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## State Water Resources Control Board

December 16, 2015

### VIA ELECTRONIC MAIL

TO: ENCLOSED SERVICE LIST OF PARTICIPANTS

### **PROCEDURAL RULING: THE WEST SIDE IRRIGATION DISTRICT DRAFT CEASE AND DESIST ORDER HEARING (ENFORCEMENT ACTION (ENF01949)) (WSID DRAFT CDO HEARING) AND THE BYRON-BETHANY IRRIGATION DISTRICT ADMINISTRATIVE CIVIL LIABILITY COMPLAINT HEARING (ENFORCEMENT ACTION (ENF01951)) (BBID ACL COMPLAINT HEARING)**

This letter addresses the November 9, 2015 [Motion to Continue Hearing Date](#) (Motion) jointly filed by The West Side Irrigation District (WSID), South Delta Water Agency (SDWA) and Central Delta Water Agency (CDWA), and the November 23, 2015 [Request to Consolidate](#) the water availability analysis portions of the hearings, submitted by WSID, Byron-Bethany Irrigation District (BBID), San Joaquin Tributaries Authority (SJTA), City and County of San Francisco (CCSF), SDWA, CDWA, and Westlands Water District (WWD).

### **PROCEDURAL BACKGROUND**

On August 19, 2015, the State Water Board issued a [Notice of Public Hearing and Pre-Hearing Conference](#) for the BBID ACL complaint hearing. In accordance with the October 2, 2015 [Ruling of Hearing Officer Doduc](#), the public hearing scheduled to be conducted on October 28, 29 and 30, 2015, was rescheduled to be conducted on March 21-25, 2016. Accordingly, the State Water Board issued on October 20, 2015, a [Revised Notice of Public Hearing and Pre-Hearing Conference](#).

On September 1, 2015, the State Water Board issued a [Notice of Public Hearing and Pre-Hearing Conference](#) for the WSID draft CDO hearing. In accordance with the October 23, 2015 [Ruling](#) and November 6, 2015 [Ruling of Hearing Officer Spivy-Weber](#), the public hearing scheduled to be conducted on November 12, 13 and 16, 2015, was postponed until January 11-15, 2016 and February 4-5, 2016. Accordingly, the State Water Board issued on November 10, 2015, a [Notice of Rescheduled Public Hearing](#) for the WSID draft CDO hearing.

### **MOTION FOR CONTINUANCE OF WSID DRAFT CDO HEARING**

The Motion filed by WSID, SDWA and CDWA requested that the WSID draft CDO hearing be continued until at least March 2016 to allow the parties to complete discovery, and review, comprehend, and respond to the materials on which the Prosecution Team is basing the enforcement action. The Hearing Team received comments from the Prosecution Team, SJTA and CCSF on the Motion. The Prosecution Team took no position on the Motion, and SJTA and CCSF supported the Motion.

In light of the request to consolidate portions of the two hearings, the motion for continuance is granted. The WSID draft CDO hearing and all document submittal deadlines for exhibits, testimony, policy and opening statements, pre-hearing briefs and motions, and written rebuttal testimony are **POSTPONED and RESECHEDULED**, as described below.

**REQUEST TO CONSOLIDATE HEARINGS**

The parties' Request to Consolidate proposed a two-phased approach to the hearings: Phase 1 (Water Availability) to be held March 21-25, 2016; and Phase 2 (Remaining Key Issues of Enforcement Actions) to be held March 28-April 1, 2016. The Hearing Team received written concurrence from the [Prosecution Team](#), Department of Water Resources, and the State Water Contractors with the general proposal to consolidate the portions of both hearings that address water availability. We appreciate the parties' coordinated proposal as to how these two hearings may proceed most efficiently and effectively.

On November 30, 2015, the [Hearing Team advised](#) the parties that the hearing officers consented to the proposed consolidation of the water availability analysis portions of the hearings, to commence on March 21, 2016 (Phase 1), and that the portions of the proceedings that are specific to each case (Phase 2) would commence immediately following completion of Phase 1. The parties were provided the opportunity to submit comments or objections to the consolidation and rescheduling of the hearings.

The Hearing Team received a comment from [Mr. Morat](#), who did not object to the consolidation if his testimony could be accommodated during the week of March 21-25, 2016. Mr. Morat is a party to the BBID ACL complaint hearing, and seeks to testify regarding the impact of unauthorized diversions on fisheries and other environmental conditions. We will allow Mr. Morat to testify during the week of March 21-25, 2016, and may discuss the timing of Mr. Morat's testimony in further detail during the second pre-hearing conference on February 8, 2016.

A formal notice of Consolidation of Public Hearings and Rescheduled Public Hearings will be issued by the State Water Board. The following table provides the rescheduled hearing dates and document submittal deadlines for both proceedings, which are substantially similar to those previously set for the BBID ACL complaint hearing. We currently intend to conduct the Phase 2 BBID ACL complaint hearing prior the Phase 2 WSID draft CDO hearing; however, this schedule may be revised:

<b>WSID CDO and BBID ACL Hearings Rescheduled Hearings and Document Submittal Deadlines</b>	
Noon, Tuesday, January 19, 2016	Deadline for receipt and service of witnesses' proposed testimony, exhibits, lists of exhibits, qualifications, and statement of service.
Noon, Monday, January 25, 2016	Deadline for receipt and service of: 1. Motions to dismiss and/or motions for summary judgment. 2. Pre-hearing briefing of legal issues. ( <u>BBID ACL Hearing Only</u> )
Monday, February 8, 2016	2 <sup>nd</sup> Pre-Hearing Conference: Phase 1, Phase 2-BBID, and Phase 2-WSID.
Noon, Monday, February 22, 2016	Deadline for receipt and service of: 1. Proposed written rebuttal testimony, exhibits, list of exhibits, qualifications, and statements of service. 2. Responsive briefing of legal issues and motions. ( <u>BBID ACL Hearing Only</u> )

Noon, Monday, February 29, 2016	Deadline for receipt and service of: 1. Written opening statements. 2. Motions in limine.
Noon, Friday, March 4, 2016	Deadline for receipt of opposition to motions in limine.
March 21, 22, 23, 24, 25, 28, 29, 30, 2016 April 1, 4 and 6, 2016	Phase 1 Hearing (Water Availability) and Phase 2 Hearing (Remaining Key Issues of Enforcement Actions).

### **SUBMITTAL OF EXHIBITS**

We expect the parties to follow the Attachment to the August 19, 2015 and September 1, 2015 Hearing Notices, "Information Concerning Appearances at Water Right Hearings" (Notice Attachment). The Notice Attachment Section 6, Written Testimony and Exhibits, states, in part:

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. 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 presenting a case-in-chief or written rebuttal in either proceeding shall provide **one complete Index of Exhibits** describing each sequentially numbered exhibit for Phase 1 and Phase 2. The index must indicate whether a particular exhibit is intended to be offered into evidence during Phase 1, Phase 2-BBID, or Phase 2-WSID.

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/WSID Hearings"**. Electronic submittals to the State Water Board of documents greater than 11 megabytes in total size should be submitted on a compact disc (CD or DVD) or a thumb drive. **Each electronically submitted exhibit must be saved as a separate PDF file, with the name in lower case lettering (i.e., pt1, pt2 or wsid1, wsid2, etc.).**

### **SECOND PRE-HEARING CONFERENCE**

The second pre-hearing conference will address outstanding procedural issues related to the conduct of Phase 1 and Phase 2 of both hearings. We will discuss the order of proceeding, hearing time limits for presentation of cases-in-chief, cross and re-cross examination, presentation of oral summary of written rebuttal testimony, and any other matter that will facilitate the efficient conduct of the hearings.

### **SCOPE OF HEARINGS**

Based on the parties' submittals addressing the proposed consolidation and rescheduling of the hearings, the following is the revised scope of Phase 1 and Phase 2 of the hearings. Some of the key issues listed in the hearing notices for these proceedings could arise in either Phase 1 or Phase 2. We do not intend to allow key issues properly raised in Phase 1 to be revisited in Phase 2, and parties should be prepared to submit all evidence with respect to those issues at the time they are first raised.

**PHASE 1 – WATER AVAILABILITY:**

The purpose of the consolidated Phase 1 of the BBID ACL complaint and WSID draft CDO hearings is to receive evidence regarding the following issues:

1. *Was the water diverted by BBID from June 13 through June 25, 2015, if any, unavailable under its claimed pre-1914 appropriative right and all other claims of right by BBID?*
2. *Was the water diverted by WSID after May 1, 2015, if any, unavailable under License 1381 and all other claims of right by WSID?*

**PHASE 2 – REMAINING KEY ISSUES OF ENFORCEMENT ACTIONS:**

The purpose of Phase 2 of the BBID ACL complaint hearing is to receive evidence relevant to determining all issues not addressed during Phase 1 of the hearing that are within the scope of the August 19, 2015, Notice of Public Hearing.

The purpose of Phase 2 of the WSID draft CDO hearing is to receive evidence relevant to determining all issues not addressed during Phase 1 of the hearing that are within the scope of the September 1, 2015, Notice of Public Hearing.

**EX PARTE COMMUNICATIONS**

We would like to remind the parties that *ex parte* communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Please be sure to copy the service list on any correspondence to us, the other Board Members, and the hearing team related to this matter.

Thank you for your continued cooperation. 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](mailto:Nicole.Kuenzi@waterboards.ca.gov); or Ernie Mona at (916) 341-5359 or by email to [Ernie.Mona@waterboards.ca.gov](mailto:Ernie.Mona@waterboards.ca.gov); or to Jane Farwell-Jensen at (916) 341-5349 or by email to [Jane.Farwell-Jensen@waterboards.ca.gov](mailto:Jane.Farwell-Jensen@waterboards.ca.gov) (Gov. Code, § 11430.20, subd. (b).)

Sincerely,



Frances Spivy-Weber, Vice-Chair  
WSID Hearing Officer



Tam M. Doduc, Board Member  
BBID Hearing Officer

Enclosure: Service Lists

**SERVICE LIST OF PARTICIPANTS  
THE WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING  
(October 8, 2015)**

Parties	
THE FOLLOWING <b><u>MUST BE SERVED</u></b> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)	
<p><b>DIVISION OF WATER RIGHTS</b> Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:Andrew.Tauriainen@waterboards.ca.gov">Andrew.Tauriainen@waterboards.ca.gov</a></p>	<p><b>THE WEST SIDE IRRIGATION DISTRICT</b> Jeanne M. Zolezzi Karna Harrigfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a> <a href="mailto:kharrigfeld@herumcrabtree.com">kharrigfeld@herumcrabtree.com</a> <a href="mailto:jkrattiger@herumcrabtree.com">jkrattiger@herumcrabtree.com</a></p>
<p><b>STATE WATER CONTRACTORS</b> Stephanie Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 <a href="mailto:smorris@swc.org">smorris@swc.org</a></p>	<p><b>WESTLANDS WATER DISTRICT</b> Daniel O'Hanlon Rebecca Akroyd Kronick Moskowitz Tiedemann &amp; Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 <a href="mailto:dohanlon@kmtg.com">dohanlon@kmtg.com</a> <a href="mailto:rakroyd@kmtg.com">rakroyd@kmtg.com</a></p> <p>Philip Williams of Westlands Water District <a href="mailto:pwilliams@westlandswater.org">pwilliams@westlandswater.org</a></p>
<p><b>SOUTH DELTA WATER AGENCY</b> John Herrick, Esq. Dean Ruiz 4255 Pacific Ave., Suite 2 Stockton, CA 95207 <a href="mailto:jherrlaw@aol.com">jherrlaw@aol.com</a> <a href="mailto:dean@hprlaw.net">dean@hprlaw.net</a></p>	<p><b>CENTRAL DELTA WATER AGENCY</b> Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 <a href="mailto:jennifer@spalettalaw.com">jennifer@spalettalaw.com</a></p> <p>Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli &amp; McDaniel <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a> <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>
<p><b>CITY AND COUNTY OF SAN FRANCISCO</b> Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p>	<p><b>SAN JOAQUIN TRIBUTARIES AUTHORITY</b> Valerie Kincaid O'Laughlin &amp; Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 <a href="mailto:vkinaid@olaughlinparis.com">vkinaid@olaughlinparis.com</a></p>

<p><b>CALIFORNIA DEPARTMENT OF WATER RESOURCES</b> Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 <a href="mailto:robin.mcginnis@water.ca.gov">robin.mcginnis@water.ca.gov</a></p>	<p><b>BYRON BETHANY IRRIGATION DISTRICT</b> Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
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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)**

<b>PARTIES</b>	
<p>THE FOLLOWING <b><u>MUST BE SERVED</u></b> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p>	
<p><b>Division of Water Rights</b> Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 <a href="mailto:andrew.tauriainen@waterboards.ca.gov">andrew.tauriainen@waterboards.ca.gov</a></p>	<p><b>Byron Bethany Irrigation District</b> Daniel Kelly Somach Simmons &amp; Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 <a href="mailto:dkelly@somachlaw.com">dkelly@somachlaw.com</a></p>
<p><b>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District</b> Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 <a href="mailto:jzolezzi@herumcrabtree.com">jzolezzi@herumcrabtree.com</a></p>	<p><b>City and County of San Francisco</b> Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 <a href="mailto:jonathan.knapp@sfgov.org">jonathan.knapp@sfgov.org</a></p> <p>Robert E. Donlan Ellison, Schneider &amp; Harris L.L.P. 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 (916) 447-2166 <a href="mailto:red@eslawfirm.com">red@eslawfirm.com</a></p>
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<p>Dante Nomellini and Dante Nomellini, Jr.  Nomellini, Grilli &amp; McDaniel  <a href="mailto:ngmplcs@pacbell.net">ngmplcs@pacbell.net</a>  <a href="mailto:dantejr@pacbell.net">dantejr@pacbell.net</a></p>	
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