

## **Mona, Ernie@Waterboards**

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**From:** Tauriainen, Andrew@Waterboards  
**Sent:** Tuesday, November 24, 2015 8:47 PM  
**To:** Jeanne Zolezzi; Doduc, Tam@Waterboards; Spivy-Weber, Frances@Waterboards  
**Cc:** rjmorat@gmail.com; dantejr@pacbell.net; dean@hprlaw.net; Riddle, Diane@Waterboards; dkelly@somachlaw.com; 'dohanlon@kmtg.com'; 'ernie.mona@waterboards.ca.gov'; Janelle Krattiger; McCue, Jean@Waterboards; jennifer@spalettalaw.com; 'Jherrlaw@aol.com'; 'jonathan.knapp@sfgov.org'; kharrigfeld@herumcrabtree.com; Linda Wood; Buckman, Michael@Waterboards; ngmplcs@pacbell.net; Kuenzi, Nicole@Waterboards; 'pwilliams@westlandswater.org'; 'rakroyd@kmtg.com'; 'robin.mcginnis@water.ca.gov'; 'smorris@swc.org'; vkincaid@olaughlinparis.com; Unit, Wr\_Hearing@Waterboards; Rob Donlan  
**Subject:** RE: Request for Consolidation

To the Hearing Teams and Parties in the BBID ACLC and WSID Draft CDO Matters:

The Prosecution Team strongly agrees with the need to hold one hearing on water availability, but we have concerns about the vague delineation of issues for the phases in Ms. Zolezzi's letter, and we are mindful that the California WaterFix Petition hearing starts April 7. The Prosecution Team respectfully proposes the following:

1. The Prosecution Team joins the request for a phased hearing starting March 21, provided that the purposes and issues for the phases are as outlined below. All phases should incorporate the submittal and briefing schedule currently in place for the BBID hearing, except the case-in-chief submittal deadline should be advanced on week, to January 12, to allow more time to develop rebuttal. If the Hearing Officers are not inclined to schedule the phases starting March 21, the Prosecution Team proposes the following alternative hearing schedule, again with the purposes and issues as outlined below. This alternative schedule focuses the Joint Phase 1 on the issues common to both proceedings, for which BBID will presumably be prepared for hearing starting January 11 even under the existing schedule.
  - a. Joint Phase 1 case-in-chief starting January 11, with the submittal deadlines currently in place for WSID case-in-chief.
  - b. Joint Phase 1 rebuttal starting February 4, with the submittal deadlines currently in place for the WSID rebuttal.
  - c. Separate Phase 2 proceedings during the week of March 21, up to 2.5 days each, with the submittal deadlines currently in place for BBID.
2. Proposed Purposes and Issues for Phases.
  - 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 the methodology adequately administers the water rights priorities among lawful water diverters in the Delta watershed.

b. BBID Phase 2.

- i. The purpose of Phase 2 in the BBID proceeding is to receive evidence, testimony and briefing relevant to determining whether the Board should impose administrative civil liability against BBID for unauthorized diversion of water, and, if so, whether in the amount of \$1,553,250 or some other amount.
- ii. Key Issues include: 1) Whether there was water available for BBID to divert under its claimed pre-1914 appropriative right during June 13 through June 25, 2015. 2) Whether BBID diverted water from June 13 through June 25, 2015, pursuant to its pre-1914 appropriative claim, and, if so, in what amount. 3) Whether BBID diverted water from June 13 through June 25, 2015, pursuant to some other basis of right, and, if so, in what amount. 4) Whether the State Water Board may enforce against pre-1914 appropriative water right claimants for diversion during periods when the Board staff has determined, applying appropriate methodology, that water is unavailable for diversion at the claimant's priority. 5) If BBID did unlawfully divert water during June 13 through June 25, 2015, whether and to what extent any factors set forth in Water Code Section 1055.3 affect the administrative civil liability amount.
- iii. BBID Phase 2 will not address issues addressed in Joint Phase 1.

c. WSID Phase 2.

- i. The purpose of Phase 2 in the WSID proceeding is to receive evidence, testimony and briefing relevant to determining whether to adopt, with or without revision, the July 16, 2015, draft cease and desist order against WSID.
- ii. Key Issues include: 1) Whether WSID violated, or threatened to violate, the prohibition set forth in Water Code Section 1052 against the unauthorized diversion of water by diverting or threatening to divert water from Old River during a period when the State Water Board staff, applying appropriate methodology, had determined that water was unavailable at WSID's priority. 2) Whether WSID holds any water rights or claims under which it may lawfully divert water from Old River during a period when the State Water Board staff, applying appropriate methodology, had determined that water was unavailable at the priority accorded License 1381. 3) Whether the City of Tracy's treated wastewater discharges to the Old River are considered abandoned foreign flows subject to appropriation downstream of the point of discharge, and, if so, in what amounts. 4) Whether the City of Tracy and/or WSID complied with all applicable legal requirements necessary to allow WSID to divert at WSID's diversion pumps any treated wastewater discharged by the City of Tracy into the Old River. 5) Whether WSID is authorized to divert at the WSID diversion pumps any tailwater discharged from Bethany Drain into the WSID intake channel, and, if so, in what amounts? 6) How much tailwater discharges from Bethany Drain into WSID's intake channel on Old River? 7) What portion of tailwater discharged from Bethany Drain to WSID's intake channel on Old River is accreted from irrigated lands within WSID's service area? 8) Can WSID divert at WSID's diversion pumps any water discharged from Bethany Drain into WSID's intake channel without also diverting or threatening to divert Old River water?
- iii. WSID Phase 2 will not address issues addressed in Joint Phase 1.

Andrew Tauriainen, Attorney III  
State Water Resources Control Board  
Office of Enforcement  
1001 I Street, 16th Floor  
Sacramento, CA 95814  
tel: (916) 341-5445  
fax: (916)341-5896  
[atauriainen@waterboards.ca.gov](mailto:atauriainen@waterboards.ca.gov)

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**From:** Jeanne Zolezzi [mailto:JZOLEZZI@herumcrabtree.com]  
**Sent:** Tuesday, November 24, 2015 5:00 PM  
**To:** Doduc, Tam@Waterboards; Spivy-Weber, Frances@Waterboards  
**Cc:** rjmorat@gmail.com; Tauriainen, Andrew@Waterboards; dantejr@pacbell.net; dean@hprlaw.net; Riddle, Diane@Waterboards; dkelly@somachlaw.com; 'dohanlon@kmtg.com'; 'ernie.mona@waterboards.ca.gov'; 'Frances.Spivy-Weber@waterboards.ca.gov'; Janelle Krattiger; McCue, Jean@Waterboards; jennifer@spalettalaw.com; 'Jherrlaw@aol.com'; 'jonathan.knapp@sfgov.org'; kharrigfeld@herumcrabtree.com; Linda Wood; Buckman, Michael@Waterboards; ngmplcs@pacbell.net; Kuenzi, Nicole@Waterboards; 'pwilliams@westlandswater.org'; 'rakroyd@kmtg.com'; 'robin.mcginnis@water.ca.gov'; 'smorris@swc.org'; vkincaid@olaughlinparis.com; Unit, Wr\_Hearing@Waterboards  
**Subject:** Request for Consolidation  
**Importance:** High

Hearing Officers,

Attached please find a letter request from the majority of the parties to the Byron Bethany ACL Hearing and The West Side CDO hearing. While we did not obtain signatures yet for the State Water Contractors and the Department of Water Resources, they were present during our discussions, and at that time expressed their support for the proposal. I do not wish to misrepresent, and would ask them to weigh in their support via email if they so desire.

Finally, Andrew Tauriainen of the Prosecution Team was in agreement, but had to speak with his team. We have not yet had a response to our request for signature, but again, believe the Prosecution Team is also in support of this request.

*Jeanne M. Zolezzi*

HERUM | CRABTREE | SUNTAG  
ATTORNEYS

Jeanne M. Zolezzi  
Attorney-at-Law

T: 209.472.7700 \ F: 209.472.7986  
5757 PACIFIC AVENUE, SUITE 222 STOCKTON, CA 95207  
[www.herumcrabtree.com](http://www.herumcrabtree.com) \ [jzolezzi@herumcrabtree.com](mailto:jzolezzi@herumcrabtree.com)

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