

TESTIMONY OF KATHRYN BARE

I am a Professional Engineer, registered in California, and a Water Resources Control Engineer with the State Water Board, Division of Water Rights. I have over 22 years of experience with the State Water Board; the last 4 years have been with the Enforcement Section within the Division. My job duties include investigating complaints of the unauthorized diversion and use of water, violation of water rights permit and license terms, and the waste or unreasonable use of water. A copy of my resume is attached as Prosecution Team Exhibit WR-14.

This testimony is based on my personal knowledge of the evidence, actions, and rationale for the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) recommendation to issue a Cease and Desist Order (CDO) against West Side Irrigation District (WSID).

My role in the investigation into WSID's diversion and use of water includes investigating a public complaint against the City of Tracy alleging the sale of treated wastewater effluent to WSID without the proper legal authority. The information gathered and received as part of the complaint investigation was used by the Division when issuing a draft Cease and Desist Order (CDO) against WSID. My involvement also included reviewing WSID's water right permit files, analyzing documents submitted as part of WSID's responses to the Prosecution Team's October 29, 2015, Subpoena, and determining whether WSID was in compliance with their license terms and conditions. I also prepared and maintain portions of the investigation file.

WSID Subpoena Responses

As of the date of the preparation of this statement, WSID has submitted three separate groups of responses to the Prosecution Team's October 29, 2015, Subpoena. On November 30, 2015, WSID submitted three bankers-box sized boxes filled with paper documents and an electronic copy of water diversion tables. These documents were not indexed, but they were grouped into file folders roughly corresponding to the specific document requests listed in the Subpoena. On December 30, 2015, WSID submitted three more bankers-box sized boxes filled with unindexed and unorganized documents. On January 11, 2015, the week before this statement is due, WSID submitted another bankers-box sized box filled with unindexed and unorganized documents. The scattered timing and lack of organization of WSID's submittals made it impossible to review all of the documents in time to prepare this statement. It is possible that WSID's submittals contain additional documents relevant to the conclusions below. I intend to review the rest of the WSID Subpoena response submittals and submit any additional documents prior to or along with the Prosecution Team's rebuttal evidence.

PUBLIC COMPLAINT OF UNAUTHORIZED SALE OF WASTEWATER BY THE CITY OF TRACY TO WEST SIDE IRRIGATION DISTRICT

A complaint filed on the CalEPA website by Steve Nicolaou (Complainant) on March 27, 2015, alleged that the City of Tracy (City) had entered into a contract to sell treated effluent from its water treatment facility into Old River to the West Side Irrigation District (WR-126 is a true and correct copy). The complainant alleged that the City had not applied to the State Water Board to obtain consent to the proposed sale of the treated wastewater to WSID as mandated by Water Code Section 1211, and that the proposed sale appeared to be an illegal diversion of water.

On April 2, 2015, my supervisor assigned the complaint to me for investigation. He forwarded an email message to me from the Complainant to Ms. Kathy Mrowka, Enforcement Section Manager of the Division (WR-127 is a true and correct copy). The email provided information that the Complainant had sent to Mr. Troy Brown, City Manager for Tracy with his concerns regarding the proposed sale of wastewater to the City. The email also indicated that the City had sold wastewater to WSID in 2014. I reviewed Agenda Items and Meeting Minutes on the City of Tracy's website and confirmed that the City had entered into an agreement with WSID in 2014 for the sale of wastewater effluent and had authorized a similar agreement for 2015. WR-167 is a true and correct copy of Tracy City Council Resolution 2014-065, authorizing the 2014 agreement. WR-168 is a true and correct copy of Tracy City Council Resolution 2015-0033, authorizing the 2015 agreement. The relevant City Council Agenda Items and Minutes are referenced in WR-187 through WR-190.

When investigating a complaint, I typically begin by writing an inquiry letter to the alleged offender requesting a response to the allegations. On April 10, 2015 (amended on May 26, 2015 to include the correct potential liabilities for unauthorized diversions during drought), I sent a letter to Mr. Brown asking him to respond to the allegations and to provide specific information regarding the sale of water to WSID (Exhibits WR- 128 and WR-130 are true and correct copies). Jack Alvarez, President of WSID, was copied on the letter.

In a letter dated May 7, 2015, the City and WSID provided a coordinated response to my letter (Exhibit WR-129 is a true and correct copy). The response indicated that Water Code Section 1211 (b) had been satisfied and that no wastewater change petition was required for the City to sell its wastewater. I discussed the letter with my supervisor and suggested we get a legal opinion from Andrew Tauriainen, State Water Board, Office of Enforcement. WR-131 is a true and correct copy his response to counsel for WSID and the City of Tracy.

2014 WATER DIVERSIONS AND BASIS OF RIGHT

I investigated WSID's 2014 water diversions and the possible basis for them, and reviewed License 1381 to determine how it affected WSID's water rights. I also reviewed WSID's response to the Prosecution Team's October 29, 2015, Subpoena (WR-169 is a true and correct copy of the Subpoena).

License 1381

WSID holds water right License 1381, originally issued on September 29, 1933, and amended on August 19, 2010. License 1381 has a priority date of April 17, 1916, and authorizes the direct diversion of 82.5 cubic-feet per second (cfs) from Old River in San Joaquin County from (1) about April 1 to October 31 of each year for irrigation, and (2) from April 1 to October 31 of each year for municipal, domestic and industrial uses. From 2007 through 2013, WSID reported that it diverted an average of 22,543 acre-feet per year under License 1381. WSID does not hold or claim any other appropriative or riparian water rights. See Exhibits WR-112 [License 1381], WR-113 [2001 Petition Service area map], WR-114 [License Map], WR-115 [2007 Report of Licensee], WR-116 [2008 Report of Licensee], WR-117 [2009 Report of Licensee], WR-118 [2010 Report of Licensee], WR-119 [2011 Report of Licensee], WR-120 [2012 Report of Licensee], WR-121 [2013 Report of Licensee], and WR-122 [2014 Report of Licensee] (all true and correct copies).

On May 27, 2014, State Water Board staff issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-

1914 Appropriative Right” (2014 Unavailability Notice) [WR-26]. This Notice applied to WSID’s License 1381 (meaning no water was available to serve License 1381), and continued until November, 2014 (WR-27 and WR-28). On June 9, 2014, WSID submitted an online Certification Form in response to the 2014 Unavailability Notice indicating that its alternate sources of water during the period was contract water purchased from the City’s WWTP and water collected from its own tile drains (WR-123 is a true and correct copy of the June 9, 2014, form).

City of Tracy Wastewater

The City of Tracy operates a wastewater treatment plant (WWTP) and discharges treated wastewater effluent to Old River, a water of the United States, pursuant to Order R5-2012-0115 (NPDES Permit CA0079154) issued by the Central Valley Regional Water Quality Control Board (WR-184). The NPDES Permit authorizes discharge of up to 10.8 million gallons per day (mgd), with the potential for expansion up to 16 mgd (see Section I of the NPDES Permit), although the City reportedly discharged approximately 9 million gallons per day (mgd) in 2014, which is equivalent to 14 cfs, on a substantially continuous basis (see WR-129).¹ The NPDES Permit’s authorized point of discharge of wastewater into the Old River is well upstream from WSID’s point of diversion under License 1381 (see NPDES Permit Attachment B). Permit Provision VI.A.2.n requires the City to comply with Water Code section 1211. (WR-184.)

On May 6, 2014, the City Council adopted Resolution 2014-065 (WR-167), authorizing the City to enter into a Wastewater Revocable License Agreement with WSID (2014 Agreement) for the sale of treated effluent from the City’s wastewater treatment plant (WR-136 is a true and correct copy of the 2014 Agreement). The 2014 Agreement provides that WSID may divert all of the City’s wastewater discharges from April 1, 2014 through October 31, 2014. The 2014 Agreement requires WSID to provide the City with written notice of when it will commence water diversion pursuant to the 2014 Agreement. An email exchange between WSID and the City confirmed that diversion of wastewater would commence the morning of June 15, 2014 (WR-137 is a true and correct copy of the email).

I reviewed the diversion tables submitted as part of WSID’s Subpoena response. A table titled “2014 City of Tracy Wastewater Used By WSID Per Month” was included in WSID’s Subpoena response Exhibit 3 (Exhibit WR-138 is a true and correct copy of this table). The table shows that WSID diverted 1,287.39 acre-feet of Tracy wastewater discharges between June and September, 2014. I also reviewed City of Tracy invoices for water and legal services in accordance with the 2014 Agreement (Exhibit WR-143 is a true and correct copy). The invoices show that WSID purchased all of Tracy’s effluent (2,736.31 acre-feet) discharged from June 15, 2014 to September 24, 2014.

The 2014 Agreement represents a change in the place of use and/or purpose of use of the City’s treated wastewater, because the City previously abandoned its wastewater discharges. Because WSID planned to divert this water during periods when it would not be able to divert under License 1381, any WSID diversions of this wastewater would potentially reduce flows downstream as compared to before the Agreement. Therefore, the City should have filed a wastewater change petition with the State Water Board under Water Code section 1211 prior to selling any wastewater to WSID. The City did not file a wastewater change petition with the State Water Board.

¹ I verified this discharge amount by reviewing the City of Tracy’s Electronic Self-Monitoring Reports (eSMR) data available on the California Integrated Water Quality System, which is used by the State Water Board and the Regional Boards to track discharge information. WR-160 is a true and correct copy of a report of the City’s eSMR data for calendar year 2014, which indicates that the City’s wastewater plant averaged 9.29 mgd over that period.

The City does not hold an appropriative water right allowing the downstream diversion of its wastewater discharges into the Old River. State Water Board staff had determined that no water was available to serve WSID's License 1381 starting on May 27, 2014, and continuing beyond September 30, 2014, and the evidence indicates that WSID was aware of these staff determinations. Therefore, WSID could not divert Tracy wastewater under License 1381. There is no evidence indicating that WSID had any other valid claim of right for the 2014 wastewater diversions.

The evidence indicates that WSID diverted at least 1,287.39 acre-feet of City wastewater under the 2014 Wastewater Agreement between June 1, 2014 and September 30, 2014. These diversions were unlawful because the City had not complied with Water Code section 1211, and because WSID could not divert the wastewater from Old River under any valid claim of right.

2015 WATER DIVERSIONS AND BASIS OF RIGHT

I also investigated WSID's 2015 water diversions and alleged basis of right.

License 1381

On May 1, 2015, State Water Board staff issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2015 Unavailability Notice) [WR-35]. The notice applies to License 1381 (meaning no water was available to serve License 1381), and continued until November, 2015 (WR-44 and WR-45).

In a letter to Mr. Tom Howard dated July 7, 2015, WSID notified the State Water Board and staff that WSID immediately rescinded an earlier-filed Certification Statement and that WSID reserved the right to divert the minimum amount of water necessary to sustain permanent crops throughout WSID (WR-125 is a true and correct copy of the July 7 letter²). The July 7 letter notes that the District intended in 2015 to rely on accretion and tile drain return flows, City of Tracy wastewater, and additional water pursuant to a third party's pre-1914 right. Based on WSID's Subpoena response submittals, described below, I understand that this third party is the Banta-Carbona Irrigation District, which claims a pre-1914 right under Statement 000495 (S000495).

I reviewed several diversion tables submitted electronically and in hard copy on November 30, 2015, by WSID attorney Karna Harrigfeld as part of WSID's Subpoena response. WR-135 is a true and correct copy of these diversion tables. These tables include a table titled "Information Order River Water Diverted 4/1-10/31/2015 (2. Daily Amount Diverted in Acre-Feet)." This table shows that WSID diverted a total of 735.51 acre-feet from the Old River on 13 consecutive days from May 1 to May 13, 2015 (WR-135, pages 2-3). WR-135 contains additional diversion tables for water diverted pursuant to Banta-Carbona Irrigation District's right (pages 4-6), and for "accretion water" (pages 7-9). Because WSID has claimed no other right or source of water, it may be presumed that the diversions totaling 735.51 acre-feet, from May 1 to May 13, 2015, described on pages 2 and 3 of WR-135, were under claim of License 1381, or perhaps under no claim of right at all.

² WR-124 is a true and correct copy of the Certification Statement referenced in the July 7 letter. The July 7 letter claims that this statement was submitted on May 13, 2015, although the statement notes that it was updated by WSID on May 14, 2015. WR-124 is submitted only to verify the submittal date, an issue raised in the July 7 letter.

The information above indicates that WSID was aware that the State Water Board staff had determined that there was no water available for diversion under License 1381 beginning on May 1, 2015. The information above also indicates that WSID continued to divert water after May 1, and that WSID waited until it had ceased those diversions on or around May 13 before submitting the Certification required under the May 1, 2015, Notice. The information above shows that WSID unlawfully diverted 735.51 acre-feet from the Old River over 13 consecutive days from May 1 to May 13, 2015.

City of Tracy Wastewater

On March 3, 2015, the City Council adopted Resolution 2015-033, authorizing the City to enter into a Wastewater Revocable License Agreement with WSID (2015 Agreement) for the sale of treated wastewater from the City's wastewater treatment plant (WR-139 is a true and correct copy). The 2015 Agreement is substantially similar to the 2014 Agreement, and provides that WSID may divert all of the City's wastewater discharges from April 1, 2015 through October 31, 2015. The City did not submit a wastewater change petition under Water Code section 1211 for the 2015 Agreement at any time, despite having been directed to do so by Division and Office of Enforcement staff as early as April, 2015. In a letter dated July 8, 2015, the City terminated the 2015 Agreement with WSID (WR-144 is a true and correct copy). The evidence suggests that WSID did not divert any wastewater under the 2015 Agreement.

Although WSID apparently did not divert wastewater from the City of Tracy in 2015, the fact that WSID did unlawfully divert City of Tracy wastewater in 2014, coupled with the fact that WSID and Tracy executed a similar agreement in 2015 again without a basis of right or without complying with Water Code section 1211, suggests that WSID and Tracy may attempt to enter into similar agreements during future drought conditions.

Banta Carbona Irrigation District (BCID)

Division records show that BCID claims a pre-1914 appropriative water right with a priority date of 1912 for the diversion of approximately 200 cfs from the San Joaquin River under Statement 000495 (S000495) [WR-141 is a true and correct copy of S000495, dated March 30, 1967, and supporting documents].³ On April 10, 2015, WSID entered into an "Agreement for Temporary Pumping Right Assignment" (BCID Pumping Agreement) [WR-142 is a true and correct copy] with BCID to allow WSID to pump from the San Joaquin River under S000495.

On June 12, 2015, the State Water Board staff issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watersheds and Delta with a pre-1914 Appropriative Claim Commencing During or After 1903" (WR-39). This Notice applied to BCID's Statement 000495, and continued until September 17, 2015 (WR-43).

I reviewed the diversion tables submitted as part of WSID's Subpoena response. A table titled "Information Order BCID River Water Diverted 4/1-10/31/2015 (2. Daily Amount Diverted in Acre-Feet)" was included in WSID's Subpoena response Exhibit 7 (WR-135, page 5). The table shows that WSID diverted 85.08 acre-feet pursuant to the BCID Pumping Agreement on 11 consecutive days between June 17 and June 27, 2015, during the period in which State Water Board staff had determined that there was no water available to serve S000495. Given WSID's receipt of the May 1, 2015, Notice, and given WSID's counsel's general involvement in discussions regarding potential curtailment of senior

³ Although the Initial Statement claims a right to 220 cfs, the supporting documents state that the right is only to 200 cfs.

rights (see WR-80), WSID was presumably aware of the June 12 Notice. Interestingly, the table shows that WSID diverted BCID water until June 12, 2015, then ceased diversions for four days before resuming diversions on June 17, 2015. Additional evidence supporting WSID's apparent awareness of the June 12 Notice is in the form of an email dated August 7, 2015, in which General Manager David Kaiser asks Carol Petz, "how many days after 6/12 did we take water under bcid license?" (WR-140 is a true and correct copy).

Based on the above information, WSID unlawfully diverted 85.08 acre-feet from the Old River under the BCID Pumping Agreement between June 17, and June 27, 2015, when no water was available under BCID's claimed pre-1914 water right.

WSID DIVERSIONS OF TAILWATER AND ACCRETION FLOWS

WSID claims in its June 9, 2014, Certification (WR-123) and in the July 7 letter (WR-125) to divert "accretion and tile drain return flows" at its pumping station. It is my understanding that a representative from WSID informed a staff member from the Delta Watermaster's office on May 18, 2015, that WSID continued to pump tail water captured from the WSID drain referred to as "Bethany Drain" (WR-134). I understand that the Bethany Drain is located within the diversion cut off of the Old River that contains WSID's pumping station, a few hundred yards "upstream" from the pumping station (see WR-150 [John Collins aerial]).

WSID's Subpoena response diversion tables contain a table titled "Information Order Accretion Water Diverted 4/1-10/31/2015 (2. Daily Amount Diverted in Acre-Feet)" (WR-135, page 8). This table lists diversions totaling 2459.41 acre-feet during May through October, 2015. Based on my ongoing review of WSID's Subpoena response (described above), it is my understanding that WSID claims the right to divert tailwater and accretions collected in the Bethany Drain, and that the "Accretion Water Diverted" table lists the total amount of such water delivered to WSID water users. I also understand that WSID's drain collects tailwater collected from lands beyond WSID's boundaries, and that these amounts are included in the "Accretion Water Diverted" table. I understand also that WSID began measuring the flows from Bethany Drain into its diversion cut in 2015, using visual observation of a permanent weir constructed in early 2015 (WSID claims to have used a temporary weir in 2014), but it is not clear how often WSID collects these observations, whether the weir is calibrated accurately, how the accretions are calculated based on the weir observations. Finally, I understand that the "Accretion Water Diverted" table lists the total amount of tailwater and accretion flows delivered to WSID water users, and not the total amount of such water pumped from the diversion cut. From this, it is reasonable to conclude due to potential conveyance losses that WSID may need to pump more than the Bethany Drain discharges in order to deliver an amount equivalent to the Bethany Drain discharges to its water users. If WSID at any time pumps at a greater rate than the Bethany Drain discharges, WSID would draw water from the Old River through its unregulated diversion cut.

Additional Exhibits

In addition to those identified above, the following are true and correct copies from the investigation file:

WR-1 – Draft CDO issued to WSID on July 16, 2015

WR-2 – WSID CDO certified mail return receipts

WR-3 – WSID request for hearing

WR-104 – May 29, 2015, Article titled “State may block water sale between city, farmers”

WR-151 – San Joaquin County Irrigation Districts map

WR-165 – WSID drainage system map [I prepared this map based on a map included in WSID’s 2001 Petition (included as WR-113), and identifiers and Google Earth images as noted]