

DEPARTMENT OF WATER RESOURCES

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June 3, 2016

VIA E-MAIL

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812-0100



Re: COMMENT LETTER – 06/07/16 BOARD MEETING: BBID ACL and WSID CDO HEARINGS

Dear Ms. Townsend:

This is in reply to the May 26, 2016 draft order dismissing the Administrative Civil Liability Complaint against Byron-Bethany Irrigation District (BBID) and dismissing the draft Cease and Desist Order against The West Side Irrigation District (WSID, Draft Order). As a party to these proceedings, the California Department of Water Resources (DWR) appreciates the opportunity to submit these comments on the general acceptability of the draft order and requests clarification of a technical issue.

The Draft Order states that the nature of the motion made by San Joaquin Tributaries Authority and others for “nonsuit” was unclear, but the Board determined to take the matter up on its own motion as a “motion for judgment.” The Draft Order also indicates that the Board does not generally allow parties to move for judgment during the course of an evidentiary hearing, and “discourage[d] any parties to a future proceeding before the Board from attempting to do so.” DWR respectfully requests that in order to provide for efficiency and fairness, the Board should be consistent in applying its rules of procedure and limit the rules to those specified in the notices actually provided to the parties.¹

As generally stated in most hearing notices issued by the Board, the hearing notices for these proceedings indicated that they would be conducted according to the Board’s procedures in the California Code of Regulations.² The Board’s regulations indicate that its hearings will be governed by its regulations, chapter 4.5 of the Administrative

¹ Based on the Board’s hearing notices, it is unclear if the Board will allow pre-hearing motions, what the limitations on pre-hearing motions include, and in what circumstances the Board will deviate from standard practices.

² California Code of Regulations, Title 23, sections 648 to 648.8, 649.6, and 760.

Procedure Act, sections 801 to 805 of the Evidence Code, and section 11513 of the Government Code. During the course of these proceedings, parties submitted arguments in motions and legal briefs that were based on sections of the Evidence Code and Civil Discovery Act that are not incorporated by the Board's regulations and were not referenced in the hearing notices. This led to confusion and unplanned time commitments for responding to irrelevant and cumulative issues that were not within the scope of these enforcement hearings. Instead, for fairness and efficiency, the Board should have rejected the unauthorized motions and legal briefs.

An example of unfairness is described in the procedural ruling dated February 1, 2016. The hearing officers had already decided to allow BBID, WSID, and the Prosecution Team to submit motions to dismiss and/or motions for summary judgment up to ten pages in length. BBID submitted five motions to dismiss and WSID filed two motions to dismiss and one motion for summary judgment, each of which was up to ten pages in length. Instead of rejecting the motions, the hearing officers construed BBID's and WSID's over-length filings as requests to submit additional pages of briefing and allowed BBID and WSID to each submit one document up to twenty pages in length. Thus, BBID and WSID ended up getting twice the number of pages they were allowed by the Board's procedural ruling while the other parties were not given a corresponding increase in page limits for their reply briefs. The result was that the parties that chose not to follow the directions in the Board's ruling were granted extra pages while other parties were not.

The Board has the authority and discretion to conduct an adjudicatory proceeding "in a manner as the Board deems most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and the Board."³ This section of the regulations gives the Board the authority to control gamesmanship of the hearing process and unexpected motions by parties. To ensure fair and consistent application of the hearing procedures contained in the regulations, procedural rulings, and civil discovery and evidence practices, the Board should specify in its hearing notices what motions will be allowed and not deviate from the notices.

Moving forward, DWR supports the Board's authority to prevent illegal diversions of water. The Board has the "authority to prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis under which the right is held."⁴ In order to uphold the water right priority system and protect water users from harm from illegal diversions, the Board should immediately start a rulemaking process for a water

³ California Code of Regulations, Title 23, section 648.5.

⁴ Water Code section 275; *Cal. Farm Bur. Federation v. Cal. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 429, as modified (Apr. 20, 2011). See also *Young v. Cal. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, 404, as modified (Sept. 20, 2013), review denied (Nov. 13, 2013); and *Millview County Water Dist. v. Cal. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 893, modified on denial of reh'g (Oct. 14, 2014), review denied (Dec. 17, 2014).

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availability methodology. During the course of the proceedings, six of the parties⁵ suggested that the Board start a public process to develop a method for determining water availability. DWR requests an opportunity to collaborate on developing a robust water availability methodology. DWR also requests that water required to meet all regulatory requirements be included in the water availability methodology.

Finally, DWR requests clarification that the examples provided in the Findings section are not included as facts in these findings of fact. In the Findings section, there are three examples of inconsistencies that the Prosecution Team's witnesses could not adequately explain: (1) updated supply and demand data for May and June 2015; (2) the water availability analysis may have overstated demand because it included demand in tributary watersheds that could not have been met with local supply; and (3) the 1,500 cfs of demand by the San Joaquin River Exchange Contractors was included as demand on the full natural flow of the San Joaquin River.⁶ In addition to these examples, the Draft Order includes in a footnote other criticisms of the water availability analysis (supply from wastewater treatment plants, North Delta Water Agency demand accounting, and adjustments for over-reporting), but "make[s] no determination as to whether these additional criticisms are accurate." DWR believes that the footnote should also apply to the three examples in the body of the Draft Order in that the Board makes no determination that the three examples are accurate. DWR understands the Draft Order to mean that the Prosecution Team's witnesses did not adequately explain these points. However, no other party submitted evidence to establish how these matters should have been analyzed in the water availability methodology. Please confirm that the examples described in the Findings section are not included as facts.

If you have any questions or need additional information, please contact me at (916) 657-5400 or robin.mcginis@water.ca.gov. Thank you.

Sincerely,



Robin McGinnis, Attorney
Office of the Chief Counsel
Department of Water Resources

cc: Service Lists for the BBID and WSID Hearings

⁵ The six parties are BBID, Central Delta Water Agency, DWR, San Joaquin Tributaries Authority, South Delta Water Agency, and Westlands Water District.

⁶ Although the Prosecution Team witnesses did not establish that the exchange contractor demand should have been included as demand on the system, no party established that the exchange contractor demand should not have been included as demand on the system.

**SERVICE LIST OF PARTICIPANTS
THE WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER HEARING
(October 8, 2015, Revised 12/18/15, 05/25/16)**

Parties	
THE FOLLOWING MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)	
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(revised 12/18/15)

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**SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING**

(09/02/15; Revised: 09/10/15; Revised 10/06/15; Revised 10/22/15, 12/18/15, 05/25/16)

PARTIES	
<p>THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p>	
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