

1 ANDREW TAURIAINEN (SBN 214837)
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2 Office of Enforcement
State Water Resources Control Board
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5 E-mail: andrew.tauriainen@waterboards.ca.gov

6 Attorneys for the Prosecution Team

7 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

8	In the Matter of the Administrative Civil	}	DECLARATION OF ANDREW TAURIAINEN IN SUPPORT OF PROSECUTION TEAM'S OPPOSITION MOTIONS TO DISMISS/SUMMARY JUDGMENT
9	Liability Complaint Against Byron Bethany Irrigation District		
10	In the Matter of the Draft Cease and	}	
11	Desist Order Against the West Side Irrigation District		
<hr/>			

12 **I, Andrew Tauriainen, declare as follows:**

13 1. I am an attorney with the State Water Resources Control Board (State Water
14 Board), Office of Enforcement. I am counsel for the Division of Water Rights (Division)
15 Prosecution Team in the above-entitled matters. I have personal knowledge of the facts
16 stated in this declaration and, if called as a witness, could testify competently thereto.

17 2. The Assistant Deputy Director for Water Rights issued a Draft Cease and
18 Desist Order (CDO) against the West Side Irrigation District (WSID) on July 16, 2015,
19 alleging that WSID diverted or threatened to divert water without authorization in violation
20 of Water Code section 1052. The Draft CDO is Prosecution Team Exhibit WR-1.

21 3. The Assistant Deputy Director for Water Rights issued an Administrative Civil
22 Liability (ACL) Complaint against Byron-Bethany Irrigation District (BBID) on July 20,
23 2015, alleging that BBID diverted water without authorization in violation of Water Code
24 section 1052. The ACL Complaint is Prosecution Team Exhibit WR-4.

25 4. The second paragraph on page 1 of the Draft CDO contains an error regarding
26 the authority to issue the Draft CDO. Because WSID is located within the Delta, the Delta
27 Watermaster is authorized to issue this enforcement action and to delegate this authority
28 to appropriate staff within the Division of Water Rights.

1 5. Paragraph 3 of the ACL Complaint contains a similar error regarding the
2 authority to issue the ACL Complaint. Because BBID is located within the Delta, the Delta
3 Watermaster is authorized to issue this enforcement action and to delegate this authority
4 to appropriate staff within the Division of Water Rights.

5 6. As described in the Declaration of Michael George, submitted concurrently
6 herewith, the Delta Watermaster authorized the Assistant Deputy Director for Water
7 Rights to issue the WSID Draft CDO and the BBID ACL Complaint.

8 7. The second sentence of Paragraph 3 of the ACL Complaint also contains an
9 error regarding the Executive Director's delegation of authority to issue ACL complaints
10 within the Executive Director's jurisdiction. The Executive Director delegated authority to
11 issue ACL complaints under Water Code section 1055 to the Deputy Director for Water
12 Rights (then known as the Chief, Division of Water Rights) in a memorandum dated May
13 17, 1999. Exhibit A hereto is a true and correct copy of the May 17, 1999 memorandum.
14 The Deputy Director for Water Rights redelegated that authority to the Assistant Deputy
15 Director for Water Rights in a memorandum dated August 27, 2008. Exhibit B hereto is a
16 true and correct copy of the August 27, 2008, memorandum. It is my understanding and
17 belief that these delegations remain in effect.

18 8. It is my understanding and belief that the errors in the Draft CDO and the ACL
19 Complaint do not pertain to material facts or relevant legal issues, and that no party has
20 been prejudiced by these errors. The Board may correct the errors in the Draft CDO
21 should it choose to issue a final CDO. The Division will issue a corrected ACL Complaint
22 if the Hearing Officer so directs.

23 9. Exhibit C hereto is a true and correct copy of Resolution 2012-0048 (2012
24 Delegations to the Delta Watermaster), and can also be found at:
25 [http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2012/rs2012](http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2012/rs2012_0048.pdf)
26 [_0048.pdf](http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2012/rs2012_0048.pdf).

27 10. Exhibit D hereto is a true and correct copy of Resolution 2015-0058 (2015
28 Delegations to the Delta Watermaster), and can also be found at:

1 http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2015/rs2015
2 [_0058.pdf.](http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2015/rs2015)

3 11. Following the hearing on WSID's motion for preliminary injunction, on August 3,
4 2015, the Hon. Shellyanne Chang found that the July 15, 2015, Revised Notice does not
5 violate anyone's due process rights and declined to issue a preliminary injunction. Exhibit
6 E is a true and correct copy of the August 3, 2015 Order (Sacramento Superior Court
7 Case No. 34-2015-80002121).

8 12. The Hearing Officer provided BBID with notice of the available hearing
9 procedures on August 19, 2015. Exhibit F is a true and correct copy of the public notice of
10 hearing procedures provided on August 19, 2015 Order, and can also be found at:
11 http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_betha
12 [ny/docs/notice_byronbethany.pdf.](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_betha)

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

15 Date: February 22, 2016



16
17 Andrew Tauriainen
18 **OFFICE OF ENFORCEMENT**
19 State Water Resources Control Board
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28



Winston H. Hickox
Secretary for
Environmental
Protection

Executive Office
901 P Street • Sacramento, California 95814 • (916) 657-0941
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100
FAX (916) 657-0932 • Web Site Address: <http://www.swrcb.ca.gov>

Gray Davis
Governor

MEMORANDUM

TO: Harry M. Schueller, Chief
Division of Water Rights

FROM: 
Walt Pettit
Executive Director
EXECUTIVE OFFICE

DATE: **MAY 17 1999**

SUBJECT: DELEGATION OF AUTHORITY PROVIDED BY WATER CODE
SECTION 1055, SUBDIVISION (A)

- 1.0 Water Code section 1055, subdivision (a) provides that the Executive Director of the State Water Resources Control Board (SWRCB) may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to Section 1052 and Section 5107. The complaint shall allege the act or failure to act that constitutes a trespass or violation, the provision of law authorizing civil liability to be imposed, and the proposed civil liability. The Executive Director is authorized to delegate authority to a deputy or other officer or employee of the SWRCB pursuant to Water Code section 7.
- 2.0 The authority to issue a complaint and impose a civil liability as provided by Water Code section 1055, subdivision (a) is hereby delegated to the Chief, Division of Water Rights. This authority is delegated without restriction; however, the Chief, Division of Water Rights, shall keep the Executive Director and the SWRCB informed of any administrative civil liability complaints that may be highly controversial or that pose a risk of litigation.

Attachment

cc: Board Members
Dale Claypoole
✓ William R. Attwater



Linda S. Adams
Secretary for
Environmental Protection

State Water Resources Control Board

Taurainen Decl. Exh B
Page 1

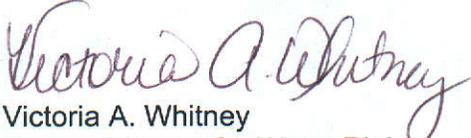


Arnold Schwarzenegg
Governor

Division of Water Rights
1001 I Street, 14th Floor ♦ Sacramento, California 95814 ♦ 916.341.5300
P.O. Box 2000 ♦ Sacramento, California 95812-2000
Fax: 916.341.5400 ♦ www.waterrights.ca.gov

MEMORANDUM

TO: James W. Kassel
Assistant Deputy Director for Water Rights
DIVISION OF WATER RIGHTS

FROM: 
Victoria A. Whitney
Deputy Director for Water Rights
DIVISION OF WATER RIGHTS

DATE: **AUG 27 2008**

SUBJECT: REDELEGATION OF AUTHORITY PROVIDED BY WATER CODE SECTION 1055, SUBDIVISION (A)

Water Code section 1055, subdivision (a) provides that the Executive Director of the State Water Resources Control Board (State Water Board) may issue a complaint to any person on whom administrative civil liability may be imposed pursuant to Section 1052 and section 5107. The complaint shall allege the act or failure to act that constitutes a trespass or violation, the provision of law authorizing civil liability to be imposed, and the proposed civil liability. The Executive Director is authorized to delegate authority to a deputy or other officer or employee of the State Water Board pursuant to Water Code section 7.

By memorandum dated May 17, 1999, the Executive Director delegated to the Deputy Director for Water Rights [then known as Chief of the Division of Water Rights] the authority to issue a complaint and impose a civil liability as provided by Water Code section 1055, subdivision (a). The delegation is without restriction, provided that the Deputy Director for Water Rights shall keep the Executive Director and the State Water Board informed of any administrative civil liability complaints that may be highly controversial or pose a risk of litigation.

The authority to issue an administrative civil liability complaint as provided by Water Code section 1055, subdivision (a) and delegated to the Deputy Director for Water Rights is hereby redelegated to the Assistant Deputy Director for Water Rights. The Assistant Deputy Director for Water Rights shall keep the Deputy Director, the Executive Director and the State Water Board informed of any administrative civil liability complaints that may be highly controversial or that pose a risk of litigation.

cc: (see next page)

James W. Kassel

- 2 -

AUG 27 2008

cc: Dorothy Rice
Executive Director
State Water Board

Thomas Howard
Chief Deputy Director
State Water Board

Michael Lauffer
Chief Counsel
Office of Chief Counsel

Andrew Sawyer
Assistant Chief Counsel
Office of Chief Counsel

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2012-0048**

CHANGES IN THE DELEGATION OF AUTHORITY TO THE DELTA WATERMASTER.

WHEREAS:

1. Pursuant to Water Code section 85230 subdivision (a), the State Water Resources Control Board (Board) appoints a special master for the Delta, whose title is “the Delta Watermaster.”
2. Pursuant to Water Code section 7, the Board is empowered to delegate authority to authorized persons.
3. Water Code section 85230 subdivision (b) provides that the Delta Watermaster shall exercise specified delegated authorities.
4. Water Code Section 85230 subdivision (b) states that the Delta Watermaster’s authority shall be limited to diversions in the Delta, and for the monitoring and enforcement of Board orders and license and permit terms and conditions that apply to conditions in the Delta.
5. Water Code section 85230 subdivision (c) provides that the Board may delegate additional duties to the Delta Watermaster as necessary for effective day-to-day enforcement of its decisions.
6. Water Code section 1051 authorizes the Board to investigate streams, lakes, and other bodies of water.
7. Government Code section 11415.50 states that an adjudicative proceeding is not required for informal fact-finding, an informal investigatory hearing, or a decision to initiate or not initiate an adjudicatory proceeding.
8. Government Code section 11415.60 authorizes the Board to delegate the power to formulate and issue decisions by settlement.
9. On October 5, 2010, the Board adopted [Resolution No. 2010-0048](#) delegating authority to the Delta Watermaster.
10. Resolution 2010-0048 provides that the delegation will be brought back before the Board within two years for reconsideration of its terms.
11. It is appropriate to modify the resolution to delegate authority regarding temporary water right permits and statements of water diversion and use.

THEREFORE BE IT RESOLVED THAT:

1. The Board delegates to the Delta Watermaster the following duties related to water diversion within the Delta and the monitoring and enforcement of Board orders and license and permit terms and conditions that apply to conditions in the Delta, as defined in Water Code section 12220:
 - 1.1 Require monitoring and reporting by holders of Board-issued water right permits or licenses. This authority may be re-delegated to the Deputy Director for Water Rights or other appropriate staff within the Division of Water Rights.
 - 1.2 Issue approvals delegated to an officer or employee of the Board by the terms of water right permits or licenses. This authority may be re-delegated to the Deputy Director for Water Rights or other appropriate staff within the Division of Water Rights.
 - 1.3 Require monitoring and reporting by persons filing statements of water diversion and use pursuant to Water Code sections 5100-5107. This authority may be re-delegated to the Deputy Director for Water Rights or other appropriate staff within the Division of Water Rights.
 - 1.4 Act on petitions or requests to approve or renew temporary permits pursuant to Chapter 6.5 (commencing with section 1425) or temporary urgency changes pursuant to chapter 6.6 (commencing with section 1435) of Part 2 of Division 2 of the Water Code. If no objections to an application for a temporary permit or a petition for a temporary urgency change are received, this authority may be re-delegated to the Deputy Director for Water Rights or appropriate staff within the Division of Water Rights. This delegation includes the authority to:
 - 1.4.1 Hold a hearing on any applications, or petition or request for renewal made pursuant to Chapter 6.5 or 6.6.
 - 1.4.2 Make the findings required by Chapter 6.5 or 6.6 as conditions precedent to the issuance or renewal of a temporary permit or temporary change order.
 - 1.4.3 Make any findings required by CEQA as conditions precedent to the issuance or renewal of a temporary change order.
 - 1.4 At the preadjudicative stage, conduct informal fact-finding or informal investigatory hearings regarding alleged unlawful diversions of water, violations of water right permits or licenses, violations involving statements of water diversion and use, or waste and unreasonable use.
 - 1.5 Issue notices of proposed cease and desist orders, and, when a hearing has not been timely requested, issue cease and desist orders in accordance with Water Code section 1831 et seq.
 - 1.6 Issue proposed administrative civil liability complaints, and, when a hearing has not been requested, issue an order imposing administrative civil liability in accordance with Water Code section 1055 et seq.

- 1.7 Convene settlement conferences up until the time a formal adjudication has commenced by the noticing of a hearing.
- 1.8 Formulate and issue decisions by settlement under Government Code section 11415.60 in matters raised by investigations or complaints, or where notices of proposed cease and desist orders or administrative civil liability have been issued but a hearing has not been noticed.
- 1.9 Request the Attorney General to institute appropriate proceedings in the superior court in accordance with Water Code section 1052 (unlawful diversions) or Water Code section 1845 (violation of cease and desist orders).
2. Adjudicative orders and decisions issued by the Delta Watermaster, including but not limited to decisions by settlement, are subject to reconsideration by the Board pursuant to Water Code section 1122 et seq.
3. The enumeration of delegated authorities in this resolution shall not be interpreted as revoking authorities already delegated, except as specified below. This resolution augments [Resolution No. 2012-0029](#), Delegation of Authority to State Water Resources Control Board Members Individually and to the Deputy Director for Water Rights, and supersedes it only to the extent of any inconsistency. Specifically, the delegation to the Deputy Director to issue notices of proposed cease and desist orders and administrative civil liability complaints is revoked as applied to diversions in the Delta and enforcement of Board orders and license and permit terms and conditions that apply to conditions in the Delta, except to the extent the Delta Watermaster expressly authorizes the Deputy Director for Water Rights or appropriate staff within the Division of Water Rights to proceed.
4. This resolution supersedes Resolution 2010-0048.
5. This resolution will be brought back before the Board within two years for reconsideration of its terms.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 3, 2012.

AYE: Chairman Charles R. Hoppin
Vice Chair Frances Spivy-Weber
Board Member Steven Moore
Board Member Felicia Marcus

NAY: None

ABSENT: Board Member Tam M. Doduc

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2015-0058**

DELEGATION OF AUTHORITY TO THE DELTA WATERMASTER.

WHEREAS:

1. Pursuant to Water Code section 85230 subdivision (a), the State Water Resources Control Board (Board) appoints a special master for the Delta, whose title is “the Delta Watermaster.”
2. Pursuant to Water Code section 7, the Board is empowered to delegate authority to authorized persons.
3. Water Code section 85230 subdivision (b) provides that the Delta Watermaster shall exercise specified delegated authorities.
4. Water Code Section 85230 subdivision (b) states that the Delta Watermaster’s authority shall be limited to diversions in the Delta, and for the monitoring and enforcement of Board orders and license and permit terms and conditions that apply to conditions in the Delta.
5. Water Code section 85230 subdivision (c) provides that the Board may delegate additional duties to the Delta Watermaster as necessary for effective day-to-day enforcement of its decisions.
6. Water Code section 1051 authorizes the Board to investigate streams, lakes, and other bodies of water.
7. Government Code section 11415.50 states that an adjudicative proceeding is not required for informal fact-finding, an informal investigatory hearing, or a decision to initiate or not initiate an adjudicatory proceeding.
8. Government Code section 11415.60 authorizes the Board to delegate the power to formulate and issue decisions by settlement.
9. On October 5, 2010, the Board adopted [Resolution No. 2010-0048](#) delegating authority to the Delta Watermaster.
10. On October 3, 2012, the Board adopted [Resolution No. 2012-0048](#) making specified changes in the delegation of authority to the Delta Watermaster.
11. Both Resolution No. 2010-0048 and Resolution No. 2012-0048 provide that the delegation will be brought back before the Board within two years for reconsideration of its terms.

12. Upon reconsideration, the Board finds that It is appropriate to further modify the terms of the delegation by making the delegation evergreen, subject to the Board's prerogative to reconsider its terms on its own motion or at the request of the Delta Watermaster.

THEREFORE BE IT RESOLVED THAT:

1. The Board delegates to the Delta Watermaster the following duties related to water diversion within the Delta and the monitoring and enforcement of Board orders and license and permit terms and conditions that apply to conditions in the Delta, as defined in Water Code section 12220:
 - 1.1 Require monitoring and reporting by holders of Board-issued water right permits or licenses. This authority may be re-delegated to the Deputy Director for Water Rights or other appropriate staff within the Division of Water Rights.
 - 1.2 Issue approvals delegated to an officer or employee of the Board by the terms of water right permits or licenses. This authority may be re-delegated to the Deputy Director for Water Rights or other appropriate staff within the Division of Water Rights.
 - 1.3 Require monitoring and reporting by persons filing statements of water diversion and use pursuant to Water Code sections 5100-5107. This authority may be re-delegated to the Deputy Director for Water Rights or other appropriate staff within the Division of Water Rights.
 - 1.4 Act on petitions or requests to approve or renew temporary permits pursuant to Chapter 6.5 (commencing with section 1425) or temporary urgency changes pursuant to chapter 6.6 (commencing with section 1435) of Part 2 of Division 2 of the Water Code. If no objections to an application for a temporary permit or a petition for a temporary urgency change are received, this authority may be re-delegated to the Deputy Director for Water Rights or appropriate staff within the Division of Water Rights. This delegation includes the authority to:
 - 1.4.1 Hold a hearing on any applications, or petition or request for renewal made pursuant to Chapter 6.5 or 6.6.
 - 1.4.2 Make the findings required by Chapter 6.5 or 6.6 as conditions precedent to the issuance or renewal of a temporary permit or temporary change order.
 - 1.4.3 Make any findings required by CEQA as conditions precedent to the issuance or renewal of a temporary change order.

- 1.5 At the preadjudicative stage, conduct informal fact-finding or informal investigatory hearings regarding alleged unlawful diversions of water, violations of water right permits or licenses, violations involving statements of water diversion and use, or waste and unreasonable use.
 - 1.6 Issue notices of proposed cease and desist orders, and, when a hearing has not been timely requested, issue cease and desist orders in accordance with Water Code section 1831 et seq. This authority may be re-delegated to the Deputy Director for Water Rights or appropriate staff within the Division of Water Rights
 - 1.7 Issue proposed administrative civil liability complaints, and, when a hearing has not been requested, issue an order imposing administrative civil liability in accordance with Water Code section 1055 et seq. This authority may be re-delegated to the Deputy Director for Water Rights or appropriate staff within the Division of Water Rights
 - 1.8 Convene settlement conferences up until the time a formal adjudication has commenced by the noticing of a hearing.
 - 1.9 Formulate and issue decisions by settlement under Government Code section 11415.60 in matters raised by investigations or complaints, or where notices of proposed cease and desist orders or administrative civil liability have been issued but a hearing has not been noticed.
 - 1.10 Request the Attorney General to institute appropriate proceedings in the superior court in accordance with Water Code section 1052 (unlawful diversions) or Water Code section 1845 (violation of cease and desist orders).
2. Adjudicative orders and decisions issued by the Delta Watermaster, including but not limited to decisions by settlement, are subject to reconsideration by the Board pursuant to Water Code section 1122 et seq.
 3. The enumeration of delegated authorities in this resolution shall not be interpreted as revoking authorities already delegated, except as specified below. This resolution augments [Resolution No. 2012-0029](#), Delegation of Authority to State Water Resources Control Board Members Individually and to the Deputy Director for Water Rights, and supersedes it only to the extent of any inconsistency. Specifically, the delegation to the Deputy Director to issue notices of proposed cease and desist orders and administrative civil liability complaints is revoked as applied to diversions in the Delta and enforcement of Board orders and license and permit terms and conditions that apply to conditions in the Delta, except to the extent the Delta Watermaster expressly authorizes the Deputy Director for Water Rights or appropriate staff within the Division of Water Rights to proceed.

4. This resolution supersedes Resolution No. 2012-0048.
5. This resolution will remain in effect until withdrawn or superseded by action of the Board.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 1, 2015.

AYE: Chair Felicia Marcus
Vice Chair Frances Spivy-Weber
Board Member Steven Moore

NAY: None

ABSENT: Board Member Tam M. Doduc
Board Member Dorene D'Adamo

ABSTAIN: None



for Jeanine Townsend
Clerk to the Board

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE:	August 3, 2015	DEPT. NO.:	24
JUDGE:	HON. SHELLEYANNE W. L. CHANG	CLERK:	E. HIGGINBOTHAM
<p>THE WEST SIDE IRRIGATION DISTRICT; CENTRAL DELTA WATER AGENCY; SOUTH DELTA WATER AGENCY; WOODS IRRIGATION COMPANY,</p> <p style="text-align: center;">Petitioners and Plaintiffs,</p> <p>v.</p> <p>CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; THOMAS HOWARD, EXECUTIVE DIRECTOR OF CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; and DOES 1 THROUGH 100, INCLUSIVE,</p> <p style="text-align: center;">Respondents and Defendants.</p>		<p>Case No.: 34-2015-80002121</p>	
Nature of Proceedings:		ORDER AFTER HEARING ON ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION	

This matter came before the Court pursuant to an ex parte application by the West Side Irrigation District, Central Delta Water Agency, and South Delta Water Agency on July 10, 2015. The ex parte application sought a stay or a temporary restraining order/order to show cause concerning the May 1, 2015 and June 12, 2015, “NOTICE OF UNAVAILABILITY OF WATER AND NEED FOR IMMEDIATE CURTAILMENT...”¹ (hereinafter referred to as the “May Curtailment Letter” and the “June Curtailment Letter”, jointly referred to as the “Curtailment Letters”) issued by the State Water Resources Control Board through its Executive Director Thomas Howard.

In its ruling granting the Temporary Restraining Order against Respondents, the Court determined that the 2015 Curtailment Letters were coercive in nature and went beyond the “informational” purpose the Board claimed prevented a stay. As in *Duarte*, even though the Curtailment Letters were not enforceable on their own and there were no separate penalties for violating them, the language used in the Curtailment Letters resulted in a “comman[d] by the...[g]overnment to stop [water diverting] activities.” (*Duarte Nursery, Inc. v. United States Army Corps of Engineers* (2014) 17 F.Supp.3d 1013, 1018.) It was not a suggestion for “voluntary cessation of activities,” but instead required Petitioners to “immediately stop diverting water.” (*Id.* at 1019; Pet. exh. B.)

¹ This language is from the heading of the June 1, 2015 letter. The May 1, 2015 letter is titled, “NOTICE OF UNAVAILABILITY OF WATER AND IMMEDIATE CURTAILMENT...”

The Curtailment Letters also required recipients to “document receipt of this notice by completing an online Curtailment Certification Form (Form) within seven days. The Form confirms your cessation of diversion under the specific pre-1914 claim of right. Completion of the Form is mandatory...” Nowhere in this language did the Curtailment Letters assert that Petitioners were free to ignore the directive that they cease diverting water or that it is merely a suggestion.²

The Court granted the ex parte application for a temporary restraining order and issued an order to show cause as to why a preliminary injunction should not issue requiring the Board to issue a revised letter/notice that was informational in nature. The matter was set for an order to show cause on July 30, 2015 at 9:00 a.m. in Department 24.

On July 15, 2015, after the Temporary Restraining Order issued, Respondents issued a “PARTIAL RESCISSION OF APRIL, MAY AND JUNE 2015 CURTAILMENT NOTICES AND CLARIFICATION OF STATE BOARD POSITION RE: NOTICE OF UNAVAILABILITY OF WATER FOR THOSE DIVERTING WATER IN THE SACRAMENTO RIVER WATERSHED, SAN JOAQUIN RIVER WATERSHED AND DELTA, AND SCOTT RIVER.” (RJN, Exh. A.) (“July Letter”). All Petitioners acknowledge that they received a copy of this letter, which provides that it applies to, among others, both the May Curtailment Letter and the June Curtailment Letter.

On July 16, 2015, Respondents filed a supplemental opposition, request for judicial notice, and evidentiary objections. On July 23, 2015, Petitioners filed a reply to Respondents’ opposition and opposition to evidentiary objections. The hearing on the order to show cause was held on July 30, 2015.

Petitioners did not file any opposition to Respondents’ request for judicial notice. The Court has reviewed the request and **GRANTS** it with respect to Exhibit A. A copy of Exhibit B was not provided to the Court, merely a link to a website. The Court declines to take judicial notice of this document.

In its Supplemental Opposition, respondents argued that the matter was now moot in light of the July Letter and that no preliminary injunction should issue. Petitioners asserted that the coercive language was still present in the July Letter and that respondents had not corrected the offending language. The Court has reviewed the July Letter and finds that Respondent has removed the coercive language that was in the Curtailment Letters. The July Letter specifies that, “[t]his notice does not establish or impose any compliance responsibilities. Non-compliance with this notice shall not constitute a basis for the State Water Board’s initiation of any enforcement action.” Further, “you are not required to complete and file the Curtailment Certification Form (Form) attached to the prior notices.”

² This is similar to *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, where the Court held plaintiffs were aggrieved by a curtailment notice within the meaning of section 1126(b) because it “required plaintiffs to immediately discontinue diversion of water under their licenses.” Although *Phelps* involved only one notice, the implication of the language of the letters was the same as in this case.

The Court finds the July Letter is now akin to the notice of violation sent by the Central Valley Regional Water Quality Control Board in *Duarte*. There, the notice informed plaintiffs of the Board's view that they were in violation of the law, but did not require them to stop engaging in any activity. (*Duarte*, 17 F.Supp.3d at 1025.) The notice did command the plaintiffs to submit a plan to mitigate the impacts of the alleged improper discharges, but did not threaten any consequences for failure to submit such a plan. (*Id.*) The Court in *Duarte* found this was a purely informational notice, and consequently no taking had occurred in violation of due process so as to make necessary a lawsuit against the Board ripe for adjudication. (*Id.*)

Here, the July Letter no longer requires recipients to cease diverting water or requires them to sign a curtailment certification form under penalty of perjury. While the July Letter does notify the recipient that the Board has information indicating that there is insufficient water available for their water right priority, such a determination, in and of itself, does not violate Due Process principles, as the July Letter makes no assessment of the recipient's legal status in light of such a determination and no longer commands the recipient to take any action. As in *Duarte*, this assessment is not sufficient to violate Due Process principles. While the Court agrees with Petitioner that it would have been more prudent to rescind the Curtailment Letters in full and issue a new informational notice (instead of a "partial rescission"), it is not for the Court to dictate how the Board should exercise its discretion.

At oral argument, Petitioners asserted that the language contained in the last paragraph on the first page of the July Letter still contained the offending language and a coercive element. Petitioners asserted that no recipient argued or understood the Curtailment Letters to be orders and because of this, the language stating "to the extent that any of the notices described above contain language that may be construed as an order requiring you to stop diversions under your affected water right, that language is hereby rescinded" was a nullity and that the July letter rescinded nothing as there was no order. But the basis for the Court's granting the TRO was that, in fact, a recipient of the Curtailment Letters *could* reasonably interpret them as an order from the Government compelling them to stop their curtailment activities. ["...the language used in the Curtailment Letters results in a command by the government to stop water diverting activities... It is not a suggestion for voluntary cessation of activities but instead requires Petitioners to immediately stop diverting water." [Internal quotes and citations omitted.] "Through the inclusion of this specific information, the Curtailment Letters appear not to be generalized notices, but instead a specific adjudication and command with respect to the particular rights holder." "...The focus is not on whether the Petitioners' legal exposure remains unchanged or not, but whether the Curtailment Letters could reasonably be interpreted to be an order or command by the government, not merely a suggestion or request for voluntary cessation of activities." (Order After Hearing on Ex Parte Application For Temporary Stay.)]

The July Letter now rescinds this language of command that the Court found violated Petitioners' Due Process Rights. Again, it is not for this Court to second guess the Board and decide exactly how it should have rescinded the Curtailment Letters.

Petitioner West Side Irrigation District further asserts that Respondents have initiated a retaliatory action against them in the form of a draft Cease and Desist Order and Information Order. (Declaration of Karna E. Harrigfeld (hereinafter "Harrigfeld Decl."), Exh. C.) West Side Irrigation District contends the Cease and Desist Order improperly relies on the May Curtailment Letter, and the information provided by West Side in response to the Curtailment Certification Form, in contravention of this Court's ruling.

The issue of whether issuance of the Cease and Desist Order and Information Order violated the Court's Temporary Restraining Order or is in retaliation for this lawsuit is not properly before the Court at this time. The only issue before the Court at the Order To Show Cause hearing was whether a preliminary injunction should issue requiring the Board to issue a revised letter/notice that is informational in nature. Further, to the extent Petitioners urge the Court to exceed this scope, the Court declines to do so. A full administrative hearing with the opportunity for both sides to present evidence challenging the propriety of the Cease and Desist Order and Information Order and whether the Curtailment Certificates were improperly used as a basis for Respondents' enforcement actions against these Petitioners and subsequent judicial review of a fully developed record and the administrative determination is the appropriate procedure.

Respondents have acknowledged that Petitioners may challenge the use of the subject information as part of the administrative process, should they request a hearing. The Court thereby exercises its discretion to allow the issue of the propriety of the Cease and Desist Order and Information Order to be adjudicated through the administrative process prior to any judicial review by this Court.

Having considered the evidence and arguments presented by the parties, the Court determines there is no cause to issue a preliminary injunction.³ Consequently, the application for preliminary injunction is **DENIED**.

Counsel for Respondents to submit a formal order for the Court's signature pursuant to CRC 3.1312.

³ In light of this determination, the evidentiary objections filed by Respondents are moot, and the Court declines to rule on them.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: August 4, 2015

E. Higginbotham, Deputy Clerk /s/ E. Higginbotham



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Herum\Crabtree\Suntag
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State Water Resources Control Board

NOTICE OF PUBLIC HEARING and PRE-HEARING CONFERENCE

The State Water Resources Control Board will hold a Public Hearing to determine whether to impose Administrative Civil Liability against

Byron-Bethany Irrigation District

**Intake Channel to the Banks Pumping Plant (formerly Italian Slough)
Contra Costa County**

The **Pre-Hearing Conference**
will commence on
Friday, September 25, 2015
at **9:00 a.m.**

in the Sierra Hearing Room
Joe Serna Jr.-CalEPA Building
1001 I Street, Second Floor
Sacramento, CA

The **Public Hearing** will commence on
Wednesday, October 28, 2015 and continue, if necessary,
on October 29 and 30, 2015
at **9:00 a.m.**

in the Coastal Hearing Room
Joe Serna Jr.-CalEPA Building
1001 I Street, Second Floor
Sacramento, CA

PURPOSE OF HEARING

The purpose of this hearing is for the State Water Resources Control Board (State Water Board or Board) to receive evidence relevant to determining whether to impose administrative civil liability against the Bryon-Bethany Irrigation District (BBID) for alleged unauthorized diversion of water and, if so, whether in the amount of \$1,553,250 or some other amount.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

BACKGROUND

Water Code section section 1052, subdivision (a), which provides that the diversion or use of water subject to Division 2 of the Water Code other than as authorized in Division 2 is a trespass. The State Water Board may administratively impose civil liability in an amount not to exceed \$500 for each day that a trespass occurs. (Wat. Code, § 1052, subd. (b).) Fines can go up to \$10,000 for each day a trespass occurs in certain critically dry years. (See Wat.Code § 1845, subd. (b)(1)(A).)

Water Code section 1052, subdivision (c), provides that any person or entity committing a trespass during a period for which the Governor has issued a proclamation of a state of drought emergency may be liable in an amount not to exceed the sum of one thousand dollars (\$1,000) for each day the trespass occurs plus two thousand five hundred dollars (\$2,500) for each acre-foot of water diverted or used in excess of that diverter's rights. A trespass is the unauthorized diversion or use of water, as defined in Water Code section 1052, subdivision (a).

Water Code section 1052, subdivision (d)(2), provides that civil liability may be imposed administratively by the State Water Board pursuant to Water Code section 1055.

On July 20, 2015, the Assistant Deputy Director of the Division of Water Rights (Assistant Deputy Director) issued an [administrative civil liability complaint \(complaint\)](#) alleging that BBID committed a trespass through the unauthorized diversion of water in violation of Water Code section 1052, subdivision (a). The complaint proposes that liability be imposed upon BBID in the amount of **\$1,553,250**.

By letter dated August 6, 2015, BBID [requested a hearing](#) on the complaint.

This notice, the complaint, and other material related to this hearing can be found on the Division's website at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/index.shtml

KEY ISSUES

In determining the amount of civil liability, the Board must take into consideration all relevant circumstances (Wat. Code, § 1055.3) The hearing will address the following key issues:

- 1) Whether the State Water Board should impose administrative civil liability upon BBID for trespass and, if so, in what amount and on what basis;
 - a. What is the extent of harm caused by BBID's alleged unauthorized diversions?
 - b. What is the nature and persistence of the alleged violation?
 - c. What is the length of time over which the alleged violation occurred?
 - d. What corrective actions, if any, have been taken by BBID?
- 2) What other relevant circumstances should be considered by the State Water Board in determining the amount of any civil liability?

HEARING OFFICER AND HEARING TEAM

State Water Board Member Tam Doduc will preside as the hearing officer for this proceeding. A hearing team will assist the hearing officer by providing legal and technical advice. The hearing team members will be: Nicole Kuenzi, Staff Counsel; Jane Farwell-Jensen, Environmental Scientist; and Ernest Mona, Water Resource Engineer. The hearing team and their supervisors will assist the hearing officer and other members of the State Water Board throughout this proceeding.

SEPARATION OF FUNCTIONS

A staff prosecution team will be a party to this hearing. State Water Board prosecution team members will include: Andrew Tauriainen, Attorney III, Office of Enforcement and Kathy Mrowka, Manager, Enforcement Section.

The prosecution team is separated from the hearing team and is prohibited from having *ex parte* communications with any members of the State Water Board and any members of the hearing team regarding substantive issues and controversial procedural issues within the scope of this proceeding. This separation of functions also applies to the supervisors of each team. (Gov. Code, §§ 11430.10-11430.80.)

HEARING PARTICIPATION

IF YOU WANT TO TAKE PART IN THIS HEARING, you should carefully read the enclosure entitled "Information Concerning Appearance at Water Right Hearings." As stated in that enclosure, anyone wishing to present evidence at the hearing must submit a **Notice of Intent to Appear**, which must be **received** by the State Water Board no later than the deadline listed below. **If BBID fails to submit a Notice of Intent to Appear by the deadline specified in this notice, the State Water Board will deem the request for a hearing regarding the imposition of administrative civil liability to be withdrawn, and the Board may impose administrative civil liability in the amount of \$1,553,250 without further notice. Similarly, if BBID withdraws its request, administrative civil liability may be imposed without further notice.**

Within one week after the deadline to submit Notices of Intent to Appear, the State Water Board will mail out a list of those who desire to participate in the hearing and a copy of all Notices of Intent to Appear that the Board timely received. The list is provided in order to facilitate exchange of written testimony, exhibits, and witness qualifications in advance of the hearing. Only parties and other participants who are authorized by the hearing officer will be allowed to present evidence. Copies of witnesses' proposed **testimony, exhibits, lists of exhibits, qualifications, and statement of service** must be **received** by the State Water Board and served on each of the parties who have indicated their intent to appear, no later than the deadline listed below.

12:00 noon, Wednesday, September 2, 2015

Deadline for receipt of Notice of Intent to Appear.

12:00 noon, Monday, October 12, 2015

Deadline for receipt and service of witnesses' proposed testimony, exhibits, lists of exhibits, qualifications, and statement of service.

PRE-HEARING CONFERENCE

The hearing officer will conduct a pre-hearing conference to discuss the scope of the hearing and any other procedural issues on **Friday, September 25, 2015 at 9:00 a.m.** The goal of the pre-hearing conference is to ensure that the hearing proceeds in an orderly and expeditious manner. The pre-hearing conference will not be used to hear arguments on, or determine the merits of, any hearing issues, other than procedural matters, unless the parties agree to resolve a hearing issue by stipulation. Following the pre-hearing conference, the hearing officer may, at her discretion, modify the hearing procedures or issues set forth in this notice in whole or in part. All parties to the hearing must attend the pre-hearing conference. Failure to attend the pre-hearing conference may result in exclusion from participation in the hearing.

SUBMITTALS TO THE STATE WATER BOARD

All documents, including Notices of Intent to Appear, written testimony, and other exhibits submitted to the State Water Board should be addressed as follows:

Division of Water Rights
State Water Resources Control Board
Attention: Jane Farwell-Jensen

By Mail: P.O. Box 2000, Sacramento, CA 95812-2000
By Hand Delivery: Joe Serna Jr.-CalEPA Building
1001 I Street, 2nd Floor, Sacramento, CA 95814
By Fax: (916) 341-5400
By Email: wrhearing@waterboards.ca.gov
With Subject of "**BBID ACL Hearing**"

ALL HAND DELIVERED SUBMITTALS should be Date and Time stamped by the Division of Water Rights' Records Unit on the second (2nd) floor of the Joe Serna Jr.-CalEPA Building at the above address prior to or at the submittal deadline. Persons delivering submittals must first check in with lobby security personnel on the first floor. Hand delivered submittals that do not have a timely Date and Time stamp by the Division of Water Rights' Records Unit will be considered late and may not be accepted by the hearing officer.

SETTLEMENTS

Please read the discussion of "Settlements" in the enclosure entitled "Information Concerning Appearance at Water Right Hearings." In this water rights enforcement hearing, the prosecution team is prosecuting BBID for an alleged violation. The prosecution team and BBID may, at their discretion, engage in private settlement discussions and may include any other persons in those discussions. Due to the separation of functions discussed above, **the hearing team cannot participate** in settlement discussions. Should the parties reach settlement, they must notify the hearing team as soon as possible.

IF YOU HAVE ANY QUESTIONS

During the pendency of this proceeding, there shall be no *ex parte* communications regarding substantive or controversial procedural matters within the scope of the proceeding between State Water Board members or hearing team members and any of the other participants, including members of the prosecution team. (Gov. Code, §§ 11430.10-11430.80.) Questions regarding non-controversial procedural matters should be directed to Staff Counsel Nicole Kuenzi at (916) 322-4142 or by email to Nicole.Kuenzi@waterboards.ca.gov; or to Jane Farwell-Jensen at (916) 341-5349 or by email to Jane.Farwell-Jensen@waterboards.ca.gov. (Gov. Code, § 11430.20, subd. (b).)

PARKING, ACCESSIBILITY AND SECURITY

The Joe Serna Jr.-CalEPA Building (CalEPA Building) is accessible to people with disabilities. Individuals who require special accommodations at the CalEPA Building are requested to contact Tanya Cole, Equal Employment Opportunity Office, at (916) 341-5880.

Due to enhanced security precautions at the CalEPA Building, all visitors are required to register with security staff prior to attending any meeting. To sign in and receive a visitor's badge, visitors must go to the Visitor and Environmental Services Center, located just inside and to the left of the building's public entrance. Depending on their destination and the building's security level, visitors may be asked to show valid picture identification. Valid picture identification can take the form of a current driver's license, military identification card, or state or federal identification card. Depending on the size and number of meetings scheduled on any given day, the security check-in could take up to fifteen minutes. Please allow adequate time to sign in before being directed to the hearing.

August 19, 2015

Date



Jeanine Townsend
Clerk to the Board

Enclosures

INFORMATION CONCERNING APPEARANCE AT WATER RIGHT HEARINGS

The following procedural requirements will apply and will be strictly enforced:

- 1. HEARING PROCEDURES GENERALLY:** The hearing will be conducted in accordance with the procedures for hearings set forth at California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760, as they currently exist or may be amended. A copy of the current regulations and the underlying statutes governing adjudicative proceedings before the State Water Board is available upon request or may be viewed at the State Water Board's web site: http://www.waterboards.ca.gov/laws_regulations

Unless otherwise determined by the hearing officers, each party may make an opening statement, call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even if that matter was not covered in the direct examination, impeach any witness, rebut adverse evidence, and subpoena, call and examine an adverse party or witness as if under cross-examination. At the discretion of the hearing officers, parties may also be afforded the opportunity to present closing statements or submit briefs. The State Water Board encourages parties with common interests to work together to make the hearing process more efficient. The hearing officers reserve the right to issue further rulings clarifying or limiting the rights of any party where authorized under applicable statutes and regulations.

Parties must file any requests for exceptions to procedural requirements in writing with the State Water Board and must serve such requests on the other parties. To provide time for parties to respond, the hearing officers will rule on procedural requests filed in writing no sooner than fifteen days after receiving the request, unless an earlier ruling is necessary to avoid disrupting the hearing.

- 2. SETTLEMENTS:** In water right enforcement hearings, a State Water Board staff member or team prosecutes an alleged violation. In such enforcement cases, the prosecution and a party who is the subject of the proposed enforcement action may at their discretion engage in private settlement discussions, or may include any other persons in those discussions. Although other persons may be authorized to participate in the hearing as parties, such a designation does not constitute a ruling that those persons must be allowed to engage in any settlement discussions between the prosecution and the party against whom the agency action is directed. The consent of other parties is not required before the State Water Board, or the Executive Director under State Water Board [Resolution No. 2012-0061](#), can approve a proposed settlement agreement between the prosecution and a party subject to a proposed enforcement action. However, all parties will be given the opportunity to comment on any settlement submitted to the State Water Board or the Executive Director for approval.

In non-enforcement hearings involving an unresolved protest between a protestant and a water right applicant or petitioner, those persons will be designated as parties in the hearing. (Cal. Code Regs., tit. 23, § 648.1, subd. (b).) Other persons who file a Notice of Intent to Appear in the hearing, may also be designated as parties. In such cases, the parties whose dispute originates the action may at their discretion meet privately to engage in settlement discussions, or may include other persons. If the original parties resolve the dispute, the hearing officers will determine whether or not to continue the hearing, after allowing all remaining parties the opportunity to comment on any proposed settlement. The Executive Director or the State Water Board may approve a settlement in the absence of a hearing, notwithstanding the lack of consent of parties besides the protestant and the applicant or petitioner.

3. **PARTIES:** The current parties to the hearing are **Byron-Bethany Irrigation District; and the prosecution team for the State Water Board**. Additional parties may be designated in accordance with the procedures for this hearing. Except as may be decided by specific rulings of the hearing officers, any person or entity who timely files a Notice of Intent to Appear indicating the desire to participate beyond presenting a policy statement shall be designated as a party. The hearing officers may impose limitations on a party's participation. (Gov. Code, § 11440.50, subd. (c).) Persons or entities who do not file a timely Notice of Intent to Appear may be designated as parties at the discretion of the hearing officers, for good cause shown, and subject to appropriate conditions as determined by the hearing officers. Except as specifically provided in this notice or by ruling of the hearing officers, only parties will be allowed to present evidence.
4. **INTERESTED PERSONS:** Pursuant to California Code of Regulations, title 23, section 648.1, subdivision (d), the State Water Board will provide an opportunity for presentation of non-evidentiary policy statements or comments by interested persons who are not designated as parties. A person or entity that appears and presents only a policy statement is not a party and will not be allowed to make objections, offer evidence, conduct cross-examination, make legal argument or otherwise participate in the evidentiary hearing. Interested persons will not be added to the service list and will not receive copies of written testimony or exhibits from the parties, but may access hearing documents at the website listed in the hearing notice.

Policy statements are subject to the following provisions in addition to the requirements outlined in regulation. (Cal. Code Regs., tit. 23, § 648.1, subd. (d).)

- a. Policy statements are not subject to the pre-hearing requirements for testimony or exhibits, except that interested persons are requested to file a Notice of Intent to Appear, indicating clearly an intent to make a policy statement only.
 - b. The State Water Board requests that policy statements be provided in writing before they are presented. Please see section 7, for details regarding electronic submittal of policy statements.
5. **NOTICE OF INTENT TO APPEAR:** Persons and entities who seek to participate as parties in this hearing must file either an electronic copy or a paper copy of a Notice of Intent to Appear, which must be **received** by the State Water Board no later than **the deadline prescribed in the Hearing Notice**. Failure to submit a Notice of Intent to Appear in a timely manner may be interpreted by the State Water Board as intent not to appear. **If BBID fails to submit a Notice of Intent to Appear by the deadline specified in this notice, the State Water Board will deem the request for a hearing regarding the administrative civil liability complaint to be withdrawn, and administrative civil liability may be imposed without further notice. Similarly, if BBID withdraws its request, administrative civil liability may be imposed without further notice.**

Any faxed or emailed Notices of Intent to Appear must be followed by a mailed or delivered hard copy with an original signature.

Interested persons who will not be participating as parties, but instead presenting only non-evidentiary policy statements should also file a Notice of Intent to Appear.

The Notice of Intent to Appear must state the name and address of the participant. Except for interested persons who will not be participating as parties, the Notice of Intent to Appear must also include: (1) the name of each witness who will testify on the party's behalf;

(2) a brief description of each witness' proposed testimony; and (3) an estimate of the time (not to exceed the total time limit for oral testimony described in section 9, below) that the witness will need to present a brief oral summary of his or her prior-submitted written testimony. (See section 6, below.) Parties who do not intend to present a case-in-chief but wish to cross-examine witnesses or present rebuttal should so indicate on the Notice of Intent to Appear.¹ Parties who decide not to present a case-in-chief after having submitted a Notice of Intent to Appear should notify the State Water Board and the other parties as soon as possible.

Parties who are not willing to accept electronic service of hearing documents should check the appropriate box on the Notice of Intent to Appear. (See section 7, below.)

The State Water Board will mail a service list of parties to each person who has submitted a Notice of Intent to Appear. The service list will indicate if any party is unwilling to accept electronic service. If there is any change in the hearing schedule, only those parties on the service list, and interested persons that have filed a Notice of Intent to Appear expressing their intent to present a policy statement only, will be informed of the change.

- 6. WRITTEN TESTIMONY AND OTHER EXHIBITS:** Exhibits include written testimony, statements of qualifications of expert witnesses, and other documents to be used as evidence. Each party proposing to present testimony on factual or other evidentiary matters at the hearing shall submit such testimony in writing.² Written testimony shall be designated as an exhibit, and must be submitted with the other exhibits. Oral testimony that goes beyond the scope of the written testimony may be excluded. A party who proposes to offer expert testimony must submit an exhibit containing a statement of the expert witness's qualifications.

Each party shall submit to the State Water Board **three (3) paper copies** and **one electronic copy** of each of its exhibits. With its exhibits, each party must submit a completed Exhibit Identification Index. Each party shall also serve a copy of each exhibit and the exhibit index on every party on the service list. A statement of service with manner of service indicated shall be filed with each party's exhibits.

The exhibits and indexes for this hearing, and a statement of service, must be **received by the State Water Board and served on the other parties no later than the deadline prescribed in the Hearing Notice**. The State Water Board may interpret failure to timely submit such documents as a waiver of party status.

All hearing documents that are timely received will be posted on the hearings program webpage identified in the hearing notice.

The following requirements apply to exhibits:

- a. Exhibits based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models.

¹ A party is not required to present evidence as part of a case-in-chief. Parties not presenting evidence as part of a case-in-chief will be allowed to participate through opening statements, cross-examination, and rebuttal, and may also present closing statements or briefs, if the hearing officers allow these in the hearing.

² The hearing officers may make an exception to this rule if the witness is adverse to the party presenting the testimony and is willing to testify only in response to a subpoena or alternative arrangement.

- b. The hearing officers have discretion to receive into evidence by reference relevant, otherwise admissible, public records of the State Water Board and documents or other evidence that have been prepared and published by a public agency, provided that the original or a copy was in the possession of the State Water Board before the notice of the hearing is issued. (Cal. Code Regs., tit. 23, § 648.3.) A party offering an exhibit by reference shall advise the other parties and the State Water Board of the titles of the documents, the particular portions, including page and paragraph numbers, on which the party relies, the nature of the contents, the purpose for which the exhibit will be used when offered in evidence, and the specific file folder or other exact location in the State Water Board's files where the document may be found.
- c. A party seeking to enter in evidence as an exhibit a voluminous document or database may so advise the other parties prior to the filing date for exhibits, and may ask them to respond if they wish to have a copy of the exhibit. If a party waives the opportunity to obtain a copy of the exhibit, the party sponsoring the exhibit will not be required to provide a copy to the waiving party. Additionally, with the permission of the hearing officers, such exhibits may be submitted to the State Water Board solely in electronic form, using a file format readable by Microsoft Office 2003 software.
- d. Exhibits that rely on unpublished technical documents will be excluded unless the unpublished technical documents are admitted as exhibits.
- e. Parties submitting large format exhibits such as maps, charts, and other graphics shall provide the original for the hearing record in a form that can be folded to 8 ½ x 11 inches. Alternatively, parties may supply, for the hearing record, a reduced copy of a large format original if it is readable.

- 7. ELECTRONIC SUBMISSIONS:** To expedite the exchange of information, reduce paper use, and lower the cost of participating in the hearing, participants are encouraged to submit hearing documents to the State Water Board in electronic form and parties are encouraged to agree to electronic service.

Any documents submitted or served electronically must be in Adobe Portable Document Format (PDF), except for Exhibit Identification Indexes, which may be in a format supported by Microsoft Excel or Word. Electronic submittals to the State Water Board of documents less than 11 megabytes in total size (incoming mail server attachment limitation) may be sent via electronic mail to: wrhearing@waterboards.ca.gov with a subject of "**BBID ACL Hearing**". Electronic submittals to the State Water Board of documents greater than 11 megabytes in total size should be submitted on a compact disc (CD). Each electronically submitted exhibit must be saved as a separate PDF file, with the name in lower case lettering.

- 8. PRE-HEARING CONFERENCE:** At the hearing officers' discretion, a pre-hearing conference may be conducted before the proceeding to discuss the scope of the hearing, the status of any protests, and any other appropriate procedural issues.
- 9. ORDER OF PROCEEDING:** Hearing officers will follow the Order of Proceedings specified in California Code of Regulations, title 23, section 648.5. Participants should take note of the following additional information regarding the major hearing events. The time limits specified below may be changed by the hearing officers, for good cause.

- a. **Policy Statements Within the Evidentiary Hearing:** Policy statements will be heard at the start of the hearing, before the presentation of cases-in-chief. Oral summaries of the policy statements will be limited to **five (5) minutes** or such other time as established by the hearing officers.
- b. **Presentation of Cases-In-Chief:** Each party who so indicates on a Notice of Intent to Appear may present a case-in-chief addressing the key issues identified in the hearing notice. The case-in-chief will consist of any opening statement, oral testimony, introduction of exhibits, and cross-examination of the party's witnesses. The hearing officers may allow redirect examination and recross examination. The hearing officers will decide whether to accept the party's exhibits into evidence upon a motion of the party after completion of the case-in-chief.
 - i. **Opening Statements:** At the beginning of a case-in-chief, the party or the party's attorney may make an opening statement briefly and concisely stating the objectives of the case-in-chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. Oral opening statements will be limited to **(20) minutes** per party. A party may submit a written opening statement before the hearing or during the hearing, prior to their case-in-chief. Any policy-oriented statements by a party should be included in the opening statement.
 - ii. **Oral Testimony:** All witnesses presenting testimony shall appear at the hearing. Before testifying, witnesses shall swear or affirm that the written and oral testimony they will present is true and correct. Written testimony shall not be read into the record. Written testimony affirmed by the witness is direct testimony. Witnesses will be allowed up to **(20) minutes** to summarize or emphasize their written testimony on direct examination. Each party will be allowed up to **one (1) hour total** to present all of its direct testimony.³
 - iii. **Cross-Examination:** Cross-examination of a witness will be permitted on the party's written submittals, the witness' oral testimony, and other relevant matters not covered in the direct testimony. (Gov. Code, § 11513, subd. (b).) If a party presents multiple witnesses, the hearing officers will decide whether the party's witnesses will be cross-examined as a panel. Cross-examiners initially will be limited to **one (1) hour** per witness or panel of witnesses. The hearing officers have discretion to allow additional time for cross-examination if there is good cause demonstrated in an offer of proof. Ordinarily, only a party or the party's representative will be permitted to examine a witness, but the hearing officers may allow a party to designate a person technically qualified in the subject being considered to examine a witness.
 - iv. **Redirect and Recross Examination:** Redirect examination may be allowed at the discretion of the hearing officers. Any redirect examination and recross examination permitted will be limited to the scope of the cross-examination and the redirect examination, respectively. The hearing officers may establish time limits for any permitted redirect and recross examination.

³ The hearing officers may, for good cause, approve a party's request for additional time to present direct testimony during the party's case-in-chief. The hearing officers may allow additional time for the oral direct testimony of the witness if the witness is adverse to the party presenting the testimony and the hearing officers are satisfied that the party could not produce written direct testimony for the witness.

v. **Questions by State Water Board and Staff:** State Water Board members and staff may ask questions at any time and may cross-examine any witness.

c. **Rebuttal:** After all parties have presented their cases-in-chief and their witnesses have been cross-examined, the hearing officers will allow parties to present rebuttal evidence. Rebuttal evidence is new evidence used to rebut evidence presented by another party.

Rebuttal testimony and exhibits need not be submitted prior to the hearing, although the hearing officers may require submittal of rebuttal testimony and exhibits before they are presented in order to improve hearing efficiency. Rebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party's case-in-chief, and it does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence. It also does not include repetitive evidence. Cross-examination of rebuttal evidence will be limited to the scope of the rebuttal evidence.

d. **Closing Statements and Legal Arguments:** At the close of the hearing or at other times, if appropriate, the hearing officers may allow oral closing statements or legal arguments or set a schedule for filing legal briefs or written closing statements. If the hearing officers authorize the parties to file briefs, three copies of each brief shall be submitted to the State Water Board, and one copy shall be served on each of the other participants on the service list. A party shall not attach a document of an evidentiary nature to a brief unless the document is already in the evidentiary hearing record or is the subject of an offer into evidence made at the hearing.

10. EX PARTE CONTACTS: During the pendency of this proceeding, commencing no later than the issuance of the Notice of Hearing, there shall be no *ex parte* communications with State Water Board members or State Water Board hearing team staff and supervisors, regarding substantive or controversial procedural issues within the scope of the proceeding. (Gov. Code, §§ 11430.10-11430.80.) **Any communications regarding potentially substantive or controversial procedural matters, including but not limited to evidence, briefs, and motions, must demonstrate that all parties were served and the manner of service.** Parties may accomplish this by submitting a proof of service or by other verification, such as correct addresses in an electronic-mail carbon copy list, or a list of the parties copied and addresses in the carbon copy portion of a letter. Communications regarding non-controversial procedural matters are permissible and should be directed to staff on the hearing team, not State Water Board members. (Gov. Code, § 11430.20, subd. (b).) A document regarding *ex parte* communications entitled "Ex Parte Questions and Answers" is available upon request or from our website at:
http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf.

11. RULES OF EVIDENCE: Evidence will be admitted in accordance with Government Code section 11513. Hearsay evidence may be used to supplement or explain other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

NOTICE OF INTENT TO APPEAR

_____ plans to participate in the water right hearing regarding
(name of party or participant)

Administrative Civil Liability
against
Byron-Bethany Irrigation District

**scheduled to commence
Wednesday, October 28, 2015 and continue, if necessary,
on October 29 and 30, 2015
at 9:00 a.m.**

1) Check only one (1) of the following:

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we plan to call the following witnesses to testify at the hearing. (Fill in the Following Table)

NAME	SUBJECT OF PROPOSED TESTIMONY	ESTIMATED LENGTH OF DIRECT TESTIMONY	EXPERT WITNESS (YES/NO)

(If more space is required, please add additional pages or use reverse side.)

2) Fill in the following information of the Participant, Party, Attorney, or Other Representative:

Name (Print): _____

Mailing
Address: _____

Phone Number: () _____ Fax Number: () _____

E-mail: _____

Optional:

- I/we decline electronic service of hearing-related materials.

Signature: _____ Dated: _____

