



State Water Resources Control Board

June 10, 2015

VIA ELECTRONIC AND REGULAR MAIL

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RE: WEST SIDE IRRIGATION DISTRICT AND CITY OF TRACY TREATED WASTEWATER

Dear Ms. Lennihan and Ms. Zolezzi:

This letter provides discussion and analysis on behalf of the Division of Water Rights (Division) and the Delta Watermaster relative to issues raised by you on behalf of the City of Tracy (City) and West Side Irrigation District (WSID), regarding the City's sale of treated wastewater to WSID through Old River.

The Division and the Delta Watermaster have been in discussions with the City and WSID regarding the regulatory obligations with respect to the wastewater sale. The Division has concluded that either the City or WSID must demonstrate a valid basis of right to allow WSID to divert the wastewater despite the notice of insufficiency of water at WSID's licensed priority, and that the City must obtain State Water Resources Control Board (State Water Board) approval for the change in place and purpose of use of the wastewater pursuant to Water Code section 1211. The City and WSID disagree.

Background

The City operates a wastewater treatment plant and discharges approximately 9 million gallons per day (mgd), which is equivalent to 14 cubic feet per second (cfs), into Old River in San Joaquin County. WSID holds water right License 1381 (Application 301), which was issued on September 29, 1933, with a priority date of April 17, 1916. License 1381 authorizes WSID to divert up to 82.5 cfs from Old River. The City discharges into Old River upstream from WSID's point of diversion such that wastewater likely reaches WSID's diversion. The State Water Board issued notice of insufficient water supply at License 1381's priority (along with all other post-1914 rights) due to drought conditions in 2014, and again in 2015 pursuant to the April 23, 2015, San Joaquin River Watershed Curtailment Notice (Curtailment Notice).¹

The City apparently obtains water supplies from three sources: 1) South San Joaquin Irrigation District (SSJID) water delivered from the Stanislaus River (typically the vast majority of the City's supply); 2) U.S. Bureau of Reclamation (Reclamation) water delivered from the Delta-

¹ http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/sjrg_2015_curtail.pdf

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Mendota Canal; and 3) local groundwater wells (typically the smallest portion of the City's supply). Thus, the City's wastewater discharges are foreign in source and/or foreign in time to the Old River flow, and subject to appropriation.²

The City generally abandons the wastewater into Old River, where it is appropriated by WSID and presumably others downstream. However, in response to drought curtailments in 2014 and 2015, the City and WSID each year entered into a Wastewater Revocable License Agreement (Agreement) whereby the City apparently agreed to sell its wastewater discharges to WSID. Under the Agreement, the City would continue to discharge into Old River, and WSID would divert an equivalent amount at its License 1381 point of diversion.

The City does not have a valid basis of right to divert the wastewater at WSID

The City and WSID both claim that background legal principles regarding recapture of foreign and developed water allow the City to cease abandoning its wastewater and sell it to WSID free from regulation by the State Water Board. Such principles may apply (subject to Water Code section 1211, discussed below) if the City itself appropriates all or some portion of its water supply under its own right. But the City holds no appropriative rights, and obtains all or nearly all of its water through contract deliveries from SSJID and Reclamation.³

Water Code section 1210 grants the City the exclusive right to the treated wastewater as against anyone who supplied the City with that water, unless otherwise provided by an agreement between the supplier and the City.⁴ But section 1210 does not grant the City the right to divert that wastewater once it has been discharged into the stream. The City must demonstrate its own basis of right.

In response to a potential basis of right for the City to divert its wastewater discharges, we note that Water Code section 1485 allows public wastewater dischargers to the San Joaquin River to file an application for an appropriative permit to divert or sell the equivalent of their own wastewater flows downstream.⁵ However, by its terms, section 1485 is inapplicable to the City

² The NPDES Permit (CA0079154) for the City's Wastewater Treatment Plant notes that the City also accepts up to 850,000 gallons per day (about 1.3 cfs) of industrial food processing wastewater from Leprino Foods Company. It is unclear whether Leprino still discharges this amount into the Wastewater Treatment Plant, or whether Leprino's supplies are foreign to Old River. All of the City's discharges are presumed foreign for this analysis.

³ It is unclear to what extent the City has relied on its own developed groundwater supplies in 2014 and 2015, but in recent years the City's groundwater pumping apparently comprises less than 10% of the City's overall supplies.

⁴ For purposes of this analysis, we have not examined the water supply contracts between the City and SSJID and between the City and Reclamation. However, we note that some Central Valley Project (CVP) water supply contracts include a provision under which Reclamation claims rights to return flows from the beneficial use of CVP water.

⁵ Section 1485 provides, in relevant part: "Any municipality ... operating waste disposal plants ... disposing [wastewater] in the San Joaquin River may file an application for a permit to appropriate an equal amount of water, less diminution by seepage, evaporation, transpiration or other natural causes between the point of discharge and the point of recovery, downstream from said disposal plant and out of the San Joaquin River or the Sacramento-San Joaquin Delta. A permit to appropriate such amount of water may be granted by the board upon such terms and conditions as in the board's judgment are necessary for the

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because the City's point of wastewater discharge is to Old River, not to the San Joaquin River. In any case, the City has never sought a permit under section 1485 and so could not support the purported current diversion of its wastewater discharges under that provision, even if it were applicable.

WSID does not have a valid basis of right to divert the wastewater at WSID

WSID's License 1381 predates most and probably all of the City's wastewater discharges, so there is no basis to argue that WSID's right is premised in any part on the availability of the City's wastewater flows. Neither is License 1381 in any way predicated on section 1485.

Certainly, WSID can and apparently often does legally divert the City's abandoned wastewater flows along with natural flows and perhaps other abandoned flows in Old River. But this year, the Board issued notice that there is insufficient water in the system to support post-1914 priorities, including the priority of License 1381, and WSID has no other currently applicable water right to support continuing diversion under current hydrological circumstances.⁶

The City and WSID claim that the notice of insufficient water supply does not apply to diversions of discharged treated wastewater, and thus License 1381 should not be curtailed to the extent that WSID diverts the City's discharges. However, the Curtailment Notice does not exempt permits or licenses that might allow or result in diversions of some foreign water. The Curtailment Notice has only limited exceptions, which are not applicable here (e.g., stored water releases and hydropower diversions).

Water Code section 1211 applies even if either party has a valid basis of right

Consistent with traditional principles regarding the protection of downstream water rights holders and instream beneficial uses with respect to return flows, "the owner of any wastewater treatment plant shall obtain approval of the board" before making any change in "point of discharge, place of use, or purpose of use of treated wastewater..." (Water Code §1211, subd. (a).) The Board reviews such proposed changes to prevent injury to legal users of water. (*Id.*) Although downstream appropriators can neither compel the continued discharge of foreign water, nor claim legal injury if the importer recaptures or reclaims the return flow or sells it to another user,⁷ these background principles do not obviate section 1211(a).

Water Code section 1211, subdivision (b) provides an exception where "changes in the discharge or use of treated wastewater ... do not result in decreasing the flow in any portion of a watercourse." But section 1211(b) is inapplicable here. The City's decision to cease abandoning the wastewater in order to sell it to WSID is a change in the place of use and purpose of use of the treated wastewater. WSID's diversion of the wastewater decreases the flow downstream, particularly considering that WSID's sole water right is subject to the Curtailment Notice.

protection of the rights of others. Water so appropriated may be sold or utilized for any beneficial purpose...."

⁶ Although we are aware that WSID has a CVP contract, limited water availability prompted Reclamation to announce zero allocation under the contract for 2015.

⁷ *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250, 1295 (Cal. 1975); *Haun v. De Vaurs*, 218 P.2d 996, 998 (Cal. 1950); *Stevens v. Oakdale Irrigation Dist.*, 90 P.2d 58, 62 (Cal. 1939).

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The City must obtain Board approval under section 1211 in order to implement the Agreement with WSID.

The Division and the Delta Watermaster are sympathetic to WSID's plight, and we appreciate the efforts the City has made on WSID's behalf. However, the City and WSID must comply with the Water Code. Failure to comply with the Water Code provisions may result in enforcement action against either the City or WSID, or both.

If you have any questions or comments regarding this letter, please feel free to contact me at (916) 341-5445, or by email at Andrew.Tauriainen@waterboards.ca.gov. The Division of Water Rights staff person monitoring the City of Tracy wastewater issues is Kathryn Bare. Ms. Bare can be contacted at (916) 341-5375 or by email at kathy.bare@waterboards.ca.gov. Written correspondence should be addressed to Ms. Bare at the following address: State Water Resources Control Board, Division of Water Rights, attn: Kathryn Bare, P.O. Box 100, Sacramento, CA 95814.

Very truly yours,



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cc [Via E-Mail Only]

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