinative of
10 the Administrative Civil Liability Complaint issued against Byron-Bethany Irrigation District."

11 San Francisco's Hetch Hetchy Water and Power System (HHWPS) provides water to
12 over 2.6 million people in San Francisco and the Bay Area. Approximately eighty-five
13 percent of the water used to supply the HHWPS is diverted from the Tuolumne River under
14 San Francisco's pre-1914 appropriative water rights. The threshold jurisdictional issues
15 raised in this proceeding, and specifically identified in the Ruling, may have ramifications for
16 pre-1914 water right holders throughout California. Thus, as a pre-1914 water right holder,
17 San Francisco writes separately to share its perspective on these important legal questions.

18 In short, as explained below, San Francisco respectfully submits that the instant
19 proceeding must be dismissed for lack of jurisdiction because Water Code section 1052¹
20 does not authorize the State Water Resources Control Board's (State Water Board)
21 enforcement of the Administrative Civil Liability complaint (ACL) against Byron-Bethany
22 Irrigation District (BBID).

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28 ¹ All further statutory references are to the California Water Code unless otherwise specified.

ARGUMENT

I. Water Code Section 1052 Does Not Authorize the State Water Board's Enforcement of the Administrative Civil Liability Complaint Against BBID Because the Water at Issue is Not Subject to the State Water Board's Permitting Authority.

A. Water Code Section 1052(a) Does Not Apply to the Diversion of Water Consistent with a Valid Pre-1914 Appropriative Water Right.

Subsection (a) of section 1052 provides that “[t]he diversion or use of water *subject to this division* other than as authorized in this division is a trespass.” (Wat. Code, § 1052 (italics added).) The “division” referenced in subsection (a) of section 1052 is division 2 of the Water Code. Part 2 of division 2 of the Water Code “provides a comprehensive scheme for the appropriation of water.” (*People v. Shirokow* (1980) 26 Cal.3d 301, 306.) All water subject to appropriation under this statutory scheme “is water subject to the provisions of division 2.” (*Id.*) Pre-1914 appropriative and riparian water rights are not subject to these statutory appropriation procedures, (*id.* at 309), and thus pre-1914 and riparian water right holders “need neither a permit nor other governmental authorization to exercise their water rights,” (*Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879, 889, *as modified on denial of reh’g* (Oct. 14, 2014), *review denied* (Dec. 17, 2014) (citing *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 428–429).)

As previously explained by the State Water Board, “the diversion of water consistent with a valid riparian or pre-1914 appropriative right would not constitute an unauthorized diversion of water subject to division 2 of the Water Code.” *In the Matter of Draft Cease and Desist Order Against Unauthorized Diversions by Woods Irrigation Company*, Order No. WR 2011-0005, February 1, 2011, 2011 WL 684674, at *6 (citing Wat. Code, §§ 1201, 1202). “Accordingly, the diversion of water as authorized under a valid pre-1914 appropriative right would not be subject to enforcement pursuant to Water Code sections 1052 and 1831, subd. (d)(1).”² *In the Matter of the Threat of Unauthorized Diversion and Use of Water by Thomas*

² The Water Code provides the State Water Board with three mechanisms for enforcing the prohibition against the unauthorized diversion or use of water prescribed by section 1052. First, section 1052(b) authorizes the State Water Board to request the Attorney General institute an action to enjoin the unauthorized diversion or use of water. Second, Water Code

1 Hill, Steven Gomes, and Millview County Water District, Order WR 2011-0016, October 18,
2 2011, 2011 WL 5375142, at *13.

3 **B. In Cases Involving Pre-1914 Rights, the State Water Board's Enforcement**
4 **Authority Under Water Code Section 1052 Depends on Whether the Water**
5 **at Issue is Unappropriated Water Subject to Its Permitting Authority.**

6 In *Young v. State Water Resources Control Board*, the Court of Appeal held that in
7 cases involving pre-1914 rights, the State Water Board has enforcement authority under
8 sections 1052 and 1831(d)(1) only when the water at issue may be unappropriated water that
9 would be subject to the State Water Board's permitting authority.³ ((2013) 219 Cal.App.4th
10 397, 404, *as modified* (Sept. 20, 2013).) In *Young*, the trial court set aside a cease-and-
11 desist order (CDO) on the ground that the State Water Board lacks jurisdiction to issue a
12 CDO for illegal diversion of water if the diverter claims a riparian or pre-1914 right. (*Id.* at
13 402.) Thus, the Court identified the question on appeal as "whether the Water Code gives
14 the [State] Water Board jurisdiction in enforcement proceedings to determine initially whether
15 a diverter has either the riparian or pre-1914 appropriative rights it claims." (*Id.* at 404.)

16 The Court stated that "[s]everal statutes provide the answer" and proceeded to
17 analyze statutes in part 2 of division 2 of the Water Code, including sections 1201, 1202,
18 1225, and 1240. (*Id.* at 404-406.) Significantly, the Court prefaced its analysis by explaining
19 that the State Water Board has "permitting authority over all water not otherwise properly
20 diverted or used under a riparian or pre-1914 right." (*Id.* at 404.) For example, the Court

21 _____
22 section 1055(a) provides that "[t]he executive director of the board may issue a complaint to
23 any person or entity on which administrative civil liability may be imposed pursuant to section
24 1052." Third, Water Code section 1831(d)(1) authorizes the State Water Board to "issue a
25 cease and desist order in response to a violation or threatened violation of [section 1052]."

26 ³ The *Young* Court's holding is consistent with the State Water Board's appellate briefing in
27 that case. (See e.g., Appellant State Water Resources Control Board's Opening Brief,
28 *Dianne E. Young, et al., v. State Water Resources Control Board*, 2012 WL 5024308
(Cal.App. 3 Dist.), at *20 (citations omitted) (emphasis added) (stating that Water Code
section 1202 defines "unappropriated water" to include "[w]ater that has never been
appropriated," "[w]ater subject to a pre-1914 right, but which was not perfected by putting the
water to beneficial use with due diligence," and "[w]ater for which a right had been perfected
by putting the water to use under a pre-1914 right, but where the use later ceased," and
explaining that "[u]nder this definition of unappropriated water, *only the water claimed under
a pre-1914 right that exceeds the actual right constitutes unappropriated water subject to the
State Water Board's regulation.*")

1 noted that under Water Code section 1202(b) “unappropriated water includes . . . water
2 subject to a pre-1914 right but that was not perfected by putting the water to beneficial use
3 with due diligence.” (*Id.* at 404 (*citing* Wat. Code, § 1202(b).) The Court reasoned that the
4 State Water Board is authorized to regulate the diversion and use of “water claimed under
5 pre-1914 appropriative rights but never perfected” because it is “unappropriated water”
6 subject to appropriation under the statutory procedures, as codified in part 2 of division 2.
7 (*Young*, 219 Cal.App.4th at 406 (*citing* Wat. Code, §§ 1201, 1202(b), 1225.)⁴

8 Significantly, the Court delimited the parameters of the State Water Board’s
9 jurisdiction as follows:

10 No one disputes that the Water Board does not have jurisdiction to
11 regulate riparian and pre–1914 appropriative rights. Nevertheless, the
12 Water Board does have authority to prevent illegal diversions and to
 prevent waste or unreasonable use of water, regardless of the basis
 under which the right is held.

13 (*Young*, 219 Cal.App.4th at 404 (citations omitted).) As described above, the *Young* Court
14 “harmonized these potentially conflicting principles by noting a permit is required for the
15 diversion of certain categories of water” and that the State Water Board has the authority
16 under section 1831 “to issue a CDO against the unpermitted diversion of such water.”
17 (*Millview*, 229 Cal.App.4th at 893-94 (*citing Young*, 219 Cal.App.4th at 404).) Thus, the
18 Court concluded that the State Water Board has jurisdiction in enforcement proceedings
19 involving pre-1914 and riparian rights holders only if there is a claim that they are diverting or
20 using unappropriated water that would be subject to the State Water Board’s permitting
21 authority. (*Id.* at 406-407.)

23
24 ⁴ See Appellant State Water Resources Control Board’s Opening Brief, *Dianne E. Young,*
25 *et al., v. State Water Resources Control Board*, 2012 WL 5024308, at *19) (italics added)
26 (where the State Water Board presented similar examples to illustrate how a pre-1914
27 appropriator’s improper diversions could become subject to the State Water Board’s
28 permitting authority over unappropriated water and thus subject to its enforcement authority
under section 1052: “for example, where a diverter has demonstrated a riparian or pre-1914
right to 77.7 [cubic feet per second or “cfs”] of water, but is diverting 90 cfs, the Board has
jurisdiction to issue a cease and desist order limiting the diverter to a diversion rate of 77.7
cfs. Similarly, a pre-1914 right to divert in May through August *would not immunize a diverter*
from Board regulation of unauthorized diversions in January.”)

1 The Court of Appeal in *Millview* applied this reasoning from *Young*, which the Court
2 found to be “straightforward and persuasive.” (229 Cal.App.4th at 894.) Thus, the *Millview*
3 Court reiterated that section 1052 applies in cases involving pre-1914 rights only if water is
4 not being properly diverted or used under the pre-1914 right and therefore is subject to
5 appropriation under the State Water Board’s permitting authority: “as *Young* noted, only
6 water diverted under a *valid* pre-1914 water right is protected from such regulation; a permit
7 *is* required to divert water appropriated pursuant to a claimed pre-1914 water right that was
8 never perfected, or has been forfeited, or is otherwise invalid.” (*Id.* (citing *Young*, 219
9 Cal.App.4th at 404).) The *Millview* Court further explained that “[u]nauthorized diversion
10 includes not merely the diversion of water under a claimed but invalid pre-1914 right, but also
11 diversion *beyond the proper scope of a valid pre-1914 right*, whether because the diversion
12 exceeds the maximum perfected amount of water under the right or because an intervening
13 forfeiture has reduced the proper scope.” 229 Cal. App. 4th at 895 (italics added).
14 Accordingly, in *Millview* the Court of Appeal held that the State Water Board can only enforce
15 section 1052 against a water right holder with a validly established pre-1914 right if water is
16 allegedly being diverted beyond the proper scope of the right, *i.e.*, because the right – or
17 some portion thereof – was never perfected, water is being diverted in excess of the right, or
18 the right has been reduced or lost due to forfeiture, and thus, the water diverted is subject to
19 the State Water board’s permitting authority over unappropriated water. (229 Cal.App.4th at
20 894-895.)

21 **C. The State Water Board Cannot Enforce the ACL Against BBID Under**
22 **Water Code Section 1052 Because the Water at Issue is Not Subject to the**
State Water Board’s Permitting Authority.

23 The rationale underlying the Court’s decisions in *Young* and *Millview* cannot be relied
24 on to support the State Water Board’s purported enforcement of the ACL against BBID under
25 sections 1052(a) and 1055 because the ACL does not allege that BBID improperly diverted
26 or used water under its pre-1914 right that could have potentially been subject to the State
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1 Water Board’s permitting authority.⁵ More specifically, the ACL does not allege that BBID’s
2 pre-1914 right is invalid. Nor does the ACL allege that BBID diverted water beyond the
3 proper scope of its pre-1914 right and thereby diverted unappropriated water subject to the
4 State Water Board’s permitting authority, *i.e.*, because BBID’s pre-1914 right – or some
5 portion thereof – was never perfected, BBID diverted in excess of its right, or BBID’s right
6 was reduced or lost due to forfeiture. (See *Millview*, 229 Cal.App.4th at 894-895.) Instead,
7 the ACL alleges that “BBID’s normal diversions” during the period from June 13-25, 2015 in
8 accordance with its pre-1914 right constituted an unauthorized diversion under section 1052
9 because BBID had been notified that as of “June 12, 2015, available supply was insufficient
10 to meet the demands of appropriative rights with priority dates of 1903 and later throughout
11 the Sacramento and San Joaquin River watersheds and the Delta.” (ACL at ¶¶ 4, 24, 27
12 (emphasis added), 28, 30-31.) The ACL charges that BBID diverted water that was entitled
13 to more senior water right holders, specifically pre-1914 appropriators with priority dates
14 earlier than 1903.⁶ (ACL at ¶¶ 24-28.) If the water was not available to BBID in June of 2015
15 because, as alleged by the State Water Board, more senior water right holders were entitled
16 to divert and/or use it during that period, then by definition, it cannot be considered
17 unappropriated water. (Wat. Code, § 1201 (italics added) (defining unappropriated water as
18 “[a]ll water flowing in any natural channel, *excepting so far as it has been or is being applied*
19 *to useful and beneficial purposes upon . . . or otherwise appropriated . . .*”); Wat. Code, §
20 1202 (declaring that “unappropriated water” includes, *inter alia*, “[a]ll water which has never
21 been appropriated”).) Thus, the water at issue does not meet any of the statutory definitions
22 of “unappropriated water,” (see Wat. Code, §§ 1201, 1202), and is not subject to the State
23 Water Board’s permitting authority. Because the water at issue was allegedly entitled to pre-

24 _____
25 ⁵ See ACL ¶¶ 4, 25 (noting that “BBID claims a pre-1914 appropriative water right to the
26 Intake Channel to the Banks Pumping Plant, formerly Italian Slough, in Contra Costa County”
with “a priority date of May 18, 1914”).

27 ⁶ San Francisco is unaware of any complaint by any senior water right holder regarding
28 BBID’s diversions during the period in question. However, to the extent that a senior water
right holder(s) alleges injury as a result of BBID’s diversions, any such complaint could be
properly adjudicated in superior court.

1 1914 appropriators with priority dates earlier than 1903 and thus was not – and could not
2 have been – subject to the State Water Board’s permitting authority over unappropriated
3 water, BBID’s “normal diversions” during the period in question are not subject to
4 enforcement under sections 1052 and 1055. Accordingly, pursuant to the Court of Appeal’s
5 decisions in *Young* and *Millview* the State Water Board must dismiss the ACL against BBID
6 for lack of jurisdiction.

7
8 Dated: January 25, 2015

DENNIS J. HERRERA
City Attorney
JONATHAN KNAPP
Deputy City Attorney

9
10
11 By: /s/ Jonathan Knapp
JONATHAN KNAPP

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13 Attorneys for City and County of San Francisco
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1 **PROOF OF SERVICE**

2 I, Linda Ma, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to
4 the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox
Plaza Building, 1390 Market Street, Suite 418, San Francisco, CA 94102.

5 On **January 25, 2016**, I served the following document(s):

6 **PRE-HEARING BRIEF ON IDENTIFIED LEGAL ISSUES BY THE CITY AND**
7 **COUNTY OF SAN FRANCISCO**

8 on the following persons at the locations specified:

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| | |
|---------------------------|--|
| See attached Service List | |
|---------------------------|--|

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11
12 in the manner indicated below:

13 **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and
14 correct copies of the above documents in addressed envelope(s) and placed them at
15 my workplace for collection and mailing with the United States Postal Service. I am
16 readily familiar with the practices of the San Francisco City Attorney's Office for
collecting and processing mail. In the ordinary course of business, the sealed
envelope(s) that I placed for collection would be deposited, postage prepaid, with the
United States Postal Service that same day.

17 **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents
18 in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the
19 above locations by a professional messenger service. **A declaration from the
messenger who made the delivery** **is attached** or **will be filed separately
with the court.**

20 **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above
21 documents in addressed envelope(s) and placed them at my workplace for collection
22 and delivery by overnight courier service. I am readily familiar with the practices of the
23 San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary
course of business, the sealed envelope(s) that I placed for collection would be
collected by a courier the same day.

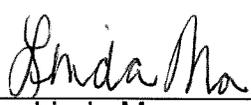
24 **BY FACSIMILE:** Based on a written agreement of the parties to accept service by
25 fax, I transmitted true and correct copies of the above document(s) via a facsimile
26 machine at telephone number 415-255-0733 to the persons and the fax numbers
listed above. The fax transmission was reported as complete and without error. The
transmission report was properly issued by the transmitting facsimile machine.

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BY ELECTRONIC MAIL: I caused the document(s) to be sent to each of the parties listed on the Service List of Participants for the Byron-Bethany Irrigation District, Administrative Civil Liability Hearing. Such document(s) were transmitted via electronic mail from the electronic address: linda.ma@sfgov.org in portable document format ("PDF") Adobe Acrobat or in Word document format.

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

Executed **January 25, 2016**, at San Francisco, California.



Linda Ma

**SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING
(09/02/15; Revised: 09/10/15; Revised 10/06/15; Revised 10/22/15)**

| PARTIES | |
|---|---|
| <p>THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p> | |
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**SERVICE LIST OF PARTICIPANTS
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ADMINISTRATIVE CIVIL LIABILITY HEARING
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Exhibit 2

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7 Attorneys for the City and County of San Francisco

8 **BEFORE THE CALIFORNIA**

9 **STATE WATER RESOURCES CONTROL BOARD**

10 In the Matter of ENFORCEMENT ACTION
11 ENF01951 – ADMINISTRATIVE CIVIL
LIABILITY COMPLAINT REGARDING
12 UNAUTHORIZED DIVERSION OF
WATER FROM THE INTAKE CHANNEL
13 TO THE BANKS PUMPING PLANT
(FORMERLY ITALIAN SLOUGH) IN
14 CONTRA COSTA COUNTY

PRE-HEARING BRIEF BY THE CITY AND
COUNTY OF SAN FRANCISCO IN
RESPONSE TO PROSECUTION TEAM'S
PRE-HEARING BRIEF OF LEGAL ISSUES
AND BYRON-BETHANY IRRIGATION
DISTRICT'S MOTION TO DISMISS

TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES ii

3 INTRODUCTION 1

4 ARGUMENT 1

5 I. The Prosecution Mischaracterizes the Court of Appeal's Decisions in
Young and Millview 1

6 II. Contrary to the Prosecution's Contentions, the Methodology Used by the
7 State Water Board to Determine Water Was Unavailable for Over 9,000
8 Water Right Holders Under Their Priority of Right in 2015 was an
9 Underground Regulation 5

10 III. This is Not an Article X, Section 2 Case 10

11

12

13

14

15

16

17

18

19

20

21

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23

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25

26

27

28

TABLE OF AUTHORITIES

State Cases

Armistead v. State Personnel Board
(1978) 22 Cal.3d 198 8, 9

Center for Biological Diversity v. Department of Fish and Wildlife
(2015) 234 Cal.App.4th 214 9

Grier v. Kizer
(1990) 219 Cal.App.3d 422 7, 8, 9

Light v. State Water Resources Control Board
(2014) 226 Cal.App.4th 1463 10

Millview County Water District v. State Water Resources Control Board
(2014) 229 Cal.App.4th 879 1, 2, 3, 4

Stoneham v. Rushen
(1982) 137 Cal.App.3d 729 9

Taye v. Coye
(1994) 29 Cal.App.4th 1339 8

Temescal Water Co. v. Department of Public Works
(1955) 44 Cal.2d 90 4

Tidewater Marine Western, Inc. v. Bradshaw
(1996) 14 Cal.4th 557 7

Young v. State Water Resources Control Board
(2013) 219 Cal.App.4th 397 1, 2, 3, 4

State Statutes & Codes

Government Code

§§ 11340, *et seq.* 7

§ 11340.5(a) 7

§ 11340.9(d) 7

§ 11342.600 7

Water Code

§ 183 5

§ 1051(a) 5

§ 1051(c) 5

§ 1052 2, 3, 4

§ 1058.5 5, 7

§ 1058.5(a)(1) 7

§ 1201 3

§ 1202 3

1
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State Water Board Decisions

To Adopt an Emergency Regulation for Statewide Drought-Related Curtailment of Water Diversions to Protect Senior Water Rights, Resolution No. 2014-0031, July 2, 2014, 2014 WL 3398115 6

Regulations

California Code of Regulations

Title 23, § 875 6

Title 23, § 875(b) 6

Title 23, § 875(c) 6

Title 23, § 875(c)(1) 6

Title 23, § 875(c)(4) 6

Title 23, § 879(c) 5

Title 23, § 879(c)(4) 6

Constitutional Provisions

California Constitution

Article X, § 2 10

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2
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8
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INTRODUCTION

The City and County of San Francisco (San Francisco) submits this brief in accordance with the Hearing Team’s January 14, 2016 clarifying e-mail which provides, among other things, that the parties may respond to other parties’ pre-hearing legal briefs and to the Motion to Dismiss filed by Byron-Bethany Irrigation District (BBID). More specifically, San Francisco writes in response to the Division of Water Right’s Prosecution Team’s Pre-Hearing Brief of Legal Issues (Prosecution Brief) and in support of certain arguments raised by BBID in its Motion to Dismiss.

ARGUMENT

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I. The Prosecution Mischaracterizes the Court of Appeal’s Decisions in *Young* and *Millview*.

Contrary to the Prosecution Brief’s mischaracterization, the Court of Appeal’s decisions in *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397, as modified (Sept. 20, 2013), and *Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879, as modified on denial of reh’g (Oct. 14, 2014), review denied (Dec. 17, 2014), do not stand for the proposition that “[d]iversion when water is not available to serve a claimed water right priority is an unauthorized diversion.” (Prosecution Brief, at 8.) Neither of these decisions even applies the rule of priority.¹ Nor do these decisions address whether the State Water Resources Control Board’s (State Water

¹ Neither *Young* nor *Millview* involved a dispute over competing water right priority claims. In *Young*, the Court framed the question on appeal as “whether the Water Code gives the Water Board jurisdiction in enforcement proceedings to determine initially whether a diverter has either the riparian or pre-1914 appropriative rights it claims.” 219 Cal.App.4th at 404. See also *Millview*, 229 Cal.App.4th 879, 894-95 (citing *Young*, 219 Cal.App.4th at 403) (emphasis added) (explaining that “the only issue directly raised by the facts in *Young* was the existence of the pre-1914 right . . .”). Similarly, in *Millview*, the Court held that the State Water Board has “the authority to determine the scope of a claimed right as well as its existence,” *id.* at 895, and proceeded to affirm the agency’s determination that the subject water district’s diversions had exceeded the maximum perfected amount of water under its pre-1914 right, *id.* at 899. The *Millview* Court also analyzed the issue of forfeiture but ultimately concluded the trial court had applied the incorrect legal standard. *Id.* at 899-905. Thus, the Court of Appeal had no occasion to apply the rule of priority in either of these cases.

1 Board) has jurisdiction to enforce the rule of priority between pre-1914 appropriators under
2 Water Code section 1052,² which is the threshold jurisdictional question in this case.

3 Further, *Young* and *Millview* analyzed water availability as an inherent *limitation* on the
4 State Water Board's authority to enforce section 1052's prohibition against the unauthorized
5 diversion or use of water in cases involving pre-1914 rights. As previously explained by San
6 Francisco and other parties, the Court of Appeal's decisions in *Young* and *Millview* limit the
7 State Water Board's enforcement authority under section 1052 in cases involving pre-1914
8 rights to situations where the water diverted may be *unappropriated water* that would be
9 subject to the State Water Board's permitting authority, *i.e.*, because the right was never
10 validly established, the right – or some portion thereof – was never perfected, “the diversion
11 exceeds the maximum perfected amount of water under the right,” or the right has been
12 reduced or lost due to forfeiture.³ (*Millview*, 229 Cal.App.4th at 894-895.) These decisions
13 hold that the State Water Board's enforcement authority under section 1052 over pre-1914
14 rights depends on whether the water at issue may be unappropriated water that would be
15 subject to its permitting authority, and thus, *available* for diversion in accordance with the
16 statutory appropriation procedures set forth in part 2 of division 2 of the Water Code. (*Id.* at
17 894 (citing *Young*, 219 Cal.App.4th at 404) (noting “a permit *is* required to divert water
18 appropriated pursuant to a claimed pre-1914 water right that was never perfected, or has
19 been forfeited, or is otherwise invalid”).

20 However, the Prosecution Brief would have *Young* and *Millview* stand for the opposite
21 proposition – that the State Water Board can exercise its enforcement authority under section
22 1052 in cases involving pre-1914 rights when there is no unappropriated water available.
23 The central allegation of the Administrative Civil Liability complaint (ACL) is that there was no
24 water available for BBID to divert between June 12-25, 2015 because senior appropriators

25 ² All further statutory references are to the California Water Code unless otherwise specified.

26 ³ See Pre-Hearing Brief on Identified Legal Issues by the City and County of San Francisco, at 3-5;
27 BBID's Motion to Dismiss Administrative Civil Liability Proceeding in ENF01951 for Lack of Statutory
28 Authority Under Water Code Section 1052, at 7-8; Central Delta Water Agency and South Delta
Water Agency Legal Issues Brief, at 16-17.

1 with priority dates of 1902 and earlier were entitled to the water that was physically present at
2 BBID's point of diversion. (ACL, at ¶¶ 18, 24-28.) Under this theory, no unappropriated
3 water could have possibly been available to divert during the subject period in accordance
4 with the statutory appropriation procedures set forth in part 2 of division 2 of the Water Code.
5 (Wat. Code, § 1201 (emphasis added) (defining unappropriated water as “[a]ll water flowing
6 in any natural channel, *excepting so far as it has been or is being applied to useful and*
7 *beneficial purposes upon . . . or otherwise appropriated*”); Wat. Code, § 1202 (declaring
8 that “unappropriated water” includes, among other things, “[a]ll water which has never been
9 appropriated”).)

10 The Prosecution Brief also argues that *Young* and *Millview* “stand for the proposition
11 that the Board and staff may make *any preliminary factual determinations necessary to*
12 *decide whether a party has engaged in the unauthorized diversion of water* [and may take
13 enforcement action under 1052 against parties claiming pre-1914 rights] who are diverting *in*
14 *excess of the water available* for those rights.” (*Id.* at 9 (emphasis added).) Again, the
15 Prosecution Brief's characterization of these decisions is misleading and untenable. As
16 discussed above, *Young* and *Millview* limited the State Water Board's enforcement authority
17 under section 1052 against pre-1914 water rights holders to situations where the water
18 diverted may be unappropriated water that would be subject to the State Water Board's
19 permitting authority. (*Young*, 219 Cal.App.4th at 405 (emphasis added), 406-407; *Millview*,
20 229 Cal.App.4th at 894-895 (citing *Young*, 219 Cal.App.4th at 403).)

21 Regarding the State Water Board's authority to make preliminary factual
22 determinations, the pertinent question is whether the agency's assessment of how much
23 water is available for pre-1914 water rights with varying priority dates is, in fact, a “threshold
24 determination[] necessary to execute its responsibility to regulate water” under section 1052
25 against pre-1914 appropriators, such as BBID. (*Young*, 219 Cal.App.4th at 405.) It is not.

26 Even assuming *arguendo* that the allegations in the ACL against BBID are true, *i.e.*,
27 that the water diverted by BBID between June 12-25, 2015 was entitled to more senior

1 appropriators with earlier priority dates,⁴ the State Water Board would have no “responsibility
2 [or authority] to regulate” such water under section 1052 because the right to divert and use it
3 would be subject to prior rights of appropriation, and therefore not subject to the State Water
4 Board’s permitting authority. (*Young*, 219 Cal.App.4th at 405.) Accordingly, the State Water
5 Board’s determination that there was no water available for BBID to divert in June 2015
6 because the water was entitled to more senior appropriators could not be considered
7 “necessary” for – or even relevant to – its enforcement of section 1052 against BBID.⁵ (*Id.*)

8 Moreover, contrary to the Prosecution’s suggestion, there was no allegation in *Young*
9 or *Millview* that a pre-1914 appropriator was “diverting *in excess of the water available*” for
10 their right.⁶ (Prosecution Brief, at 9 (emphasis added).) In *Millview* the Court of Appeal
11 affirmed the State Water Board’s determination that the water district’s diversions had
12 *exceeded the maximum perfected amount of water* under its pre-1914 right,⁷ and expressly
13 limited application of section 1052 in cases involving pre-1914 rights to situations where the
14 water diverted may be unappropriated water that would be subject to the State Water board’s
15 permitting authority, for example, “because the diversion exceeds the maximum perfected
16 amount of water under the right.” (*Millview*, 229 Cal.App.4th at 895 (emphasis added).)
17 Thus, the Prosecution’s assertion that *Young* and *Millview* “stand for the proposition” that the
18 State Water Board may exercise its enforcement authority under section 1052 against pre-
19 1914 appropriators “who are diverting in excess of the water available for those rights,”
20 (Prosecution Brief, at 9 (emphasis added), is simply wrong and contravenes the rationale
21 underlying the Court of Appeal’s decisions in *Young* and *Millview* discussed above.

22 ⁴ ACL at ¶¶ 18, 24-28.

23 ⁵ By contrast, as noted by the *Young* Court, it is necessary for the State Water Board to make a
24 threshold determination “as to the availability of unappropriated water” prior to deciding whether to
25 exercise its discretion to issue a permit to appropriate water. *Young*, 219 Cal.App.4th at 404 (citing
Temescal Water Co. v. Department of Public Works (1955) 44 Cal.2d 90, 103-104).

26 ⁶ See *supra* note 1.

27 ⁷ *Millview*, 229 Cal.App.4th at 886-888, 899 (although the record showed that the water district had
28 diverted as much as 1,174.75 acre-feet per year (afa) under its pre-1914 right in recent years, the
State Water Board determined the district’s predecessor in interest of the right had never perfected
the claim for more than 243 afa and the Court affirmed).

1 **II. Contrary to the Prosecution’s Contentions, the Methodology Used by the State**
2 **Water Board to Determine Water Was Unavailable for Over 9,000 Water Right**
3 **Holders Under Their Priority of Right in 2015 was an Underground Regulation.**

4 San Francisco joins in BBID’s argument that the methodology used by the State Water
5 Board in 2015 as the basis for informing over 9,000 water right holders that there was no
6 water available under their priority of right (the “methodology”), and that continued diversions
7 were unlawful, is an improper underground regulation, and writes separately to raise a few
8 additional points.⁸

9 Although the Prosecution asserts the “supply and demand analysis and the resulting
10 notices to the affected community” are authorized by the State Water Board’s investigative
11 power,⁹ there is no statute, regulation, or State Water Board decision that authorized the
12 development or application of the methodology as the basis for curtailment, and related State
13 Water Board enforcement actions, such as issuance of the ACL to BBID, in 2015.¹⁰

14 The Prosecution’s reliance on the State Water Board’s general investigative authority,
15 and its specific authority to issue informational orders during the drought, is unavailing
16 because it wrongly suggests the agency’s enforcement power is co-extensive with its
17 investigative power – which it is not. (Prosecution’s Brief, at 4-5 (*citing* Wat. Code, §§
18 1051(a),(c); 183; 1058.5.) For example, the Prosecution, in part, relies on California Code of
19 Regulations, title 23, section 879(c) – an emergency regulation that authorizes the Deputy

20 ⁸ See BBID’s Motion to Dismiss, at 3-6. San Francisco also joins in BBID’s argument that the ACL
21 “must be dismissed for lack of delegation authority.” *Id.* at 11-13.

22 ⁹ Prosecution’s Brief, at 6 (wherein the Prosecution asserts that the “supply and demand analysis and
23 the resulting notices to the affected community are squarely within the authorities described in the
24 previous section.”) The preceding section of the Prosecution Brief, Section III(B), primarily identifies
25 sources of the State Water Board’s investigative authority, and is titled “[t]he State Water Board and
26 Staff have Broad Authority to Investigate Water Supply and Demand, Particularly During the Drought
27 Emergency.” *Id.* at 4-5.

28 ¹⁰ Notably, in his deposition, the Assistant Deputy Director for the Division of Water Rights, John
O’Hagan, conceded there was no statute, regulation, or State Water Board decision that supported
staff’s application of the methodology in 2015. Deposition Transcript of John O’Hagan, Vol. 1, Nov.
19, 2015 (O’Hagan Depo.), attached hereto as Exhibit A to Declaration of Jonathan Knapp, at 116:25-
117:8, 117:20-25, 118:1-7. See also Prosecution’s Brief, at 2-3 (explaining that the ACL against
BBID should not be understood as a curtailment action: “the question of whether, and in what
circumstances, is the State Water Board authorized to curtail, (e.g., issue enforceable curtailment
orders), is not relevant to the ACL Complaint proceedings.”).

1 Director of the Division of Water Rights (Deputy Director) to issue informational orders
2 requiring water right holders, diverters, or users to provide certain information concerning
3 their rights (Information Regulation) – as putative authority for the development and
4 application of the methodology. (Prosecution Brief, at 5-6.) However, the Information
5 Regulation does not augment the State Water Board's enforcement authority in any way
6 other than to prescribe fines for violation of its reporting requirements. (23 CCR § 879(c)(4).)

7 The Prosecution also completely fails to explain how any of the authorities cited in its
8 brief specifically authorized the development and application of the methodology in 2015.
9 For example, although responses to informational orders issued pursuant to the Information
10 Regulation could contain relevant information for determining water availability, the regulation
11 says nothing about *how* the State Water Board or its staff should develop or apply a
12 methodology that would make use of such information, nor, as noted, does it authorize use of
13 the methodology in support of the agency's enforcement efforts.

14 By contrast, in 2014 the State Water Board adopted California Code of Regulations,
15 title 23, section 875 – a regulation titled “Curtailments Due to Lack of Water Availability”
16 (Curtailment Regulation) – that did, in fact, specify elements of a methodology to be applied
17 “[i]n determining whether water is available under a diverter’s priority of right.”¹¹ However,
18 the Curtailment Regulation solely applied to post-1914 appropriators and expired by
19 operation of law on April 14, 2015.¹² (23 CCR § 875(b).) Remarkably, in his deposition,

20
21 ¹¹ See State of California Office of Administrative Law Notice of Approval of Emergency Regulatory
22 Action, In Re: State Water Resources Control Board, OAL File No. 2014-0708-02E, dated July 16,
23 2014, attached as Exhibit G to Declaration of Lauren D. Bernadette in Support of BBID’s Motion to
24 Dismiss (Bernadette Decl.), 23 CCR § 875(c) (identifying information that the Deputy Director may
25 rely upon “[i]n determining whether water is available under a diverter’s priority of right and to issue or
26 suspend curtailment orders”); 23 CCR § 875(c)(1) (specifying assumption to be used in determining
27 water availability, *i.e.*, “[a]bsent evidence to the contrary, riparian water rights are presumed senior to
28 appropriative water rights with regard to natural flow for purposes of curtailments pursuant to this
section”); 23 CCR § 875(c)(4) (prescribing certain notification protocols, *e.g.*, “[w]hen issuing
curtailment orders to senior water right holders, the Deputy Director shall include information
regarding the quantity of water that should be made available by the prior curtailment of more junior
water rights.”)

¹² See *To Adopt an Emergency Regulation for Statewide Drought-Related Curtailment of Water
Diversions to Protect Senior Water Rights*, Resolution No. 2014-0031, July 2, 2014, 2014 WL
3398115, at ¶ 21 (emphasis added) (explaining that “[g]iven complexities surrounding the relative

1 Mr. O'Hagan acknowledged that the Curtailment Regulation was not re-adopted yet
2 explained "we are utilizing the same methodology that we did in 2014." (O'Hagan Depo., at
3 116:25-117:8.)

4 Moreover, even if one were to accept the Prosecution's theory that the cited statutes,
5 which grant investigative power to the State Water Board, also materially amplify the
6 agency's enforcement power, these statutes "must be read in conjunction" with the balance
7 of the applicable statutory scheme. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 433,
8 *modified* (May 2, 1990) disapproved of on other grounds by *Tidewater Marine Western, Inc.*
9 *v. Bradshaw* (1996) 14 Cal.4th 557.) This includes Government Code section 11340.5(a),
10 which requires the State Water Board to comply with the Administrative Procedure Act
11 (APA), (Gov. Code, §§ 11340, *et seq.*), in adopting regulations, and Water Code section
12 1058.5(a)(1), which authorizes the State Water Board to adopt emergency regulations to,
13 among other things, "require curtailment of diversions when water is not available under the
14 diverter's priority of right."¹³ (*Grier*, 219 Cal.App.3d at 433.) Thus, the pertinent question is
15 whether the methodology constitutes a "regulation" within the meaning of Government Code
16 sections 11340.5(a) and 11342.600, "or amounts only to an exempt internal management
17 rule." (*Id.*; Gov. Code, § 11340.9(d) (exempting "[a] regulation that relates only to the internal
18 management of the state agency" from the APA requirements).)

19 The methodology at issue here is a "regulation" because it is a "standard of general
20 application . . . adopted by [a] state agency to implement . . . the law [allegedly] enforced or
21 administered by it." (Gov. Code, § 11342.600) In *Grier*, the Court of Appeal held that the

22

23 priority of individual pre-1914 appropriative water rights and riparian water rights, the emergency
regulation does not apply curtailment orders to these categories of water rights.")

24 ¹³ Although the Prosecution also relies on Governor Brown's Executive Order B-29-15 which, among
25 other things, directs the State Water Board "to bring enforcement actions against illegal diverters,"
26 Prosecution's Brief, at 4-5, it appears to overlook the Governor's prior April 25, 2014 Proclamation of
27 a Continued State of Emergency, that provides, in part, "the Water Board *will adopt and implement*
28 *emergency regulations* pursuant to Water Code section 1058.5, as it deems necessary . . . *to require*
curtailment of diversions when water is not available under the diverter's priority of right." April 25,
2014 Proclamation *available online* at <http://ca.gov/Drought/topstory/top-story-6.html>, and attached as
Exhibit F to Bernadette Decl. (emphasis added). Executive Order B-29-15 confirmed the Governor's
directive regarding section 1058.5 remains "in full force and effect." Executive Order B-29-15, at ¶ 1.

1 challenged audit method “was a standard of general application which, in implementing the
2 Department’s statutory auditing authority, affected Medi-Cal providers statewide.” (219
3 Cal.App.3d at 434-435, 438.) Significantly, the *Grier* Court “*found that a challenged method*
4 *of conducting an audit—by extrapolating from a small, select, sample of claims submitted—*
5 *was in fact a regulation*. The court concurred in the reasoning of the Office of Administrative
6 Law, *determining that the method was a regulation* because it was a standard of general
7 application applied in every Medi-Cal case reviewed by the Department Audit teams and
8 used to determine the amount of the overpayment.” (*Taye v. Coye* (1994) 29 Cal.App.4th
9 1339, 1345 (citing *Grier*, 219 Cal.App.3d at 434-435, 438, 440 (emphasis added).)

10 Similarly, the methodology for determining water availability used by the State Water
11 Board in 2015 as the basis for curtailment, and related enforcement actions, such as the ACL
12 against BBID, was a standard of general application, which, in allegedly implementing the
13 State Water Board’s investigative authority and/or the rule of priority¹⁴ affected water right
14 holders statewide. (*Grier*, 219 Cal.App.3d at 434-435, 438.) Thus, the State Water Board
15 was required to comply with the APA before using the methodology. (*Id.* at 438, 440.)

16 The methodology is not an exempt internal management rule because it impacts water
17 right holders throughout the state. (*Id.* at 437 (citing *Armistead v. State Personnel Board*
18 (1978) 22 Cal.3d 198, 203-204) (explaining that unlike “purely internal rules which merely
19 govern an agency’s procedure . . . rules which have external impact . . . invoke the APA.”) In
20 *Grier*, the agency used the challenged audit method to audit claims for payment by
21 physicians who were Medi-Cal providers and prove overpayments. (219 Cal.App.3d 428,
22 436-437.) In the instant case, the State Water Board used the challenged methodology to
23 determine whether and how much water was diverted during periods when water was
24

25 ¹⁴ See Prosecution’s Brief, at 7 (emphasis added) (stating that “[t]he purpose of the Division’s drought
26 water availability determination analyses described in the June 12 Notice” at issue in this proceeding
27 “*was to protect the rule of priority*.”); *id.* (citing WR-9, at 3 [Testimony of Brian Coats]) (emphasis
28 added) (wherein Mr. Coats explains, “[i]n accordance with the State’s water right priority system, the
State Water Board notifies diverters of a water shortage when sufficient flows in a watershed are not
available for a water user’s needs, based on their priority of right.”)

1 allegedly unavailable for a particular priority of right, a determination that it then relied on as
2 the basis for enforcement action against water right holders, like BBID. Similar to the
3 agency's use of the auditing method in *Grier*, the State Water Board's use of the
4 methodology for determining water availability has significant external impacts, *i.e.*, on water
5 right holders such as BBID, and thus is not exempt from APA requirements. (See *Center for*
6 *Biological Diversity v. Department of Fish and Wildlife* (2015) 234 Cal.App.4th 214, 260-262
7 (where court found mitigation measure that required state biologists to "evaluate whether
8 water bodies should be stocked for the Fishing in the City program" was a regulation that
9 required compliance with the APA because the evaluation could lead to a "significant number
10 of water bodies" being removed from the program to the detriment of "numerous citizens . . .
11 especially children."); *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 736 (where court
12 held that a "classification system [which] determines the custody level of a prisoner and the
13 institution in which he will be housed . . . represents a rule of general application which must
14 be adopted in compliance with the [APA].").

15 As the *Grier* Court explained, the purpose of the APA is "to provide a procedure
16 whereby people to be affected by proposed regulatory action may be heard on the merits of
17 proposed rules," and thus to avoid "the problem of *house rules of the agency* which are
18 promulgated without public notice, opportunity to be heard, filing with the Secretary of State,
19 and publication in the California Code of Regulations." (*Grier*, 219 Cal.App.3d at 435 (citing
20 *Armistead*, 22 Cal.3d at 204-205) (emphasis added).) In his deposition, Mr. O'Hagan
21 explained that it was his decision to use the methodology for determining water availability in
22 2015, and that there were no applicable statutory or regulatory requirements that he needed
23 to comply with in developing the methodology. (O'Hagan Depo., at 23:12-14, 114:13-16,
24 119:12-16.) In fact, Mr. O'Hagan stated there were no constraints whatsoever imposed on
25 his discretion to decide what should be considered and what should be excluded from the
26 water availability analysis. (*Id.* at 119:17-25, 120:1-11.) San Francisco respectfully submits
27 that the methodology to determine water availability used by the State Water Board in 2015

1 represents a paradigmatic example of the problem of "house rules of the agency" that was
2 intended to be redressed by enactment of the APA.

3 **III. This is Not an Article X, Section 2 Case.**

4 Although the ACL against BBID contains no allegations of waste or unreasonable use
5 (or diversion) in violation of Article X, section 2 of the California Constitution, the
6 Prosecution's Brief repeatedly refers to the Constitutional provision.¹⁵ These references to
7 Article X, section 2 appear to be offered as support for their argument that the Division of
8 Water Rights "may commence administrative enforcement against a water right holder who
9 diverts after State Water Board staff determines that no water is available to serve that *water*
10 *right priority.*" (Prosecution's Brief, at 2 (emphasis added).) Given that the rule of priority is,
11 of course, separate and distinct from the prohibition against waste and unreasonable use
12 prescribed by Article X, section 2, and it is undisputed that there are no allegations of waste
13 or unreasonable use (or diversion) in the instant proceeding, the Constitutional provision
14 does not (and cannot) provide any support for the Prosecution's arguments.

15
16 Dated: February 22, 2016

DENNIS J. HERRERA
City Attorney
JONATHAN KNAPP
Deputy City Attorney

17
18
19 By: Is/Jonathan Knapp
JONATHAN KNAPP

20
21 Attorneys for City and County of San Francisco

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23
24 ¹⁵ See e.g., Prosecution Brief, at 4 (quoting *Light v. State Water Resources Control Board* (2014)
25 226 Cal.App.4th 1463, 1481-1482, as modified on denial of reh'g (July 11, 2014), review denied
26 (Oct. 1, 2014) (where the Prosecution states "the Board's authority to prevent unreasonable or
27 wasteful use of water extends to all users, regardless of the basis under which the users' water rights
28 are held" in apparent support of their argument that the State Water Board is authorized to investigate
the availability of water under a diverter's priority of right); Prosecution's Brief, at 6-7 (citing *Light*, 226
Cal.App.4th at 1488) (stating "[a]ll water users are subject to the prohibition against waste and
unreasonable use set forth in Section 2 of Article X of the California Constitution" in apparent support
of their argument that "Board and staff must uphold the rule of priority.").

1 **PROOF OF SERVICE**

2 I, Patty Slomski, declare as follows:

3 I am employed in the County of Sacramento, State of California. I am over the age of eighteen
4 years and am not a party to the within action. My business address is ELLISON, SCHNEIDER
5 & HARRIS, L.L.P.; 2600 Capitol Avenue, Suite 400; Sacramento, California, 95816. On
6 February 22, 2016, I serviced the following documents described as:

7 **PRE-HEARING BRIEF BY THE CITY AND COUNTY OF SAN FRANCISCO IN**
8 **RESPONSE TO PROSECUTION TEAM’S PRE-HEARING BRIEF OF LEGAL ISSUES**
9 **AND BYRON-BETHANY IRRIGATION DISTRICT’S MOTION TO DISMISS**

10 **DECLARATION OF JONATHAN P. KNAPP IN SUPPORT OF PRE-HEARING BRIEF**
11 **BY THE CITY AND COUNTY OF SAN FRANCISCO IN RESPONSE TO**
12 **PROSECUTION TEAM’S PRE-HEARING BRIEF OF LEGAL ISSUES AND BYRON-**
13 **BETHANY IRRIGATION DISTRICT’S MOTION TO DISMISS**

14 on the attached service list.

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25 I declare under penalty of perjury that the foregoing is true and correct and that this declaration
26 was executed on February 22, 2016, at Sacramento, California.

27 

28 _____
Patty Slomski

**SERVICE LIST OF PARTICIPANTS OF
THE BYRON-BETHANY IRRIGATION
DISTRICT ADMINISTRATIVE CIVIL
LIABILITY HEARING
AND THE WEST SIDE IRRIGATION
DISTRICT CEASE AND DESIST ORDER
HEARING**

| PARTIES | |
|--|--|
| THE FOLLOWING MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.) | |
| 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 | Byron Bethany Irrigation District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 dkelly@somachlaw.com |
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Byron-Bethany Irrigation District ACL Hearing
West Side Irrigation District CDO Hearing

| | |
|---|--|
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8 BEFORE THE CALIFORNIA

9 STATE WATER RESOURCES CONTROL BOARD

10 In the Matter of ENFORCEMENT ACTION
11 ENF01951 – ADMINISTRATIVE CIVIL
LIABILITY COMPLAINT REGARDING
12 UNAUTHORIZED DIVERSION OF
WATER FROM THE INTAKE CHANNEL
13 TO THE BANKS PUMPING PLANT
(FORMERLY ITALIAN SLOUGH) IN
14 CONTRA COSTA COUNTY

DECLARATION OF JONATHAN P. KNAPP IN
SUPPORT OF PRE-HEARING BRIEF BY THE
CITY AND COUNTY OF SAN FRANCISCO IN
RESPONSE TO PROSECUTION TEAM'S
PRE-HEARING BRIEF OF LEGAL ISSUES
AND BYRON-BETHANY IRRIGATION
DISTRICT'S MOTION TO DISMISS

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I, Jonathan P. Knapp, declare:

1. I am an attorney at law licensed to practice before the courts of the State of California. I am a Deputy City Attorney with the San Francisco City Attorney's Office.

2. Attached hereto as Exhibit A is a true and correct copy of excerpts from the Deposition of John O'Hagan, Volume 1, dated November 19, 2015.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed in San Francisco, California on February 19, 2016.



JONATHAN P. KNAPP

EXHIBIT A

BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN RE THE MATTERS OF:

SWRCB Enforcement Actions
ENFO1951; ENFO1949

WEST SIDE IRRIGATION
DISTRICT CEASE AND DESIST
ORDER HEARING,

and

BYRON-BETHANY IRRIGATION
DISTRICT ADMINISTRATIVE
CIVIL LIABILITY HEARING.

DEPOSITION OF JOHN O'HAGAN
Volume I

November 19, 2015

Reported By: KATHRYN DAVIS, CSR No. 3808

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28 For the City and County of San Francisco:

29 CITY AND COUNTY OF SAN FRANCISCO
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DEPOSITION OF JOHN O'HAGAN, VOLUME I

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APPEARANCES CONTINUED

Also Present:

KENNETH R. HENNEMAN
KENNETH R. HENNEMAN CONSULTING

RICK GILMORE
BYRON-BETHANY IRRIGATION DISTRICT

NICHOLAS BONSIGNORE, P.E.
WAGNER & BONSIGNORE

TULLY & YOUNG
GREG YOUNG, P.E.

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I N D E X O F E X A M I N A T I O N

| | Page |
|----------------------------------|------|
| Examination by Ms. Spaletta..... | 6 |
| Examination by Mr. Knapp..... | 114 |

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1 question that maybe will make this easier.

2 Q Did anyone at the State Water Resources Control
3 Board review and approve the water availability analysis
4 that was performed by Aaron Miller or Brian Coats during
5 2014?

6 MS. MORRIS: Objection. Compound. Vague.

7 MR. CARRIGAN: I'll join.

8 Q BY MS. SPALETTA: You can answer.

9 A The methodology -- it was my decision on the
10 methodology that we use in 2014 that was eventually
11 used for that determination.

12 Q Was it also your decision regarding the
13 methodology for 2015?

14 A Yes.

15 Q So then going back to my original question,
16 which was regarding the supply side of the water
17 availability analysis. What method was used to identify
18 supply in 2014?

19 A I'm trying to recall. That is my problem.
20 For 2015 I know. But I'm not 100 percent sure on
21 2014. If they were the same, which I believe they
22 were -- how is that --

23 Q Let's start with what you do remember. What was
24 the method used to identify supply for 2015?

25 A It was full natural flow from the Department

1 So I'll go ahead and turn the questions over
2 to Mr. Knapp.

3 THE WITNESS: Thank you.

4 EXAMINATION BY MR. KNAPP

5 Q BY MR. KNAPP: I just have a few questions.

6 Mr. O'Hagan, you testified earlier today that it
7 was your decision at the Division of Water Rights to use
8 the water availability analysis developed by Brian Coats
9 and Aaron Miller; is that correct?

10 A What was the last of that?

11 Q Developed by Brian Coats and Aaron Miller.

12 A For 2014.

13 Q And I believe you also testified that it was
14 your decision to use the water supply availability
15 analysis in 2015 as well?

16 A Yes.

17 Q You mentioned that you received some stakeholder
18 input regarding the water availability analysis. Was
19 there any public process for soliciting input from all
20 of the potentially-affected stakeholders?

21 MR. CARRIGAN: I would say vague and ambiguous.

22 THE WITNESS: Not to my recall.

23 Q BY MR. KNAPP: To be more specific, were there
24 any workshops conducted at the State Water Board where
25 formal comments could be received on the water

1 curtailment. It was couched as Term 96, or something
2 like that, based on modeling in lieu of the methodology
3 that we were using with supply and demand.

4 Q Well, in 2015 was there any workshops conducted
5 to solicit input on the methodology that the Division of
6 Water Rights was proposing to use and ultimately used to
7 conduct its water supply availability analysis?

8 A No, because I believe the Board's decision in
9 the previous year, based on that information, was
10 that we were going to stick with the current
11 methodology in lieu of the proposed modeling type of
12 curtailment.

13 Q To be clear. So you are referring to the
14 emergency regulations that were enacted in 2014?

15 A There was a issue discussed, as I recall,
16 about what methodology to do curtailments in 2014 in
17 June, I believe. I can't recall the date. It would
18 be on our website.

19 Q Did the State Water Board rely on the emergency
20 regulations this year to conduct the curtailments?

21 A No. The emergency regulations that were
22 finally adopted just pertained to informational
23 orders. So yes, we are utilizing the Informational
24 Order portion of that reg.

25 Q With respect to the portion of that reg that

1 dealt with curtailment, is that portion still in effect?

2 A No. But you asked was there any public
3 noticing and opportunity for comment, and that was
4 the opportunity in 2014.

5 Q Okay. And the curtailment portion of that
6 regulation, has that since been repealed?

7 A It was not adopted, so we are utilizing the
8 same methodology that we did in 2014.

9 Q Okay. Well, so following up on that question.
10 So the emergency regulation provided -- well, I'll ask
11 you the question.

12 Is it your position that the methodology that
13 the Water Board used in 2015 is supported by the
14 emergency regulation that has now since been repealed
15 that was operative in 2014 dealing with curtailment?

16 MR. CARRIGAN: Calls for a legal conclusion.

17 THE WITNESS: It is not a methodology that has
18 been adopted by the Board, if that is what you are
19 asking.

20 Q BY MR. KNAPP: Okay. To be clear, there is no
21 decision by the Board that adopted the methodology that
22 the Division of Water Rights used in 2014 or 2015 to
23 determine water supply availability?

24 A Correct.

25 Q Is there any statutory authority, that you are

1 aware of, that authorizes the Division of Water Rights
2 to use the methodology that you've used in 2014 and 2015
3 for curtailment?

4 MR. CARRIGAN: Calls for legal conclusion.

5 MR. KNAPP: I'm just asking if he is aware.

6 MR. CARRIGAN: Same objection.

7 THE WITNESS: I'm not aware.

8 Q BY MR. KNAPP: Okay. So I've asked you about
9 public process. Was there any public process in 2015
10 for receiving public input on the methodology that the
11 State Water Board used to determine water supply
12 availability?

13 MR. CARRIGAN: Calls for speculation.

14 THE WITNESS: There is always opportunity for
15 public to comment, and that is what we constantly
16 received.

17 Q BY MR. KNAPP: Just to be clear, though, there
18 were no workshops held, there was no formal opportunity
19 to comment in 2015 on water supply availability
20 analysis; is that correct?

21 MR. CARRIGAN: Calls for speculation.

22 THE WITNESS: I don't recall.

23 Q BY MR. KNAPP: Well, okay. Was there any public
24 process for responding to comments from stakeholders in
25 2015 on the water methodology analysis used by the Board

1 as the basis for curtailment?

2 A I don't recall.

3 Q If there had been a public process, would you
4 have been involved? Given that you've stated that it
5 was your decision to use the methodology, would you have
6 been involved in the workshop if one had been conducted?

7 A Myself or my staff.

8 Q But you don't recall if you attended any
9 workshop?

10 A I do not recall a specific workshop or Board
11 item in which the methodology came up in 2015.

12 Q In developing the methodology for water supply
13 availability, were there any regulatory or statutory
14 requirements that you needed to adhere to?

15 MR. CARRIGAN: Calls for a legal conclusion.

16 THE WITNESS: Not to my knowledge.

17 Q BY MR. KNAPP: So it was your discretion that it
18 was completely unfettered?

19 MR. CARRIGAN: Same objection. Argumentative.

20 THE WITNESS: What does "unfettered" mean?

21 MR. CARRIGAN: Have you finished with your
22 question, counsel?

23 MR. KNAPP: I was just asking if there was
24 bounds, any parameters, for his discretion in developing
25 the water supply availability methodology.

1 MR. CARRIGAN: Calls for a legal conclusion.

2 THE WITNESS: "Unfettered," what do you mean
3 "unfettered"? I don't know what that means.

4 Q BY MR. KNAPP: Was there any constraint imposed
5 under your discretion to decide what to include or what
6 not to include in the water availability analysis that
7 you conducted?

8 MR. CARRIGAN: Calls for a legal conclusion.

9 THE WITNESS: Not to my knowledge. But we were
10 only utilizing supply and demand to make sure that we
11 honored the water right priority system.

12 Q BY MR. KNAPP: You testified that you don't
13 recall whether there was any public process in 2015 for
14 either soliciting input or responding to input, in a
15 formal workshop setting, regarding the State Water
16 Board's water availability analysis and the methodology
17 that you had in mind.

18 Have I restated that correctly?

19 A That is correct. But I believe that
20 stakeholders had an opportunity to comment on the
21 Board's Dry Year Report that was done in January, I
22 believe, of 2015.

23 Q And did the Dry Year Report, did that explain
24 the assumptions that the Division of Water Rights was
25 relying upon as the basis for its methodology for its

1 **PROOF OF SERVICE**

2 I, Patty Slomski, declare as follows:

3 I am employed in the County of Sacramento, State of California. I am over the age of eighteen
4 years and am not a party to the within action. My business address is ELLISON, SCHNEIDER
5 & HARRIS, L.L.P.; 2600 Capitol Avenue, Suite 400; Sacramento, California, 95816. On
6 February 22, 2016, I serviced the following documents described as:

7
8 **PRE-HEARING BRIEF BY THE CITY AND COUNTY OF SAN FRANCISCO IN**
9 **RESPONSE TO PROSECUTION TEAM'S PRE-HEARING BRIEF OF LEGAL ISSUES**
10 **AND BYRON-BETHANY IRRIGATION DISTRICT'S MOTION TO DISMISS**

11 **DECLARATION OF JONATHAN P. KNAPP IN SUPPORT OF PRE-HEARING BRIEF**
12 **BY THE CITY AND COUNTY OF SAN FRANCISCO IN RESPONSE TO**
13 **PROSECUTION TEAM'S PRE-HEARING BRIEF OF LEGAL ISSUES AND BYRON-**
14 **BETHANY IRRIGATION DISTRICT'S MOTION TO DISMISS**

15 on the attached service list.

16
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25 I declare under penalty of perjury that the foregoing is true and correct and that this declaration
26 was executed on February 22, 2016, at Sacramento, California.

27 

28 _____
Patty Slomski

**SERVICE LIST OF PARTICIPANTS OF
 THE BYRON-BETHANY IRRIGATION
 DISTRICT ADMINISTRATIVE CIVIL
 LIABILITY HEARING
 AND THE WEST SIDE IRRIGATION
 DISTRICT CEASE AND DESIST ORDER
 HEARING**

| PARTIES | |
|---|---|
| <p>THE FOLLOWING MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p> | |
| <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\Suntag 5757 Pacific Ave., 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</p> <p>Robert E. Donlan Ellison, Schneider & Harris L.L.P. 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 (916) 447-2166 red@lawfirm.com</p> |
| <p>Central Delta Water Agency Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com</p> <p>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.mcginis@water.ca.gov</p> |

Byron-Bethany Irrigation District ACL Hearing
West Side Irrigation District CDO Hearing

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|---|--|
| <p>San Joaquin Tributaries Authority Valerie Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 vkincaid@olaughlinparis.com towater@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</p> <p>Dean Ruiz, Esq. Harris, Perisho & Ruiz, Attorneys at Law 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hprlaw.net</p> | <p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rimorat@gmail.com</p> |
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**SERVICE LIST OF PARTICIPANTS OF
THE BYRON-BETHANY IRRIGATION
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Byron-Bethany Irrigation District ACL Hearing
West Side Irrigation District CDO Hearing

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