I. INTRODUCTION

The State Water Resources Control Board (State Water Board) issued an Administrative Liability Complaint (ACL Complaint) against the Byron Bethany Irrigation District (BBID) on June 20, 2015. The State Water Board issued a draft cease and desist order (CDO) against the Westside Irrigation District (WSID) on July 16, 2015. The ACL Complaint and CDO (collectively referred to as “Enforcement Actions”) are based primarily on allegations that BBID and WSID continued to divert water after receiving notice that the State Water Board staff had determined there was not sufficient water to support BBID and/or WSID diversions. The State Water Board staff determined unavailability based on
the water availability analysis (WAA) developed and administered by staff to support curtailment actions in 2015.

Each party to this matter has a different interpretation of what this matter is about. The Prosecution Team will tell you this matter is an enforcement action and has nothing to do with curtailment. The parties accused of unauthorized diversion, BBID and WSID, rightfully understand this matter to be about authority and evidence to prove allegations of unlawful diversion. For the San Joaquin Tributaries Authority (SJTA), this matter is fundamentally about when the State Water Board is required to take action as a state agency. The SJTA and its members are not accused of unauthorized diversion in this matter. However, if the actions taken by the State Water Board staff in this matter are determined to be valid or otherwise approved, the rules under which the SJTA and its members are able to divert and store water will be dramatically altered. For this reason, the SJTA and its members are vitally interested in the determinations made in the Enforcement Actions.

The SJTA has previously submitted briefing in this matter regarding the State Water Board's jurisdiction over pre-1914 water right holders, the due process violations inherent within the staff determination of water availability, the authority to delegate the authority to issue enforcement orders to staff, and the lack of continuing authority to regulate previously appropriated water. The SJTA believes these issues are fundamental. However, despite their importance, the SJTA will not repeat the arguments it has made previously, but instead, incorporates them into this document by reference.

Instead, the SJTA will focus this opening brief on two issues: (1) State Water Board involvement in curtailment actions; and (2) the primary deficiency of the WAA.

II. STATE WATER BOARD ACTION RELATING TO CURTAILMENT

The State Water Board was not involved and did not authorize the approach to curtailing water users in 2015. One of the consistent and overarching themes in the depositions of the State Water Board staff members was the lack of direction or authorization from the State Water Board on curtailment and water availability analyses
issues. Brian Coats testified that he believed the authorization for curtailment actions in 2015 came from “upper management” within the State Water Board staff. He was not aware of any direction from the State Water Board. (Coats Deposition, at 123:15-124:10; 173:16-174:21.) Jeff Yeazell created the spreadsheets for curtailment. He testified that he was the only person that worked on the spreadsheets, and he only spoke with Brian Coats about the spreadsheets; he never spoke with or received direction from the State Water Board. (Yeazell Deposition, at 22:8-14; 27:12-28:10.) Kathy Mrowka testified that she and her staff, including Brian Coats, Jeff Yeazell, and John O’Hagan, made water availability analyses decisions unilaterally. (Mrowka Deposition, at 233:4-236:14; 237:3-238:9.) She further testified that staff determined when water was and was not available for specific groups of water users. (Id., at 24:23-25.) When specifically asked about State Water Board authorization, Ms. Mrowka testified that she believed the State Water Board was briefed and “gave the nod” to go ahead with curtailment, but she did not receive direction from the State Water Board directly. (Id., at 192-18-193:19.) Mr. Howard testified he did not recall whether he received direction from the State Water Board regarding curtailment. (Howard Deposition, at 97:24-98:20.) Thus, it appears that staff did not receive any specific direction or authorization from the State Water Board regarding curtailment.

The lack of State Water Board involvement in the 2015 curtailment is in stark contrast to its role in the 2014 curtailment. In 2014, State Water Board staff developed two different draft emergency curtailment regulations. (See State Water Resources Control Board, Emergency Regulations: Statewide Drought Related Curtailment to Protect Senior Water Rights, http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/emergency_regulations.shtml.) Both of the emergency regulations were based on the new authority granted by Water Code section 1058.5. (State Water Resources Control Board, Notice of Proposed Emergency Rulemaking (June 20, 2014) at N-1 available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/emergency_regulations/nperm_sw_eregs_062014.pdf.) The first regulation curtailed post-1914 water right holders and the second proposed to curtail pre-1914 water right holders.
The draft regulations were released for public comment. (State Water Resources Control Board, June 20, 2014 Draft Regulations, at 20 available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/emergency_regulations/attach5_draft_regs_and_info062014.pdf.) The State Water Board held a meeting at which they spent multiple hours receiving comments, suggesting edits, and generally discussing the curtailment regulations. In the end, the State Water Board chose to adopt a Resolution regarding post-1914 curtailment regulations with several significant amendments. (State Water Resources Control Board, Resolution No. 2014-0031 (July 2, 2014), available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/emergency_regs/attach2_rs2014_0031_with_regs.pdf.) The State Water Board chose not to adopt the pre-1914 curtailment regulations. (Id., at ¶ 21.)

The 2015 curtailment process was vastly different. The State Water Board staff did not propose regulations. The public did not have the opportunity to comment on a proposed regulation or approach. There was no opportunity for the public to provide concern and/or input to State Water Board members. There was no public discussion or deliberation among and between State Water Board members. There was no opportunity for the State Water Board to provide staff with direction on how to proceed with curtailment. There was no opportunity for the State Water Board to vote on the issue of whether to curtail post-1914 or pre-1914 water right holders.

Instead, State Water Board staff unilaterally developed a methodology and issued curtailment notices to post-1914 and pre-1914 water right holders. The staff actions departed significantly from the State Water Board-approved actions the year before, especially from the perspective of a pre-1914 water right holder. The evidence and depositions in this matter to date do not make clear who is responsible for the decision to change the course of curtailment so drastically from one year to the next or when that decision was made.

The SJTA is concerned with the significant shift in approach for several reasons. First, curtailment is a controversial issue that has statewide implications. These types of decisions are historically handled at the State Water Board level and not by staff. In fact,
during the 2014 curtailment hearing, several State Water Board members recognized the gravity of curtailment decisions and specifically expressed their opinion that curtailment decisions were of such significance that they must be handled by the elected State Water Board and could not be delegated to staff. Board Member D’Adamo stated: “I’d feel better if the Board grappled with it because we are talking about some big issues that have been around for quite some time.” (Dorene D’Adamo, SWRCB Meeting Item 5, July 1, 2014 [Archived Copy 3 of 3 at 4:00].) Board Member Dudoc agreed and further remarked that “we as a board have a responsibility to tackle these issues ourselves, and not just delegate it to [staff] . . . we should have these discussions publicly . . . because the magnitude of these topics is so critical and because we do need to have that in order to develop a level of trust.” (Tam Dudoc, SWRCB Meeting Item 5, July 1, 2014 [Archived Copy 3 of 3 at 18:14].)

The sentiments of the State Water Board members above make sense and reflect existing rules and regulations for State Water Board delegation. Resolution 2012-029 prohibits the State Water Board from delegating any issue that requires substantive policy decisions and is controversial in nature. Thus, the second reason the SJTA objects to the 2015 curtailment process is that staff acted without authorization. The State Water Board is prohibited from delegating any authority it may have and allow staff to undertake statewide curtailment action. Without lawful delegation, the staff has no authority to conduct water availability analyses and make determinations of when water is available for particular water users or particular groups of water users.

The third reason the SJTA objects to the 2015 curtailment process is that it lacked transparency and public review. From the depositions of State Water Board staff, it has become clear that the curtailment approach and water availability analyses were developed by one or two individuals without any stakeholder input, peer review, or other testing of inputs or approach. (Coats Deposition, at 123:15-124:10; 173:16-174:21; Yeazell Deposition, at 22:8-14; 27:12-28:10; Mrowka Deposition, at 24:23-25; 233:4-236:14; 237:3-238:9.) The individuals inputting numbers and running the spreadsheets simply input numbers and assumptions provided by other staff. (Id.) It was unclear if any stakeholder...
input was used to change or improve the WAA. (Yeazell Deposition, at 126:24-127:21.)

The WAA was not further reviewed outside Yeazell, Coats, and O’Hagan. (Coats Deposition, at 123:15-124:10; 173:16-174:21; Yeazell Deposition, at 22:8-14; 27:12-28:10; Mrowka Deposition, at 24:23-25; 233:4-236:14; 237:3-238:9.) In essence, a few staff members alone unilaterally determined the water use and curtailment actions for the Sacramento, San Joaquin, and Bay-Delta Watersheds.

Finally, the change in direction regarding how to approach curtailment also lacked transparency. In 2014, staff proposed emergency regulations and had a full public process before adopting regulations. In 2015, staff did not propose emergency regulations and did not engage in any other public actions. Clearly, a decision was made to change directions. However, even after depositions of State Water Board staff, it remains unclear who made this decision, when the decision was made, and why the decision was made, and under what authority it was made.

III. **DEFICIENCIES IN THE WATER AVAILABILITY ANALYSES**

There are several technical deficiencies with the WAA. The SJTA has previously submitted briefing in this matter that explains these deficiencies. The SJTA will not repeat these points here, but incorporates them by reference. Instead, the SJTA will discuss only the primary deficiency of the WAA, which is that it only takes into consideration the full natural flow of water. If the State Water Board were limiting the application of its water availability analysis to the diversion of water pursuant to riparian rights, this approach may be understandable. However, the State Water Board did not apply the water availability to the riparian water right holders. Instead, the State Water Board applied the water availability analysis only to appropriative water right holders. The water available for appropriation by appropriative water right holders is not limited to natural flow. Appropriative water right holders are allowed to divert water that has (a) previously been stored, (b) been imported and/or transferred into the system, (c) been returned to streams after use, (d) been used to meet water quality objectives and not subject to recapture, (e) otherwise been abandoned and (f) been influenced by ocean or tidal means.
Thus, the water availability analysis conducted by State Water Board staff was only applicable to riparian water right holders. However, the State Water Board staff applied the riparian water availability analysis to determine when to curtail appropriative water right holders. Due to the fundamental differences in how to determine supply and demand between riparian and appropriative water right holders, it was not appropriate or legally supportable to apply this analysis to appropriative water use.

IV. RECOMMENDATION

In this opening brief and in other briefing documents in this matter, the SJTA has been critical of the State Water Board staff’s actions during the 2015 curtailment process, the development of the water availability analysis, and the enforcement actions resulting therefrom. However, the SJTA understands it is easy to throw rocks, but more challenging to offer a solution. In that spirit, the SJTA recommends the State Water Board re-direct the enforcement efforts in the WSID and BBID matters into developing a method through which the State Water Board can properly communicate water availability during times of water shortage. The State Water Board has a critical role in times of drought by providing timely information that will help water operators plan their water operations. If water users understand and support how this information was developed, they will accept it and rely on it as operational guidance. To the extent water users do not understand or support the analysis, it will be questioned, resisted, and challenged. The goal of the curtailment actions should be education and adherence, which avoid the need for enforcement.

DATED:  February 29, 2016  O’LAUGHLIN & PARIS LLP

By:  

TIM O’LAUGHLIN
VALERIE KINCAID, Attorneys for
SAN JOAQUIN TRIBUTARIES AUTHORITY
Re: SWB - BBID-ACL/WSID CDO Hearings

PROOF OF SERVICE BY MAIL
(Government Code §11440.20)

I, Linda L. Wood, declare that:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within cause. My business address is 2617 K Street, Suite 100, Sacramento, CA 95814. On this date, in the following manner, I served the foregoing document(s) identified as:

SAN JOAQUIN TRIBUTARIES AUTHORITY'S OPENING BRIEF

E-MAIL [CCP §1010.6]: Based on pending consent of the parties, and/or court order or an agreement of the parties to accept service by e-mail, I caused the documents to be sent to the following persons at the following e-mail address, and did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful:

PERSONAL DELIVERY [CCP §415.10]: I arranged to have the documents personally delivered to the office of the persons identified below on ______________:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 29th day of February, 2016, at Sacramento, California.

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PROOF OF SERVICE
WEST SIDE IRRIGATION DISTRICT

CEASE AND DESIST ORDER

HEARING

(October 8, 2015)

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