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9 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

10 ENFORCEMENT ACTION ENFO1949) **WRITTEN OPENING STATEMENT OF**
11 DRAFT CEASE AND DESIST ORDER) **THE WEST SIDE IRRIGATION DISTRICT**
12 REGARDING UNAUTHORIZED)
13 DIVERSIONS OR THREATENED) Hearing Date: March 21, 2016
14 UNAUTHORIZED DIVERSIONS OF)
15 WATER FROM OLD RIVER IN SAN) Hearing Officer: Frances Spivy-Weber
16 JOAQUIN COUNTY)

17 **I. INTRODUCTION**

18 While WSID disagrees with the method used by the State Water Resources Control
19 Board (“**Board**”) Division of Water Rights staff to determine water availability, as well as its
20 application to water right holders, in the interest of time and space WSID defers to and joins in
21 the written opening statements of other parties on that issue. WSID here focuses on two critical
22 issues:

- 23 1. Diversions of treated wastewater from the City of Tracy (“**City**”) under contract, and
- 24 2. Diversions of irrigation return flows and shallow groundwater from the Bethany Drain.

25 Aside from the obfuscation of the Prosecution Team (“**PT**”) intended to create a “wilderness of
26 mirrors”¹ –these two issues present straightforward issues of facts and law.

27 **II. WSID IS LEGALLY ALLOWED TO DIVERT TREATED WASTEWATER**
28 **UNDER CONTRACT WITH THE CITY OF TRACY.**

29 **A. THE LAW AUTHORIZES TREATED WASTEWATER TO BE**
30 **DIVERTED UNDER CONTRACT.**

31 _____
32 ¹ T.S. Eliot Gerontion 61.

1 1. The City holds title to its treated wastewater. Regardless of its original source, the
2 City’s treated wastewater was originally appropriated, and is now under the title and control of
3 Tracy according to Water Code Section 1210², which fully answers the question posed by this
4 enforcement action:

5 The owner of a waste water treatment plant operated for the purpose of treating wastes
6 from a sanitary sewer system shall hold the exclusive right to the treated waste water as
7 against anyone who has supplied the water discharged into the waste water collection and
8 treatment system. . .”

8 2. The City may use Old River to convey its treated wastewater. Water flowing in a
9 natural channel is subject to appropriation only if it is not being applied to beneficial use or not
10 otherwise appropriated. §1201. Expressly excluded from water subject to appropriation is “water
11 appropriated. . . which has ceased to be put to the useful or beneficial purpose for which it was
12 appropriated. . .” §1201(c).

13 Is the water in question otherwise appropriated”? Yes it is. Simply stated, when under
14 contract with WSID, the City’s wastewater continues to be appropriated and not abandoned;
15 therefore it is not available to be appropriated in Old River. (See D 1602 at pp. 5-6, citing
16 *Burnett v. Whitesides* (1860) 15 Cal. 35. “*By conveying the wastewater in Old River under*
17 *contract, the City is not abandoning the water*”). A leading treatise explains:

18 It is competent for the producer of return flow from foreign water to dispose of the
19 same by contract prior to abandonment of the flow. *Haun v. De Vours* (1950) 97
20 Cal.App.2d 841, 844. **Appropriative rights that have attached to waters**
21 **abandoned in the past are not infringed by such acts, for such rights are always**
22 **subject to the right of the importer to sell or otherwise dispose of the surplus**
23 **water before abandoning it.** If after the termination of the agreement the water is
24 again abandoned, it comes thereupon under the appropriative rights theretofore
25 established.

23 Hutchins, *The California Law of Water Rights* at p. 400 (bolding added). As a result, the City
24 has a statutory right to convey treated wastewater water through Old River, and WSID can divert
25 it under contract at its point of diversion downstream as provided by §7075: “Water which has
26 been appropriated may be turned into the channel of another stream, mingled with its water, and
27 then reclaimed; but in reclaiming it the water already appropriated by another shall not be
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² All future unidentified code sections refer to the Water Code.

1 diminished". Underscoring added. WSID has and will establish that diverting treated
2 wastewater, which is similar in quality to Old River water, does not diminish water others are
3 entitled to in Old River, as this diversion does not change the relevant water flow, levels, or
4 quality.

5 **B. WATER CODE SECTION 1211 DOES NOT APPLY TO WSID'S**
6 **DIVERSION OF THE CITY OF TRACY'S TREATED WASTEWATER.**

7 Section 1211 provides:

8 (a) Prior to making any change in the point of discharge, place of use, or purpose of use
9 of treated wastewater, the owner of any wastewater treatment plant shall obtain approval
10 of the board for that change. . .

11 (b) Subdivision (a) does not apply to changes in the discharge or use of treated
12 wastewater that do not result in decreasing the flow in any portion of a watercourse.

12 Underscoring added. At the request of the Board, Subsection (b) was added to §1211 in 2001.
13 At the time the Board explained the reason for the requested statutory amendment as follows:
14 "Where there is no threat to instream flows or third party water-right holders, requiring [Board]
15 review is an unnecessary burden on wastewater reclamation." WSID0027.

16 WSID has proven the applicability of §1211(b):³ (1) WSID's operator has testified that
17 he did not observe any change in flow in Old River at any time in 2014 when diversions of City
18 of Tracy wastewater of up to 13 cfs were being made under contract (WSID0174 at p. 6), (2)
19 WSID's expert, Tom Burke, has testified that he used DSM2, a scientific accepted Delta model,
20 to determine that no measurable decrease in flow or water levels results from WSID's diversion
21 of 8 to 14 cfs (WSID0123 at ¶12; WSID0125 at p. 2), and, most telling, (3) the PT itself has
22 acknowledged in its testimony that:

23 Mr. Burke used DSM2 to demonstrate that WSID diversions of 8 and 14 cfs do not affect
24 water levels. **I agree that pumping such a relatively small quantity of water from a**
25 **relatively large channel will have no substantive observed effect.** The correct
26 conclusion should rather state: "Given the numerous withdrawals in the Delta, and the
effect of the tides, water is always moving back and forth in the channels but the
elevations of the water in the channels experience little change in response to a single,
relatively small diversion of 14 cfs."

27 (WR-213 at p. 4, bolding added). The PT did not introduce any evidence contradicting WSID's
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³ WSID and the PT disagree over who has the burden of proof that §1211(b) applies. In any event, WSID has met the burden.

1 evidence, and its truncated investigation neglected to take flow measurements at the WSID point
2 of diversion, or downstream in either direction. WSID0152 at pp. 92-93. Instead the PT simply
3 offers a naked opinion that WSID’s diversion would “necessarily reduce the flow of the Old
4 River” (PT Opposition to WSID Motions at p. 9) citing only to testimony of Kathy Mrowka and
5 Kathryn Bare who in turn simply make the statements free and unburdened by evidentiary
6 support. WR-7 at pp. 13-15 and WR-13 at pp 3, 5. Such fact starved conclusions cannot fill in
7 the gaps and discrepancies in the PT presentation. Subsequently, for the first time, others argue
8 that WSID’s diversion of the City’s treated wastewater would adversely affect the quality of
9 water in Old River, raising an issue not contemplated by 1211(b) and representing an obvious
10 attempted *post-hoc* rationale to salvage the Enforcement Action on this issue.

11 **C. NO WATER RIGHT APPLICATION IS REQUIRED TO DIVERT**
12 **TREATED WASTEWATER.**

13 As a matter of law, WSID can divert the City’s wastewater by contract without an
14 appropriative right because the water remains appropriated and is not abandoned. Wat. Code
15 Section 1201(c). Only water flowing in a natural channel not being applied to beneficial use or
16 not otherwise appropriated, is available for appropriation. Wat. Code Sec. 1201. “Although
17 appropriative rights can attach to any unappropriated water flowing in a stream, previously
18 appropriated water only becomes unappropriated if it is abandoned”. State Water Resources
19 Control Board Order No. WR 97-05 at pp. 27-28. “Unappropriated water does not include water
20 being used by others under paramount rights”. D 1635 at p. 26.

21 Shockingly, the PT claims without supplying any statutory or decisional law citation:
22 “The general rule is diversions of wastewater discharge to a stream channel can occur only under
23 a valid appropriative water right,” (PT Opposition to WSID Motions at p. 10). For its statement
24 that “use of foreign waters in contingent on having a valid appropriative right” (Id. at p. 9), the
25 PT cites only to a bald statement by Kathy Mrowka that this is the way it is. WR-7 at p. 14. Staff
26 conclusions unsupported by facts are not substantial evidence and may not be relied upon by
27 decision makers. *Walnut Acres Neighborhood v. City of Los Angeles* (2015) 235 Cal.App.4th
28 1303. The PT argues “the Board has required wastewater discharges to obtain appropriative

1 permits in order to withdraw discharged water downstream,” with a single meager reference to D
2 1638. Yet D 1638 supports neither this statement nor the PT’s other assertions. In D 1638 the
3 Board did not “require” Thousand Oaks to obtain a water right permit; rather, Thousand Oaks
4 *voluntarily* filed a water right application to appropriate both its treated wastewater and
5 additional flows within the natural watercourse. It was this request to appropriate additional
6 flows that compelled Thousand Oaks to seek a permit. Nothing in D 1638 expressly or impliedly
7 suggests that just diverting wastewater triggers the need for an appropriative permit and nothing
8 in D 1638 supports a “general rule” that wastewater diversions can “occur only under a valid
9 appropriative water right.” D 1638 is the only decision in which the State Board has granted a
10 water right permit that incidentally includes treated wastewater,⁴ and it is mischievous for the PT
11 to misapply the Thousand Oaks Decision as the foundation for requiring WSID to obtain an
12 appropriative permit to exclusively divert Tracy’s wastewater.

13 The City’s treated wastewater is previously appropriated and, when under contract with
14 WSID, remains under the City’s control; thus the water is being applied to beneficial use,
15 remains appropriated, and therefore is not subject to appropriation. At no time has it reverted to
16 unappropriated water or stopped being applied for a beneficial use, and it is irrelevant that the
17 City previously abandoned the water into the river. An appropriator “that has abandoned water in
18 the past, causing an artificial flow of water, may cease to abandon water as it increases its use of
19 water.” Order WR 97-05 at p. 28, citing *Stevens v. Oakdale Irrigation District* (1939) 13 Cal.2d
20 343. The City assumed no legal obligation to continue to abandon water for the use of another
21 (see D 1602 at p. 4; Order WR 95-9 at pp. 18-19; *Haun v. De Vours* (1950) 97 Cal.App.2d 841)
22 and no private water rights holder complained about the agreement with WSID.

23 Once the City ceased to abandon its treated wastewater and opted to dispose of the water
24 through formal written contract, it followed a practice endorsed and approved by the Board. *See*
25 Order WR 95-9 *supra*, citing *Haun v. DeVours* (1950) 97 Cal.App.2d 841. It is fully consistent
26 with State law to use stream channels to convey the water to the contracting user: “The intention
27 not to abandon the water turns the stream channel into a mere means of conveyance”. D 334, at

28 _____
⁴ Other than pursuant to Water Code Sections 1485 and 1486, which are distinguishable.

1 p. 18, citing Weil, *Water Rights in the Western States*, 3rd Edition, Vol. 1, pp. 37 and 38. Indeed
2 the Board concedes that water may be abandoned, reclaimed and conveyed through stream
3 channels: “The intent to recapture is essential, and without it, the water is abandoned; and as
4 previously set forth, cannot be reclaimed again claimants on the stream, existing at the time the
5 recapture is attempted.” D 334.

6 Rather than carve out limited exceptions to the newly minted “rule” designated by the PT
7 to salvage this Enforcement Action, §§1485 and 1486 provide that specified producers of
8 wastewater “*may* file an application for a permit to appropriate” that water. Italics added. May is
9 a permissive and not mandatory term, and does not compel any diverter to obtain a permit. State
10 Water Board Decision D 851 succinctly states at page 11: “While under his control the
11 applicant’s drainage water is his to use and a permit to appropriate same would avail him
12 nothing,” while Water Right Order 2004-0004 adds: “Water that is appropriated and is flowing
13 in a channel under the control of its appropriator is not subject to appropriation by others”, at p.
14 5, citing *Stevens, supra* at p. 352.

15 **III. WSID IS LEGALLY ALLOWED TO DIVERT WATER DISCHARGED**
16 **FROM THE BETHANY DRAIN INTO ITS INTAKE CHANNEL DURING**
17 **THE IRRIGATION SEASON**

18 This issue is the most frustrating for WSID and the reason and basis for the PT’s
19 objection is perplexing. The issue of the right to return flows has long been established in
20 California, and forms the basis for hundreds of thousands of acre feet of irrigation throughout the
21 state every year. It is a matter of horn book law that:

22 The general rule as to waste and seepage waters is that the owner of the land on which
23 they originate is not obligated to continue to allow the waste and seepage. [citations
24 omitted]. . . The original owner of waste and seepage waters has a right to recapture
25 these waters for use on his own land. [citations omitted]. The right to discharge water into
26 a natural watercourse has long been recognized.

27 Rogers & Nichols, *Water for California*, Vol. I, Chapter XI, §§260, 261, underscoring added.

28 Rather than follow this historical and unambiguous rule, the PT offers a deftly
ambulatory and unstable contradictory position. The PT originally requested a CDO ordering
WSID to cease diverting intermingled tail water diversions form Old River “until the SWRCB
determines that there is sufficient water in the system to support beneficial use at the priority of

1 License 1381”. WR-1 at p. 8. This request was abandoned when the PT requested a revision to
2 the CDO ordering WSID to cease diversions of intermingled tail water diversions from old River
3 until “West Side Irrigation District installs measurement devices sufficient to ensure that tail
4 water diversions are limited to the amount of tail water arising from irrigation on West Side
5 Irrigation District’s lands” (WR-7 at p. 7). Apparently dissatisfied with this legal theory, most
6 recently, in the PT response to WSID’s Motion for Summary Judgment, the PT now asserts that
7 WSID can only legally use non-foreign water. The only consistent element to these three wildly
8 diverse theories is that none of them are accompanied by any recognized legal support (PT
9 Opposition to WSID Motions at p. 11).

10 **A. WATER IN THE BETHANY DRAIN DURING THE IRRIGATION**
11 **SEASON IS COMPRISED SOLELY OF WSID IRRIGATION RETURN FLOW AND**
12 **SHALLOW GROUNDWATER.**

12 Responding to the CDO, WSID has undertaken extensive investigation into the source of
13 the waters in the Bethany Drain. The conclusion is definitive and WSID will testify that water in
14 the Bethany Drain **during the irrigation season** is comprised solely of two sources:

- 15 1. Irrigation return flow from lands within WSID, and
- 16 2. Shallow groundwater accretions captured through tile drainage, from inside
17 WSID and from a two square mile area within Tracy, outside of the boundaries of WSID.

18 WSID confirmed these facts, and its primary system operator, in sworn testimony,
19 testified to the truth of these facts. Despite this, for reasons WSID finds baffling, the PT
20 continues to provide the Hearing Officer with misinformation and continues relying on stale and
21 outdated documents I order to falsely assert “that Bethany Drain also collects drainage water
22 from neighboring irrigation districts” (PT Response to WSID’s Separate Statement of Facts at
23 page 5 lines 1-2) despite the fact that WSID has continually represented that this is not the case,
24 and notwithstanding the fact that WSID provided evidence that at least one of the outside
25 drainage agreements was terminated. WSID0174 at p. 6. The only support cited for these
26 assertions are Kathy Mrowka’s references to a stale, outdated and factually inaccurate 2009
27 Report (WR-7 at p. 10), and Kathryn Bare’s naked statement that this was her “understanding”
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1 (WR-13 at p. 6)⁵. While the PT correctly states that WSID’s drainage system “extends into and
2 serves a 2-square mile area of de-annexed lands that are part of the City of Tracy” and that
3 “[d]rainage from the City is conveyed into the drain pursuant to agreement between WSID and
4 the City of Tracy.” (PT Response to WSID’s Separate Statement of Facts at page 5 lines 21-23),
5 these statements are irrelevant concerning WSID’s legal authority to divert water in the Bethany
6 Drain **during the irrigation season**. Services provided by WSID to areas outside of its
7 boundaries collect municipal stormwater runoff only, which does not occur during the irrigation
8 season. Mr. Martinez succinctly states: “Very simply, during the irrigation season, there is no
9 storm water runoff delivered from the City under the 2010 Drainage Agreement.” WSID0174 at
10 p. 10. The PT does not dispute this statement with a fact based analysis.

11 **B. WATER CODE SECTION 7075 ALLOWS THE WATER IN THE**
12 **BETHANY DRAIN TO BE RECAPTURED FROM THE INTAKE CHANNEL⁶.**

13 Because water within the Bethany Drain is “waste and seepage,” that is, irrigation and
14 shallow groundwater captured by tile drains, WSID is entitled to recapture it because (1) the
15 majority of it is groundwater beyond the reach of the Board’s regulatory authority, and (2) the
16 remainder is irrigation return flow directly from lands within WSID.

17 The PT concedes that drainage water from WSID’s Bethany Drain enters the WSID
18 Intake Canal, briefly commingles with water from Old River present in the Intake Canal, and
19 then is pumped out of the Intake Canal at WSID’s point of diversion. The Board offers no
20 evidence that the quality of the water being discharged from Bethany Drain is any different from
21 the quality of water in the Intake Canal that WSID pumps. Yet, even if there was a water quality
22 difference, it would not matter in this context. Under these undisputed facts, the law authorizes
23 WSID to pump a quantity of water equal to its Bethany Drain discharges without a water right
24 permit because it is simply maintaining control of and conveying its own drainage water.

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26 ⁵ In the context of Ms. Bare’s testimony the term “understanding” apparently means “this is what others told me.”

27 ⁶ The PT also raises a new argument for the first time in its Response to WSID’s Separate Statement of Facts, arguing that to the
28 extent water discharged from the Bethany Drain includes irrigation return flows that originated from non-foreign Old River
diversions, re-diversion of those flows counts against License 1381 (citing only WR-Kathy Mrowka testimony as the law). This
argument is unsupported. Water in a natural watercourse can be diverted either under a License or by maintaining control over
that water. A right holder will likely take different actions depending upon the year type. In addition, prior correspondence from
WSID confirmed that drain water was not being counted against diversions under License 1381 (WSID0017 at p. 2).

1 The Board expressly recognizes this right for DWR and USBR: “By their export
2 pumping, DWR and the USBR are turning water into the channels of the San Joaquin River,
3 **commingling it, and then reclaiming it**, as [Section 7075] authorizes.” State Water Board
4 Order WR 89-8 at p. 25 (bolding added). Section 7075 codifies a long line of California cases
5 clarifying a party’s right to convey water through a natural watercourse, commingle it, and
6 recapture it downstream. The seminal case on recapture, decided before the Civil War, is *Butte*
7 *Canal and Ditch Co. v. Vaughn* (1858) 11 Cal. 143, where the Supreme Court first upheld the
8 right of a prior appropriator to convey, commingle and recapture water using a natural
9 watercourse. The *Butte* court was not persuaded by an allegation, remarkably similar to the
10 assertion advanced by this PT nearly 160 years later, that an appropriator could be injured by
11 such commingling by injuring the quality of the water in the natural stream *Id.* at p. 148.
12 Contrary to the PT’s assertion, Water Code §7075, by its plain language, is not limited in its
13 application to foreign waters, but applies to all “waters which has been appropriated.” Section
14 7075 is derived from a predecessor statute, Civil Code section 1413, enacted in 1872, which used
15 the same wording, and codifies California case law, such as *Butte Canal and Ditch Co. v.*
16 *Vaughn* (1858) 11 Cal. 143, which does not refer to foreign water, and states only:

17 The first appropriator of the water of a stream passing through the public lands in this
18 State, has the right to insist that the water shall be subject to his use and enjoyment to the
19 extent of his original appropriation, and that its quality shall not be impaired so as to the
20 defeat the purpose of its appropriation. To this extent his rights go, and not further. In
21 subordination of these rights, subsequent appropriators may make such use of the channel
of the stream as they think proper, and they may mingle with its waters other waters, and
22 divert an equal quantity, as often as they choose. Whilst resting in the perfect enjoyment
of their original rights, the first appropriators have no cause of complaint.

22 *Butte Canal* at pp. 153-154 (underscoring and bolding added).

23 **C. WSID MEASURES ALL DISCHARGES AND DIVERSIONS.**

24 This record includes unambiguous evidence that WSID measures all discharges from the
25 Bethany Drain into the WSID Intake Canal. WSID0174 at pp. 2-4. The WSID methodology is
26 reasonable, and consistent with general irrigation operations in California. WSID0175. Thus the
27 PT must conveniently ignore the record in order to assertion that “it is unclear how the weir is
28 calibrated and measured with any reasonable accuracy. (Response to Statement of Facts at p. 6

1 lines 15-16.). (See WSID0175 at p. 5. “A weir is a flow measuring device. It should not require
2 calibration if it is properly installed and operated.”)

3 Similarly, WSID measures all diversions from the Intake Channel. WSID0174 at pp. 4-6.
4 The Prosecution Team asserts that WSID “admits” that it diverted in excess of Bethany Drain
5 discharges on at least 22 days during the 2015 unavailability period – this is simply not the case,
6 as demonstrated by WSID’s rebuttal exhibits. WR-217 does not use the correct figures for
7 pumping rates from the Intake Channel⁷. WSID0165 is a compilation using the correct
8 measurements for inflow into and diversions out of the Intake Channel. WSID0165 demonstrates
9 only five instances after June 27, 2015⁸ where deliveries made to landowners within WSID
10 appear to exceed measured discharges from the Bethany Drain. However, one cannot conclude
11 from this anomaly that pumping exceeded Bethany Drain discharges, to the contrary, deliveries
12 from WSID’s irrigation system are not instantaneous; water pumped from the Intake Canal on
13 one day will still rest in laterals and conveyance canals for several days and be available for
14 pumping. Therefore, one cannot simply look at the measured Bethany Drain flow for one day
15 and compare it directly to the calculated deliveries for that date - rather it would be more
16 accurate to take a running average over multiple days to make such comparison. WSID0174 at
17 p. 5. Given the overall operation of the system the measuring these two events in the same day is
18 not correlated to meaningful data making this fallacious approach mere sophistry. The three day
19 running averages surrounding the apparent five exceedances show that measured inflow from
20 Bethany Drain over the three day period always exceeded measured pumping.

21 **IV. CONCLUSION**

22 WSID has taken creative efforts to address the water shortage it has faced in 2014 and
23 2015. Those efforts are legal, and comport with long-standing interpretations of California water
24 law. In its haste to use WSID as a “test case,” the PT has included issues in the CDO that should

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28 ⁷ Ms. Bare takes a notation from Mr. Martinez’s calendar, which (1) was never intended to be used as an accurate measurement
of diversions, and (2) includes pumping under WSID’s agreement with Banta-Carbona Irrigation District.

⁸ Prior to June 27, 2015 WSID was diverting pursuant to agreement with Banta-Carbona Irrigation District and any amounts
pumped from the Intake Channel above the Bethany Drain accretions were covered under that agreement.

1 not be included, such as the two issues discuss herein.

2 Date: February 29, 2016 HERUM\CRABTREE\SUNTAG
3 A California Professional Corporation

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5 By: _____
6 JEANNE M. ZOLEZZI
7 Attorneys for The West Side Irrigation District

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