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VIA ELECTRONIC MAIL

Frances Spivy-Weber, Hearing Officer
Tam Doduc, Hearing Officer
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: West Side Irrigation District Draft CDO and Byron Bethany Irrigation District Draft ACL Hearings

Dear Hearing Officers:

We write in response to Mr. Buckman's email request for comments of November 30, 2015 and prior comments of the Prosecution Team (PT), State Water Contractors (SWC) and Department of Water Resources (DWR) regarding a consolidated Phase 1 hearing in the above referenced matters for the water availability issue. These comments are submitted on behalf of both Central Delta Water Agency and The West Side Irrigation District.

CDWA and WSID agree that a combined Phase 1 hearing, beginning March 21, 2016, for evidence and argument regarding the water availability issue common to both the WSID and BBID enforcement proceedings is a more efficient method for all parties and the hearing team.

CDWA and WSID object to the characterization of the issue for the Phase 1 combined hearing previously proposed by the Prosecution Team (PT), State Water Contractors (SWC)¹ and Department of Water Resources (DWR)².

¹ The Prosecution Team (PT), joined by the State Water Contractors (SWC), characterized the purpose of Phase 1 as follows:

a. Joint Phase 1.

- i. The purpose of the Joint Phase 1 is to receive evidence, testimony and briefing regarding the adequacy of the methodology employed by State Water Board staff to determine availability of water to serve water rights at the priorities noticed in the May 1 and June 12, 2015, Unavailability Notices, as generally applied to in-Delta diverters.*
- ii. Key Issues: 1) Whether the water supply/demand methodology employed by State Water Board staff supports the availability determinations set forth in the May 1 and June 12, 2015, Unavailability Notices, as modified by the July 15, 2015, Clarification. 2) Whether*

While CDWA and WSID disagree with both prior characterizations, we do agree that it is critical to clarify and define the issue for Phase 1 as soon as possible. CDWA and WSID propose the following definition of the issues to be covered by Phase 1:

- 1. What sources and amounts of water were available to divert under the WSID License and BBID pre-1914 appropriative right, at the district’s respective points of diversion, during the relevant time period?**
- 2. What were the actual senior water right demands for the available supplies in the vicinity of the WSID and BBID points of diversion?**
- 3. Was there sufficient water available, after accounting for actual exercised senior water right demands, for BBID and WSID to divert under their respective priorities of right during the relevant time period?**

Unlike the issues framed by the PT, DWR and the SWC, the list above properly recognizes the PT’s burden of proof in these enforcement actions for alleged unlawful diversion of water pursuant to Water Code section 1052. (Evid. Code, § 520 [“The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.”]; *Brown v. City of Los Angeles* (2002) 102 Cal. App. 4th 155, 174-75 [city department violated due process clause in requiring a city officer, who had received a pay downgrade, to show that the decision was improper]; *Parker v. City of Fountain Valley* (1981) 127 Cal. App. 3d 99, 113 [“It is axiomatic, in disciplinary administrative proceedings, that the burden of proving the charges rests upon the party making the charges.”].)

To prove unlawful diversion, the PT must identify the water available to divert under the WSID and BBID water rights during a specific time period, relative to the location of the WSID and BBID diversion points, and relative to actual diversions by senior water rights from the same source. The May 1, 2015 and June 12, 2015 Notices may have summarized the findings of the Board regarding water availability, but they do not replace the PT’s burden of proof as to the specific factual elements that must be established in these enforcement actions. The notices alone are not credible, admissible evidence of unavailability of water; and the Board indicated as much in its revised notices. (July 15, 2015 Clarification Notice at 2 [“Non-compliance with this notice shall not constitute a basis for the State Water Board’s initiation of any enforcement action.”].) Rather, the PT must present credible, admissible evidence regarding how much water was available at the respective WSID and BBID points of diversion, under the districts’ respective water rights, during the relevant time period for each enforcement action.

the methodology adequately administers the water rights priorities among lawful water diverters in the Delta watershed.

² The Department of Water Resources (DWR) characterized the purpose of Phase 1 as follows:

“[W]hether the methodology developed by the State Water Resources Control Board for determining water availability to support the May 1, 2015 and June 12, 2015 Unavailability Notices was sufficient.”

If the PT is unable to meet its initial burden of proof, the hearing officers should summarily dismiss the enforcement actions. (See, e.g., *Brown v. City of Los Angeles* (2002) 102 Cal. App. 4th 155, 175.)

In addition, the PT, DWR and SWC appear to be seeking a ruling from Phase 1 that approves a methodology for determining water availability for purposes beyond just these two enforcement proceedings for ðin-Delta divertersö in general. CDWA and WSID strongly object to any such characterization of Phase 1 as going far beyond the noticed hearings for WSID and BBID. If the Board wants to set precedent for a water availability methodology that will be used in the future, it should properly notice such an action at a regular board meetingô not try to back door such a precedent through isolated enforcement actions where the issue of water availability was not even identified in the hearing notices.

CDWA and WSID also support the following actions to improve the hearing process:

- Evidence submittal deadlines for combined Phase 1 and the remaining phases of the two hearings should be no earlier than the deadlines currently set for the BBID ACL matter.
- A combined pre-hearing conference for Phase 1 and an additional separate pre-hearing conference in each of the two enforcement proceedings.
- Clarification regarding Exhibit submittal protocols for the phased hearings as soon as possible.
- Recognition that if the PT fails to meet its burden of proof in Phase 1, the hearing officers should not continue with the remaining phases of the two enforcement actions as this would be a waste of party and hearing team resources.

Very truly yours,



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Attorney-at-Law

cc: Service list of participants in WSID CDO Hearing and BBID ACL Hearing

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

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**SERVICE LIST
WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER HEARING**

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