

1 Thomas M. Berliner (SBN 83256)
2 Jolie-Anne S. Ansley (SBN 221526)
3 **DUANE MORRIS LLP**
4 Spear Tower
5 One Market Plaza, Suite 2200
6 San Francisco, CA 94105-1127
7 Telephone: +1 415 957 3000
8 Fax: +1 415 957 3001
9 E-mail: tmberliner@duanemorris.com
10 jsansley@duanemorris.com

11 Stefanie D. Morris (SBN 239787)
12 State Water Contractors
13 1121 L. St., Suite 1050
14 Sacramento, CA 95814-3974
15 Telephone: +1 916 447 7357
16 Fax: +1 916 447 2734
17 E-mail: smorris@swc.org

18 Attorneys for State Water Contractors

19 **BEFORE THE**
20 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

21 ENFORCEMENT ACTION ENF01949 -
22 DRAFT CEASE AND DESIST ORDER
23 REGARDING UNAUTHORIZED OR
24 THREATENED UNAUTHORIZED
25 DIVERSIONS OF WATER FROM OLD RIVER IN
26 SAN JOAQUIN

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

**STATE WATER CONTRACTORS'
CONSOLIDATED RESPONSE TO
PARTIES' LEGAL BRIEFS AND
OPPOSITION TO WEST SIDE
IRRIGATION DISTRICT'S MOTION
FOR SUMMARY JUDGMENT OR IN
THE ALTERNATIVE SUMMARY
ADJUDICATION**

Hearing Date: March 21, 2016

1 Pursuant to the December 16, 2015 procedural ruling in the above-referenced proceedings,
2 State Water Contractors (“SWC”) hereby provide its consolidated response to issues raised in the
3 pre-hearing legal briefs submitted by the San Joaquin Tributary Authority (“SJTA”) and Central
4 Delta Water Agency and South Delta Water Agency in which numerous parties joined¹ (collectively
5 “CDWA et al.”) and opposition to West Side Irrigation District’s (“WSID”) motion for summary
6 judgment or, in the alternative, summary adjudication. As part of its opposition to WSID’s motion,
7 SWC also submits its Response to WSID’s Separate Statement of Undisputed Material Facts, and its
8 Objections to WSID’s Separate Statement of Undisputed Material Facts.

9
10 **I. Delta Diverters Alleging Senior Water Rights Have No Right to the Stored Water
Supplies of the State Water Project**

11 In their legal briefs, SJTA and CDWA et al. incorrectly assert that alleged senior water rights
12 in the Delta, such as BBID and WSID,² have a right to divert stored water supplies of the State
13 Water Project (“SWP”). For example, SJTA alleges that the State Water Resources Control Board’s
14 (“Water Board”) analysis failed to consider other sources of water including “released stored water”
15 and questions the legal protection of stored water releases. (See SJTA Brief, pp. 7, 9.) Similarly,
16 CDWA et al. allege that inflow does not affect availability of water in the Delta and that Delta users
17 are “entitled” to stored water releases of the SWP and Central Valley Project (“CVP”) (collectively
18 “Project” or “Projects”). (See CDWA et al. Brief, pp. 9-12.) Delta diverters, regardless of water
19 right priority, have no right to divert stored water releases.

20
21 **A. Diverters have no Right to Stored Water Supplies Without a Contract.**

22 Neither the alleged water rights of BBID or WSID, or any other similarly-situated diverter in
23 the Delta, extend to SWP stored water released to the Delta for delivery to SWC member agencies or

24 ¹ West Side Irrigation District, Banta-Carbona Irrigation District and Patterson Irrigation District
25 join the legal brief filed by Central Delta Water Agency and South Delta Water Agency.

26 ² SJTA apparently agrees that diverters reporting to the Water Board as owners of senior water rights
27 may not actually hold senior water rights. However, as the Water Board is aware, those reporting as
28 senior water rights are doing so under penalty of perjury. As the Water Board is also aware, those
senior water rights often claim that the same water is both riparian and appropriative. Since the
same water cannot have two different priorities, the Water Board has to apply its judgment regarding
how to account for those alleged rights.

1 for any other regulatory purpose. “No riparian or appropriator has a right to use water that was
2 previously stored or imported by another upstream and then released into the watercourse for use
3 downstream.” (*El Dorado Irrig. Dist. v. State Water Resources Control Board* (2006) 142
4 Cal.App.4th 937, 962 citing Water Code § § 1201, 7075.) Such “foreign” water is not part of the
5 natural flow of the stream system nor is it subject to appropriation unless abandoned.³ (*Stevens v.*
6 *Oakdale Irrigation Dist.* (1939) 13 Cal.2d 343, 348-349; *Mayberry v. Alhambra Addition Water Co.*
7 (1899) 125 Cal. 444, 449-451.) Abandonment of water only occurs once an appropriator
8 relinquishes dominion and control over the water with no intent to put the water to further beneficial
9 use. (*See Stevens*, 13 Cal.2d at 350.)

10 SWP has manifested no intent to abandon stored water releases. SWP stored water is
11 conveyed through the Delta to benefit water quality and for consumptive use downstream by SWC
12 member agencies. As WSID acknowledges, the Water Board has recognized the right of the SWP
13 and CVP to use the channels of the Delta to convey, **and recapture**, previously appropriated and
14 stored water without the threat of diversion by others, a right codified in Water Code Section 7075.
15 (*See WSID Motion Brief*, pp. 8-9; *Order on Protests Submitted by Delta Water Users Association*
16 *and South Delta Water Agency*, Order WR 89-8, 1989 Cal ENV LEXIS 30 *20-28; *In the Matter of*
17 *the Petition for Reconsideration of Lloyd L. Phelps, Jr.; Gary Phelps; Joey P. Ratto, Jr.; and Ronald*
18 *D. Conn Regarding Term 91 Curtailment Notices*, Order WR 2007-0027-EXEC, 2007 Cal. ENV
19 LEXIS 103, *26-28 [“Senior in-basin diverters cannot claim a right to stored water released by
20 upstream projects,” including the “previously stored water of the DWR or USBR”].)

21
22 **B. The WQCP does not Give Diverters a Right to Divert Stored Water Supplies of
the State Water Project.**

23 The Water Quality Control Plan for the San Francisco Bay/Sacramento San Joaquin Delta
24 Estuary (“WQCP”) does not give senior water right holders a right to divert stored water released to

25 ³ Although the term “foreign water” typically refers to water that is imported from another watershed
26 and discharged into the stream (*E. Clemens Horst Co. v. New Blue Point Mining Co.* (1918) 177 Cal.
27 631, 634), the term also refers to water which is foreign in time to the natural flow of the stream,
28 such as stored water. (*See Holmes v. Nay* (1921) 186 Cal. 231, 234, 235-237; *see also In the Matter*
of Wastewater Change Petition WW-0045 City of Riverside, Order WR 2008-0024, 2008 Cal. ENV
LEXIS 50 *11.)

1 meet WQCP standards. The WQCP does not provide protection for water rights but rather provides
2 protection for the reasonable protection of beneficial uses. (WQCP, p. 3; *U.S. v. State Water*
3 *Resources Control Board* (1986) 182 Cal.App.3d 82, 116 citing Water Code §§ 13200 et seq.) The
4 water rights of Delta diverters are not expanded by the fact that the SWP and CVP are responsible
5 for meeting WQCP standards. (*See Id.* at 116-117.) As recognized by the Water Board, nothing in
6 the WQCP grants senior water rights holders in the Delta the right to divert stored water supplies.

7
8 **1. The Water Board has Expressly Stated that the WQCP did not Expand Senior Water Rights**

9 In its brief, the SJTA argues that the Water Board has not taken an official position on
10 whether the senior diverters have a right to divert stored water released to satisfy WQCP
11 requirements. (SJTA Brief, p. 9:9-28.) This is incorrect. The Water Board has expressly stated that
12 senior water right holders have no right to such stored water releases. (*See*, Order WR 2007-0027-
13 EXEC, *supra*, 2007 Cal. ENV LEXIS 103, *26-28.) In Decision 1485, the Water Board explained
14 that:

15 Industries in the vicinity of Antioch have benefitted by the operation of the project
16 facilities including the Contra Costa Canal, especially during the period 1945-1967.
17 After 1967, when the SWP commenced operations and demands on the CVP increased,
18 the benefits of project operations decreased and will continue to be reduced and will
19 continue to be reduced in the future. The water rights of these industries do not entitle
20 them to flows which are in excess of natural flow conditions in the Delta. If without
21 project conditions in the Delta are provided by this decision, vested water rights, as
22 limited by reasonable use, will be protected against infringement by the SWP and CVP
23 operations. However, in accordance with the Delta Protection Act, if Delta water users
24 desire additional benefits, they may seek such benefits from the project operators
25 through water service contracts. (Decision 1485, pp. 14-15 [emphases added].)

26 The Water Board reaffirmed this position in Decision 1641 stating:

27 Notwithstanding the unavailability of water to satisfy existing water rights in the
28 southern Delta during certain periods, the SWRCB has determined that protection of
agriculture in the southern Delta is in the public interest. Water quality objectives have
been set for this purpose, and the USBR is responsible for meeting the Vernalis salinity
objective. The months in which the southern Delta water users' needs exceed their
rights to water under riparian claims are the same months in which water quality
violations tend to occur. Consequently, the southern Delta agricultural uses should not
be deprived of water of useable quality as a result of this decision. However, the
SWRCB urges the SDWA to seek water supply contracts to fill its water supply needs
during water shortages. These shortages occur relatively frequently because of natural
changes in the water supply. (Decision 1641, p. 35 [emphasis added].)

1 **C. The Delta Protection Act and Other Area of Origin Laws do not Give Senior**
2 **Water Right Holders the Right to Divert Stored Water Supplies.**

3 In its legal brief, CDWA et al. allege that the Water Board ignored the legal mandates of the
4 Delta Protection Act (“DPA”) by curtailing senior Delta water rights in order to facilitate exports or
5 protect stored water releases, claiming an “entitlement” by Delta diverters to the stored water
6 supplies of the SWP and CVP pursuant to the Act. (CDWA et al. Brief, pp. 10-12.) California
7 courts and the Water Board have soundly rejected the argument that the DPA, or other area of origin
8 law, gives senior Delta water right holders the right to divert stored water releases.

9 The DPA prohibits exports from the Delta of water necessary to provide water to which the
10 Delta users are ‘entitled’ and water which is needed for salinity control and an adequate supply for
11 Delta users. (Water Code § 12204.) Under Section 12201, the DPA provides for two goals (1)
12 maintaining an adequate water supply in the Delta and (2) providing a common source of fresh water
13 for export to areas of water deficiency. As to the first goal, the DPA provides that “no one may
14 divert water from the Delta that is necessary for salinity control or to provide an adequate water
15 supply for users in the Delta.” (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th
16 674, 768.) The DPA does not specify what is an adequate level of supply for the Delta or exactly
17 what level of salinity control must be provided. (*Id.*; *United States v. State Water Resources Control*
18 *Board*, 182 Cal.App.3d at 139-140 [noting that Board concluded that the Projects are responsible
19 only for maintaining that level of salinity that would exist in the Delta without the projects].) It is up
20 to the Board to determine, in the exercise of its judgment, what level of salinity control should be
21 provided. (*State Water Resources Control Board Cases*, 136 Cal.App.4th at 772.) However,
22 “nothing in the DPA purports to grant any kind of water right to any particular party.” (*Id.* at 771-
23 772 [rejecting argument that the DPA gives Delta riparians and appropriators a right to water stores
24 upstream by others]); *accord Phelps*, 157 Cal.App.4th at 110.) In *Phelps* the court stated that
25 “plaintiffs must have adequate existing water rights, acquired under the laws that govern acquisition
26 of water rights, before they can divert and use water from the channels of the Delta. If existing
27 water rights are not adequate to supply the needs of in-Delta users, the DPA does not ensure the
28 Delta water users an adequate supply.” (*Id.*)

1 Similarly, with regards to the area of origin protections afforded by the Watershed Protection
2 Act (Water Code Sections 11460 et seq.), the court in *El Dorado* explained that while a party might
3 be entitled to a priority under Section 11460, that priority does not extend to water the projects have
4 properly diverted to storage at an earlier date. (152 Cal.App.4th at 976; *see also Phelps*, 157
5 Cal.App.4th at 107-109.) Section 11462 provides that the area of origin statutes shall not be
6 construed so as “to require the Department to furnish to any person without adequate compensation
7 therefore any water made available by the construction of any works by the department.” (*Id.*) The
8 “Legislature did not intend to give users within an area of origin the right to water stored by the
9 Department without paying for it.” (*Id.*; *see also U.S. v. State Water Resources Control Board*, 182
10 Cal.App.3d at 139 [if the needs of the watershed inhabitant can only be met by augmentation of the
11 natural flow, then compensation must be paid to the Projects].) In the *Phelps* decision, the Water
12 Board, citing *El Dorado*, stated that the watershed protection statutes do not create a right to divert
13 water; instead, they provide the inhabitants of the protected watershed with an area of origin priority
14 against water project exports. (Order WR 2007-0027-EXEC, *supra*, 2007 Cal. ENV LEXIS 103
15 *23.)

16 Finally, in an Order discussing the applicability of the DPA, in a challenge to D-1485, as
17 well as area of origin statutes, the Water Board stated that “[a]gainst the CVP and SWP, Delta vested
18 right holders are entitled to no more than without project flows and the resulting salinity conditions.”
19 (*In the Matter of Permit 12720 (Application 5625) and Other Permits of the U.S. Bureau of*
20 *Reclamation for the Federal Central Valley Project and of California Department of Water*
21 *Resources for the State Water Project*, Order WR 78-17, 1978 Cal. ENV LEXIS 35, *25-26.) The
22 Water Board concluded that any additional benefit that might accrue from the DPA was not a part of
23 the vested right but was a separate statutorily conferred benefit. Under Water Code section 11462,
24 made applicable to the DPA, the DWR is not required to furnish water to anyone without adequate
25 compensation therefore. (*Id.*) The State Board concluded that together the watershed of origin
26 statutes and the DPA “reveal a statutory scheme in which statutorily conferred benefits are to be paid
27 for. None of these statutes establish a vested right to additional water.” (*Id.*)
28

1 **D. The State Water Contractors are Injured by Unlawful Diversions of Stored**
2 **Water Releases**

3 CDWA et al. allege that the Projects cannot claim a “senior” right to water released “for the
4 benefit of Delta diverters” and that the Water Board failed to show an injury to a “senior water right”
5 justifying curtailment. (CDWA et al. brief, pp. 4-5.) Unlawful diversions of SWP stored water
6 released to the Delta for the purpose of satisfying WQCP and other regulatory obligations and/or for
7 diversion by the SWP injure the SWC member agencies as the contractual beneficiaries of the SWP.
8 (Hutton Decl., SWC0001, ¶¶ 18, 19.) These unlawful diversions cause the SWP (and CVP) to
9 make additional stored water releases to satisfy WQCP and other regulatory requirements, thereby
10 decreasing the stored water supplies of the SWP available to SWC member agencies. (Hutton Decl.,
11 SWC0001, ¶ 19.)

12
13 **II. Regulatory Obligations Under the WQCP were not Improperly “Shifted” When the**
14 **Useable Water Supply for those with Alleged Senior Water Rights Dissipated.**

15 CDWA et al. alleges that Water Board actions to “curtail” senior water rights were a
16 violation of water rights priorities, even if such water rights holders were pumping stored water
17 supplies requiring additional releases of stored water supplies to meet WQCP objectives. CDWA et
18 al. argues that by, granting the temporary urgency change petition to DWR and Reclamation while
19 curtailing water rights, the Board “sought to shift, and did in fact shift,” the Projects’ regulatory
20 burden of WQCP compliance onto senior water rights. (CDWA et al. Brief, pp. 12-14.)

21 As discussed above, neither the alleged senior water rights nor the statutory protections
22 offered by the DPA or the Watershed Protection Act provide Delta diverters with the right to divert
23 the stored water releases of the SWP or CVP. Any diversions, including of stored water releases, by
24 Delta diverters, when water was unavailable under their respective water rights, was unlawful.
25 Nothing in the *El Dorado* decision cited by CDWA et. al. sanctions the diversion of water when
26 water is otherwise unavailable under a water right or the diversion of stored water releases (142
27 Cal.App.4th 937, 968.)

28 Citing *El Dorado*, CDWA et al. alleges that the Water Board’s actions violated the rules of
water rights priorities by requiring BBID to bypass natural flow to which it was entitled for the

1 purported “benefit” of the Projects. (CDWA et al. Brief, pp. 12-14.) As determined by the Water
2 Board, however, water was not available under BBID’s water right for appropriation. As such no
3 “natural flow” available under water right priority to BBID was bypassed to meet water quality
4 objectives for which BBID had no obligations, the scenario discussed in *El Dorado*. (*Id.* at 968-69.)

5 Moreover, it is wholly untrue that the regulatory burden of WQCP compliance was
6 improperly “shifted” from the DWR or Reclamation to Delta Diverters, allegedly “benefitting” the
7 Projects. Throughout 2015, the DWR continued to meet WQCP standards pursuant to its water
8 rights permits, as modified by the Board, providing salinity protection to the Delta. (Hutton Decl.,
9 SWC0001, ¶ 18.) To meet its regulatory obligations, the DWR continued to make releases of stored
10 water from its reservoirs, cut its exports, and installed salinity barriers. (Hutton Decl., SWC0001, ¶
11 19.) At no time did the Water Board order BBID or any other water right holder in the Delta to meet
12 WQCP standards *in lieu of* compliance by the DWR (or Reclamation).

13
14 **III. Water is Unavailable for Diversion at Salinity Levels Above 1 EC Because it Cannot Be
Put to Reasonable and Beneficial Use for Agricultural Purposes.**

15 WSID filed a motion for summary judgment, or in the alternative summary adjudication, in
16 part on allegations that water is allegedly *always* available to WSID during the irrigation season.
17 (WSID Motion Brief, pp. 3:2-4, 5:3-11; Undisputed Material Facts (“UMF”) ¶ 16.) In its legal brief,
18 CDWA et al. also allege that water is always available for diversion in the Delta. (*See e.g.*, CDWA
19 et al. Brief, pp. 7-9, 10:6-9, 14:25-26.) This is incorrect. The analyses submitted by WSID (and
20 BBID) in support of its assertions of water availability are flawed because they use an incorrect
21 baseline.

22 Second, an analysis of salinity conditions conducted by CH2M Hill on behalf of the State
23 Water Contractors established that water is *not* always available during the irrigation season. (*See*
24 Declaration of Paul Hutton (“Hutton Decl.”), SWC0001, ¶¶ 17, 33.) This analysis demonstrates that,
25 under without Project operations, salinity levels in the Delta would be unsuitable for reasonable and
26 beneficial use for agricultural purposes during the irrigation season of many dry and critically dry
27 years. (*Id.*; SWC0005.) It is well settled that pursuant to Article X, Section 2 of the California
28 Constitution the right to the use of waters of the State is limited to a reasonable beneficial use.

1 (*Meridian, Ltd. v. City and County of San Francisco* (1939) 13 Cal.2d 424, 445; *Peabody v. City of*
2 *Vallejo* (1935) 2 Cal.2d 351, 383; *Tulare Irrigation District v. Lindsey-Strathmore Irrigation*
3 *District* (1935) 3 Cal.2d 489, 524; *Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d 132,
4 138.) There is no vested water right to the unreasonable use of water. (*Imperial Irrigation Dist. v.*
5 *State Water Resources Control Board* (1990) 225 Cal.App.3d 548; *Tulare Irrigation District*, 3 Cal.
6 2d.at 547.)

7 **A. WSID’s (and BBID’s) Water Availability Analyses Use An Incorrect Baseline**

8 Because senior Delta water rights do not have rights to stored water supplies, as discussed
9 above, the correct baseline for a water availability analysis is “without project” conditions in which
10 such operations and water supplies are excluded from the calculation. (*See e.g.*, Order WR 78-17,
11 *supra*, 1978 Cal. ENV LEXIS 35, *25-26 [“[a]gainst the CVP and SWP, Delta vested right holders
12 are entitled to no more than without project flows and the resulting salinity conditions”].)

13 Here, WSID (and BBID) has submitted, and rely on, a technical analysis (BBID-384) that
14 modeled two scenarios: (1) conditions in water year 2015 which *included* project operations and (2)
15 conditions in water year 1931 on the assumption that 1931 was representative of conditions that
16 would have occurred during 2015 had the CVP and SWP not been constructed. (BBID-384, pp. 73,
17 96.) Water Year 1931, however, poorly represents 2015 without project conditions. (Hutton Decl.,
18 SWC0001, ¶¶ 20-23, 31.). A scenario analysis of irrigation season Delta outflow and salinity
19 comparing 1931 (historical) and 2015 (without project), as shown in SWC0003, demonstrates that
20 historical outflow during the irrigation seasons (April through August) in 1931 is consistently higher
21 than without project outflow during the irrigation season of 2015 while historical salinity during the
22 irrigation season in 1931 is consistently lower than without project salinity during the irrigation
23 season in 2015. (Hutton Decl., SWC0001, ¶¶ 20-21; SWC0003.) The primary reason that 1931
24 experienced higher outflows and lower salinity than would have occurred in 2015 absent Project
25 operations, is less upstream development (water use) in 1931 than 2015. (Hutton Decl., SWC0001,
26 ¶¶ 20-23; SWC0003.)

27 For these reasons, the correct baseline for a 2015 water availability analysis also uses the
28 current level of development. (Hutton Decl., SWC0001, ¶¶ 23.) An adjudication as to existing

1 water rights or to determine whether unappropriated water exists in a watershed, is determined in the
2 context of present, not past, uses of water. (See *Peabody*, 2 Cal.2d at 368; *Temescal Water Co. v.*
3 *Dep't of Public Works*, 44 Cal. 2d 90, 106; *Tulare Irrigation District*, 3 Cal. 2d. at 567.) An analysis
4 of present uses also accounts for circumstances such as forfeiture or prescription of water rights
5 which can operate to reorder the traditional priorities of the California water rights system.

6 Similarly, an analysis of water availability in the Delta should be premised not just on current
7 use but also on current channel configurations. This is because, for the most part, the extent of lands
8 having riparian rights requires that the land “must be contiguous to or about on the stream.”
9 (*Rancho Santa Margarita v. Vail*, 11 Cal.2d 501, 528 (1938).) Case law and Board decisions
10 establish that a water availability assessment should use the current configuration of Delta channels.
11 (See *id.* at 548; *McKissick Cattle Co. v. Alsaga* (1919) 41 Cal.App. 380, 387-389; *Paige v. Rocky*
12 *Ford Canal and Irrigation Co* (1890) 83 Cal. 84, 93.) As the Board stated in *Phelps*, “[p]ast
13 configurations of the land are not the basis of riparian rights; instead, riparian rights are determined
14 from the current topography.” (Order WR 2004-004, *supra*, 2004 Cal. ENV LEXIS 104 *21)

15 The technical analysis relied upon by WSID, BBID-384, is flawed because it utilizes an
16 incorrect baseline for its analyses.

17 **B. Without Project Operations, Salinity in the Delta in the Summer and Fall of**
18 **Many Dry and Critically Dry Years Would Exceed Levels for Reasonable and**
19 **Beneficial Use, a Limitation on all Water Rights**

20 An analysis of salinity conditions in south Delta channels under a without project scenario
21 demonstrates that, absent the CVP and SWP, salinity levels (measured as specific conductance)
22 would be above 1.0 mS/cm during the irrigation seasons of many dry and critically dry years.
23 (Hutton Decl., SWC0001, ¶¶ 13-15, 17, 33; SWC0005.) Salinity Levels of 1.0 mS/cm are higher
24 than the current irrigation season WQCP agricultural standard of 0.7 mS/cm indicating that water
25 quality would be too poor to support for reasonable and beneficial use for agricultural purposes
26 during the irrigation season of many dry and critically dry years. (Id. ¶ 33.) All water rights,
27 including WSID’s and BBID’s, are limited to reasonable and beneficial use of water under Article
28 X, Section 2 of the California Constitution. This analysis establishes that water is *not always*
available at WSID point of diversion during the irrigation season as alleged in UMF ¶ 16.

1 Historical data collected before the construction of Shasta Dam, provided further
2 corroboration that the Delta was subject to severe seawater intrusion before the construction and
3 operation of the SWP-CVP. (Hutton Decl. ¶¶ 26-30.) The existence of such poor water quality
4 conditions during this same time period is noted by the DWR in Bulletin 27. (Hutton Decl.,
5 SWC0001 ¶ 30, SWC0004.) in which the DWR stated:

6 Beginning in 1917, there has been almost an unbroken succession of subnormal years
7 of precipitation and stream flow which, in combination with increased irrigation and
8 storage diversions from the upper Sacramento and San Joaquin River systems, has
9 resulted in a degree and extent of saline invasion greater than has occurred ever before
10 as far as known. These abnormal saline invasions not only have curtailed irrigation
11 diversions and affected crop production and land values in the delta also have reduced
12 considerably the diversions of fresh-water supplies from the lower river and upper bay
13 channels by the industries in the upper Suisun Bay area, thus increasing the difficulties
14 and cost of obtaining industrial fresh-water supplies. The seriousness of this situation
15 resulted in the initiation of investigations of salinity by the State, leading to the present
16 investigation and report. (DWR Bulletin 27, SWC0004, p. 16.)

17 Despite unsubstantiated claims to the contrary, water is not *always* available for diversion at
18 their either WSID or BBID's respective points of diversion. For this reason, and also based on
19 SWC's responses to WSID's Statement of Undisputed Material Facts filed separately, SWC
20 respectfully request that the Water Board deny WSID's motion for summary judgment, or in the
21 alternative, summary adjudication.

22 **IV. Conclusion**

23 For the reasons stated above, the legal arguments that senior Delta water rights have a right
24 to the stored water supplies of the SWP or CVP or that the Water Board unlawfully shifted the
25 burden of compliance with WQCP standards to senior water right holders is incorrect. Similarly, for
26 the reasons stated above, WSID's motion for summary judgment or, in the alternative, summary
27 adjudication should be denied.

28 Dated: February 21, 2016

DUANE MORRIS LLP

By: 
Thomas M. Berliner
Jolie-Anne S. Ansley

Attorneys for State Water Contractors

DM2\6552682.1