SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

500 CAPITOL MALL, SUITE 1000, SACRAMENTO, CA 95814
OFFICE: 916-446-7979 FAX: 916-446-8199
SOMACHLAW.COM

March 17, 2016

Via Electronic Mail

Frances Spivey-Weber
Vice Chair
Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814

Cris Carrigan
Director
Office of Enforcement
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814

Tam M. Doduc
Board Member
Division of Water Rights
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814

Re: BBID/WSID Hearings

Dear Mses. Spivey-Weber and Doduc and Mr. Carrigan:

The purpose of this letter is to state the Byron-Bethany Irrigation District's (BBID) concern with the due process violations that result from the State Water Resources Control Board's (SWRCB) Office of Enforcement's continued and ongoing prosecution of the Administrative Civil Liability Complaint to BBID, Enforcement Action (ENF01951), and with the SWRCB's refusal to address the significant due process violations that result from the unlawful June 12, 2015 Curtailment Notice, July 15, 2015 Rescission and Clarification, and the proceedings surrounding ENF01951. This letter also serves to advise you that ENF01951 is being prosecuted and adjudicated in violation of *Sackett v. United States EPA* (2012) 132 S.Ct. 1367 (*Sackett*), *Hawkes Co. v. United States Army Corps of Eng'rs* (2015) 782 F.3d 994 (*Hawkes*), and *Duarte Nursery, Inc. v. United States Army Corps of Eng'rs* (2014) 17 F. Supp.3d 1013. The SWRCB's Office of Enforcement knowingly maintains ENF01951 in violation of BBID's and its landowners' due process rights as addressed in the aforementioned cases. Moreover, the SWRCB, through its actions in purporting to curtail BBID's water rights, and in its representations to the Courts of this State with respect to the import of the SWRCB's

curtailment and finding of unavailability, continues to knowingly and purposefully deprive BBID and its landowners of their due process rights. BBID filed pre-hearing motions in an attempt to have the SWRCB properly address these due process issues. To date, however, the SWRCB has not issued rulings, and has not corrected the ongoing due process violations.

On June 12, 2015, the SWRCB issued a Curtailment Notice to BBID commanding BBID to cease all diversions of water under BBID's pre-1914 appropriative water right. The SWRCB based the command on its determination that there was insufficient water available to satisfy BBID's pre-1914 appropriative water right. On June 25, 2015, BBID filed a Petition for Reconsideration with the SWRCB, seeking, among other things, review of the SWRCB's curtailment of BBID's pre-1914 water right, and the SWRCB's determination of the unavailability of water for BBID to divert. By letter dated July 24, 2015, the SWRCB refused to accept BBID's Petition for Reconsideration because, according to the SWRCB, the Curtailment Notice was not an "order".[1] With that, the SWRCB conveyed to BBID that there was no SWRCB administrative review available with respect to the June 12, 2015 Curtailment Notice, or the determination that there was insufficient water available for BBID to divert. Thus, according to the SWRCB, subsequent to receiving the June 12, 2015 Curtailment Notice, BBID had two options: 1) cease diverting water consistent with the Curtailment Notice, or 2) continue diverting and risk the SWRCB initiating an enforcement action against BBID.

The SWRCB refused to "reconsider" any of the claims contained in the June 12, 2015 Curtailment Notice, and argued to the Superior Court that BBID can only challenge the June 12, 2015 Curtailment Notice when *and if* the SWRCB brings an enforcement action against BBID. In other words, the SWRCB's use of the June 12, 2015 Curtailment Notice was "designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." (*Sackett, supra,* 132 S.Ct. at p. 1374.) BBID was left to the "mercy" of the SWRCB, potentially subjecting itself to fines in the millions of dollars without having the ability to challenge the SWRCB's prior determination in Court. As the United States Supreme Court made clear in *Sackett*, "[i]n a nation that values due process, not to mention private property, such treatment is unthinkable." (*Id.* at p. 1375 (conc. opn. of Alito, J).)

The SWRCB's July 15, 2015 Rescission and Clarification letter, purporting to rescind the "curtailment" portion of the June 12, 2015 Curtailment Notice, did not cure the due process violation, but instead perpetuated it. In fact, the SWRCB expressly maintained the SWRCB's determination that there was insufficient water to meet certain

---

[1] In denying BBID's Petition for Reconsideration, the SWRCB stated that "the information underlying the [June 12, 2015] notice may form the basis for allegations in a subsequent adjudicative proceeding before the [SWRCB] or in Court."

pre-1914 appropriative water rights. The rescission and clarification further informed water right holders to not recommence diversions "before being notified by the [SWRCB] that water is legally available for diversion under your priority of right." The continuing due process violations contained in the July 15 Rescission and Clarification are made clear by the SWRCB's "Fact Sheet: Question and Answers on Notices of Unavailability of Water Issued In the Sacramento River Watershed, San Joaquin River Watershed and Delta and Scott River" prepared to provide clarity and explanations of the Rescission and Clarification. This "Fact Sheet" provides:

> The State Water Board staff has determined based upon available data that, as of the date of the original notice, there is not enough water in the system for water right holders with your priority to divert unless you have an alternative water source or some other legal basis for diverting water. If you continue to divert water and are unable to demonstrate your diversion is authorized under California's water rights priority system, you may be subject to administrative or civil enforcement seeking injunctive relief and civil penalties.

The Fact Sheet also made clear that:

> The Clarification Notice removes a portion of the Unavailability Notices that might have been construed as ordering water right holders to stop diversions, as well as the requirement to submit a Certification Form (Form) attached to the Unavailability Notices. Otherwise, the original Unavailability Notice remains the same.

Therefore, the SWRCB's determination that there was insufficient water for certain pre-1914 appropriative water rights, was *not rescinded*. As explained in the Fact Sheet:

> The Clarification Notice informs its recipients that the State Water Board staff has determined, based upon available information, that there is not enough water in the system to divert under the recipient's priority of right as of the original notice date unless the recipient has an alternative water source or some other legal basis for diverting water. It informs the recipient of the severity of the situation, and provides information on whether water is needed to remain instream to serve senior right holders.
>
> Diverters should be aware that they may be subject to enforcement if they do not stop diversions due to insufficient water supply under the priority of their water rights, unless they have an alternative water source or some other legal basis for diverting water, irrespective of whether the State

> Water Board has advised them that water is not available to serve their priority of right.
>
> The Clarification Notice reminds water rights holders that diversion when there is no available water under the priority of the right is unauthorized diversion and use, subject to enforcement by the State Water Board. Penalties of up to $1,000 per day of violation and $2,500 for each acre-foot diverted or used in excess of water available to the water right priority may be assessed.

This is precisely the type of "strong arming" of regulated parties into "voluntary compliance" without the opportunity for judicial review that a unanimous United States Supreme Court found repugnant in *Sackett*. (*Sackett, supra,* 132 S.Ct. at p. 1374.)

In *Sackett,* the Sacketts received a compliance order from the Environmental Protection Act (EPA), which stated that their residential lot contained navigable waters, and that their construction project violated the Act. (*Sackett, supra,* 132 S.Ct at p. 1368.) The Sacketts, who did not believe their property was subject to the Clean Water Act (CWA), asked the EPA for a hearing, but that request was denied. (*Id.* at p. 1371.)Both the District Court and the Ninth Circuit denied relief, concluding that the CWA precludes pre-enforcement judicial review of compliance orders, and that such preclusion does not violate the Fifth Amendment's due process guarantee. (*Id.* at p. 1368.)

The Sackett's experience with the EPA is remarkably similar to the SWRCB's June 12, 2015 Curtailment Notice, the July 15 2015 Rescission and Clarification, and refusal to accept BBID's Petition for Reconsideration. As explained in *Sackett*:

> As the Sacketts learned when they unsuccessfully sought a hearing, the "Findings and Conclusions" that the compliance order contained were not subject to further agency review. The Government resists this conclusion, pointing to a portion of the order that invited the Sacketts to "engage in informal discussion of the terms and requirements" of the order with the EPA and to inform the agency of "any allegations [t]herein which [they] believe[d] to be inaccurate." [citations]. But that confers no entitlement to further agency review. The mere possibility that an agency might reconsider in light of "informal discussion" and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.

(*Sackett, supra,* 132 S.Ct. at p. 1371.)

Like the SWRCB's position with respect to curtailments and water availability, the Sacketts could not initiate any judicial review process, which was triggered only through an enforcement action brought by the EPA. "[E]ach day [the Sacketts] wait[ed] for the agency to drop the hammer, they accrue[d] . . . an additional $75,000 in potential liability." (*Sackett, supra,* 132 S.Ct at p. 1368.) In rejecting the argument that the Sacketts could not get judicial review of the EPA decision, the Supreme Court determined that this minimal due process protection, providing for judicial review, was a "repudiation of the principle that efficiency of regulation conquers all." (*Id.* at p. 1374.).)

The holding in *Sackett* was applied in *Hawkes*. In *Hawkes*, Hawkes Co., Inc. wanted to mine peat from wetland property owned by two affiliated companies in northwestern Minnesota. The Corps of Engineers sent a letter to Hawkes advising it had made a "preliminary determination" the wetland was a regulated water of the United States. (*Hawkes, supra,* 782 F.3d 994 at p. 998.) After undergoing an internal appeal process at the Corps of Engineers, a final Jurisdictional Determination (JD) issued. Hawkes attempted to challenge the JD in Court. The District Court dismissed the complaint for lack of final agency action.

On appeal, the Eighth Circuit Court of Appeal overturned the District Court's dismissal. In doing so, the Court agreed with the reasoning in Sackett, recognizing that the "prohibitive costs, risk, and delay of [] alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project" without having to be subjected to judicial review. (*Hawkes, supra,* 782 F.3d 994 at p. 1001.)

Importantly, the Court rejected the agency's argument that the Corps' determination was "merely advisory". (*Hawkes, supra,* 782 F.3d 994 at p. 1002.) Here, the same problems exist. The SWRCB issued the Curtailment Notice and subsequent Rescission and Clarification that maintained the prior finding of unavailability. While the SWRCB attempted to explain that the finding of unavailability was merely advisory, it left water right holders with the option of complying with the notice and ceasing diversions, or continuing to divert and facing the likelihood of substantial fines and penalties when and if the SWRCB initiated an enforcement action. The only way for BBID to obtain judicial review of the SWRCB's determination that there was no water available for BBID to divert was to ignore the notice and continue to divert. In other words, it left BBID "little practical alternative but to dance to the [SWRCB's] tune." "In a nation that values due process, not to mention private property, such treatment is unthinkable." (*Ibid.*, citing *Sackett*, 132 S. Ct. at p. 1375 (conc. opn of Alito, J.).

The SWRCB must dismiss ENF01951 because it initiated and continues to prosecute the action in violation of basic due process.

Very truly yours,

Daniel Kelly

DK:yd
cc: Andrew Taurianen *(via electronic mail)*
Michael Lauffer *(via electronic mail)*
Service List

SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING
(Revised 9/2/15; Revised: 9/11/15)

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
Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com	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
Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com Dante John Nomellini Daniel A. McDaniel Dante John Nomellini, Jr. NOMELLINI, GRILLI & MCDANIEL 235 East Weber Avenue Stockton, CA 95202 ngmplcs@pacbell.net dantejr@pacbell.net	California Department of Water Resources Robin McGinnis, Attorney P.O. Box 942836 Sacramento, CA 94236-0001 robin.mcginnis@water.ca.gov
Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rmorat@gmail.com	San Joaquin Tributaries Authority Tim O'Laughlin Valerie C. Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 towater@olaughlinparis.com vkincaid@olaughlinparis.com

South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: Jherrlaw@aol.com	State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org

SERVICE LIST
WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER HEARING

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	The West Side Irrigation District Jeanne M. Zolezzi Karna Harringfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Avenue, Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com kharringfeld@herumcrabtree.com jkrattiger@herumcrabtree.com
State Water Contractors Stefani Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org	Westlands Water District Daniel O'Hanlon Rebecca Akroyd Kronick Moskovitz Tiedemann & Girad 400 Capitol Mall, 27th Floor Sacramento, CA 95814 dohanlon@kmtg.com rakroyd@kmtg.com Phillip Williams of Westlands Water District pwilliams@westlandswater.org
South Delta Water Agency John Herrick Law Offices of John Herrick 4255 Pacific Avenue, Suite 2 Stockton, CA 95207 Email: Jherrlaw@aol.com	Central Delta Water Agency Jennifer Spaletta Law PC P.O. Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com Dante Nomellini and Dante Nomellini, Jr. NOMELLINI, GRILLI & MCDANIEL ngmplcs@pacbell.net dantejr@pacbell.net

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	San Joaquin Tributaries Authority Valerie C. Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 vkincaid@olaughlinparis.com
Byron-Bethany Irrigaton District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 dkelly@somachlaw.com	California Department of Water Resources Robin McGinnis, Attorney P.O. Boc 942836 Sacramento, CA 94236-0001 robin.mcginnis@water.ca.gov