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7 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

8	In the Matter of the Administrative Civil)	PROSECUTION TEAM'S OPPOSITION TO THE WEST SIDE IRRIGATION DISTRICT'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION AND MOTIONS TO DISMISS
	Liability Complaint Against Byron)	
9	Bethany Irrigation District)	
)	
10	In the Matter of the Draft Cease and)	
	Desist Order Against the West Side)	
11	Irrigation District)	
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1 **I. INTRODUCTION**

2 The West Side Irrigation District’s (WSID’s) Motion For Summary Judgment, Or In the
3 Alternative, Summary Adjudication; Motion to Dismiss Based Upon Violation of Due
4 Process; Motion to Dismiss-Method of Determining Water Availability Is an Unlawful
5 Underground Regulation (Motion), dated February 3, 2016, must be denied as to all points,
6 except for one point on which the Prosecution Team should be granted summary judgment.
7 WSID is not entitled to summary judgment as to the sufficiency of water in 2015 to support
8 diversions under WSID’s License 1381 (Motion, Part III.A, at pp. 5:4-10), and as to the basis
9 of right for WSID’s diversions of tailwater from the Bethany Drain (Motion, Part III.C, at pp.
10 8:17-10:26), because there are disputed issues of key material facts on both points.

11 The Prosecution Team should be granted summary judgment concerning WSID’s
12 use and potential use of the City of Tracy’s wastewater, because the City did not file a
13 wastewater change petition under Water Code section 1211 and obtain State Water Board
14 approval to sell the wastewater to WSID. In addition, neither the City nor WSID has a valid
15 claim of right to divert the wastewater once it has been discharged into the Old River. There
16 are no disputed issues of material fact as to this issue, and summary judgment should be
17 granted to the Prosecution Team. (Motion, Part III.B, at pp. 5:11-8:14.)

18 The Hearing Officer should reject WSID’s motions to dismiss because they lack
19 merit. WSID first moves to dismiss on the basis that having Hearing Officer Spivy-Weber
20 hear this matter would violate its due process rights, but WSID fails to show either actual
21 bias on Ms. Spivy-Weber’s part, or the requisite intolerable risk of bias based on the
22 circumstances, to warrant dismissal on due process grounds. Accordingly, WSID’s motion to
23 dismiss for violation of due process should be denied.

24 WSID incorporates the legal arguments and assertions raised by Byron-Bethany
25 Irrigation District (BBID) and alleges that the process State Water Board staff used to
26 conclude that water was unavailable to WSID was a regulation, unlawfully adopted and
27 violative of the Administrative Procedures Act (APA). That argument is unavailing because
28 staff’s factual water unavailability determination does not meet any of the elements

1 necessary to establish that it is a regulation subject to the APA. WSID's motion to dismiss
2 alleging an underground regulation also should be denied.

3 **II. FACTUAL BACKGROUND**

4 **A. License 1381**

5 WSID holds water right License 1381, originally issued on September 29, 1933, and
6 amended on August 19, 2010. License 1381 has a priority date of April 17, 1916, and
7 authorizes the direct diversion of 82.5 cubic-feet-per-second (cfs) of water from the Old
8 River in San Joaquin County from (1) April 1 October 31 of each year for irrigation, and (2)
9 from April 1 to October 31 of each year for municipal, domestic and industrial uses. WSID
10 does not hold or claim any other appropriative or riparian rights. (WR-13 at p. 2, WR-112,
11 WR-113, WR-114.) The Prosecution Team and WSID do not dispute these facts.

12 **B. The State Water Board's 2014 and 2015 Unavailability Notices apply to 13 License 1381**

14 On May 27, 2014, the State Water Board staff issued an Unavailability Notice for
15 those diverting water in the Sacramento and San Joaquin Watershed with a post-1914
16 appropriative right. (2014 Unavailability Notice). The 2014 Unavailability Notice applied to
17 License 1381, meaning that no water was available to serve License 1381, and the
18 conditions of unavailability remained in place until November, 2014. (WR-13 at pp. 2-3; WR-
19 26, WR-27, WR-28.) The Prosecution Team and WSID dispute the staff determinations
20 regarding the availability of water in 2014.

21 On May 1, 2015, State Water Board staff again issued an Unavailability Notice of
22 water for those diverting water in the Sacramento and San Joaquin River Watershed with a
23 post-1914 appropriate right. (May 2015 Unavailability Notice.) (WR-13 at p. 4, WR-35.)
24 The May 2015 Unavailability Notice applied to License 1381, meaning that no water was
25 available to serve License 1381, and conditions of unavailability remained in place until
26 November, 2015. (WR-44 and WR-45.) The Prosecution Team and WSID dispute the staff
27 determinations regarding the availability of water for License 1381 after May 1, 2015.
28

1 On June 12, 2015, State Water Board staff issued an Unavailability Notice for those
2 diverting water from the Sacramento and San Joaquin River watersheds and Delta with pre-
3 1914 appropriative claims commencing on or after 1903. (June 2015 Unavailability Notice.)
4 (WR-13 at 5, WR-39.) These conditions applied to Banta-Carbona Irrigation District's
5 Statement 000495, and remained in place until September, 2015. (WR-141 [Banta-Carbona
6 S000495]; WR-43.) The Prosecution Team and WSID dispute the staff determinations
7 regarding the availability of water for Statement 495 after May 1, 2015.

8 Water Board staff conducted an exhaustive water availability and demand analysis
9 before issuing the Unavailability Notices. (See WR-7 at pp. 1-4, WR-9, WR-11, WR-209,
10 WR-210, WR-211, WR-213, et al.) Water quality is included in staff's water availability and
11 demand analysis, particularly as to whether water is of sufficient quality to meet beneficial
12 uses such as crop irrigation. (WR-7 at pp. 12-13, WR-213 [passim].) These are among the
13 central disputed issues of these proceedings.

14 **C. WSID's agreements with the City of Tracy to divert treated wastewater from**
15 **the Old River**

16 The City of Tracy operates a wastewater treatment plant (WWTP) and discharges
17 treated wastewater effluent into the Old River at a point that is upstream from WSID's point
18 of diversion under License 1381. (WR-13 at p. 3, WR-184.) In 2014 the City discharged
19 approximately 9 million gallons of wastewater per day into the Old River, which is equivalent
20 to 14 cfs on a substantially continuous basis. (*Id.*) The Prosecution Team and WSID do not
21 dispute these facts.

22 In May 2014, the City entered into an agreement with WSID for the sale of treated
23 effluent from the City's wastewater treatment plant (2014 Agreement.) (WR-13 at p. 3, WR-
24 136, WR-167.) The 2014 Agreement provides that WSID may divert all of the City's
25 wastewater discharges from April 1, 2014 through October 31, 2014, and must provide
26 written notice of its intent to divert wastewater under the Agreement. (*Id.*) Before entering
27 into the 2014 Agreement the City had abandoned its wastewater discharges into the Old
28 River, and the City does not hold an appropriative water right to divert water, including its

1 discharged wastewater, from the Old River. (WR-7 at 14-15, WR-13 at p. 4.) The
2 Prosecution Team and WSID do not dispute these facts.

3 In March 2015, the City of Tracy and WSID again entered into an agreement for the
4 sale of the City's of treated wastewater effluent to WSID (2015 Agreement.) (WR-13 at p. 5,
5 WR-139.) The 2015 Agreement is substantially similar to the 2014 Agreement, and provides
6 that WSID may divert all of the City's wastewater discharges from April 1, 2015 through
7 October 31, 2015. (*Id.*) On July 8, 2015, the City terminated the 2015 Agreement with
8 WSID. (WR-13 at 5, WR-144.) The Prosecution Team and WSID do not dispute these
9 facts.

10 The City did not submit a wastewater change petition to the State Water Board under
11 Water Code section 1211 for either the 2014 Agreement or the 2015 Agreement. (WR-13 at
12 pp. 3, 5.) The Prosecution Team and WSID do not dispute these facts.

13 **D. WSID's reported water use in 2014 and 2015 after receipt of the**
14 **Unavailability Notices**

15 WSID admits the following facts through its Subpoena response, and the Prosecution
16 Team does not dispute them:

17 WSID continued to divert water from the Old River in 2014 after the State Water
18 Board had issued the 2014 Unavailability Notice, and also in 2015 after the 2015 Water
19 Unavailability Notice was issued. (WR-13 at pp. 2-6.) In 2014 WSID purchased all of the
20 City's treated wastewater (2,736.31 acre-feet) that was discharged into the Old River
21 between June 15, 2014 to September 24, 2014. (WR-13 at p. 3, WR-143.) Between June
22 and September 2014, WSID diverted at least 1,278.39 acre-feet of the City's wastewater
23 discharges. (WR-13 at p. 3, WR-138.)

24 From May 1 to May 13, 2015, WSID diverted at least 735.51 acre-feet of water from
25 the Old River under License 1381 though, as outlined in the May 2015 Unavailability Notice,
26 there was no water available to serve License 1381. (WR-13 at p. 4, WR-135, WR-139.)
27 WSID apparently did not divert any wastewater from the City of Tracy under the 2015
28 Agreement. (WR-14 at 5.) WSID did divert water based on a "temporary pumping right

1 assignment” it obtained from the Banta Carbona Irrigation District (BCID), where BCID
2 claims a pre-1914 appropriative right with a priority date of 1912 for the diversion of
3 approximately 200 cfs from the San Joaquin River under Statement 000495 (S000495).
4 (WR-13 at p. 5, WR-141, WR-142.) The June 2015 Unavailability Notice applied to BCID’s
5 S000495, but WSID continued to divert water under its agreement with BCID between June
6 17 and June 27, 2015, when State Board Board staff had determined there was no water
7 available to serve S000495. (WR-13 at p. 5, WR-43, WR-142.) The total amount diverted
8 was 85.08 acre-feet according to WSID’s records. (WR-13 at pp. 5-6, WR-135 at p. 5.)

9 Finally, in 2015 WSID also diverted tailwater and accretion flows from a drain on its
10 property called the Bethany Drain. (WR-13 at 6, WR-134, WR-135 at p. 8.) From May
11 through October 2015, WSID claims it diverted 2459.41 acre-feet of tailwater and accretions
12 from the Bethany Drain. The Bethany Drain collects water from a variety of sources,
13 including tailwater from WSID’s irrigation, water collected in WSID’s tile drains, drainage
14 from the City of Tracy, and irrigation tailwater from neighboring districts. WSID and the
15 Prosecution Team dispute the sources and ownership of water in the Bethany Drain. Water
16 discharged from the Bethany Drain commingles with water in the Old River. (WR-7 at pp.
17 11-12, WR-13 at p. 6, WR-135 at p. 8.)

18 **III. LEGAL STANDARDS**

19 **A. Summary Judgment**

20 A motion for summary judgment cannot be granted if there are disputed issues of
21 material fact. (Cal. Code Civ. Proc. § 437c(c).) Rather, summary judgment is only proper “if
22 all the papers submitted show that there is no triable issue as to any material fact and that
23 the moving party is entitled to judgment as a matter of law.” (*Id.*)

24 A defendant moving for summary judgment has the initial burden of proving that a
25 cause of action has no merit. (*Id.* at § 437c(p).) Only if a defendant meets this initial burden
26 does the burden then shift to the opposing party “to show that a triable issue of one or more
27 material facts exists as to that cause of action.” (*Id.* at § 437c(p)(2).) Moreover, “from
28 commencement to conclusion, the party moving for summary judgment bears the burden of

1 persuasion that there is no triable issue of material fact and that he is entitled to judgment
2 as a matter of law.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

3 In ruling on a summary judgment motion, the court or hearing officer must view all
4 evidence, and all inferences reasonably drawn from the evidence, in the light most favorable
5 to the non-moving party. (*Id.* at p. 843.) When a triable issue of fact exists, summary
6 judgment must be denied. (Cal. Code Civ. Proc. § 437c(c).)

7 California Code of Civil Procedure section 437c also provides that a party may move
8 for summary adjudication “as to one or more causes of action within an action, one or more
9 affirmative defenses, one or more claims for damages, or one or more issues of duty.” (*Id.* at
10 § 437c(f).) A motion for summary adjudication may only be granted if it “completely disposes
11 of a cause of action.” (*Id.*)

12 **B. Dismissal standard for WSID’s alleged due process violations and alleged**
13 **creation of an underground regulation**

14 A “motion to dismiss” is a nonstatutory motion, i.e., not specifically authorized by the
15 Code of Civil Procedure except in certain limited circumstances not relevant here. (Cal.
16 Prac. Guide, Civil Procedure Before Trial, § 7:370.) When courts exercise their inherent
17 judicial power to hear such pleadings denominated as a motion to dismiss, they typically
18 apply procedural rules and standards applicable to demurrers. (*Id.* § 7:376.) Thus, motions
19 to dismiss should be confined to the matters appearing on the face of the draft CDO or of
20 which the hearing officer can take judicial notice. (*Id.*)

21 **IV. ARGUMENT**

22 **A. Motion for Summary Judgment**

23 Parts III.A and III.C of WSID’s summary judgment motion must be denied because
24 there are disputed issues of material fact concerning the basis of the draft cease and desist
25 order that is the subject of this proceeding, as noted in the Prosecution Team’s Response to
26 WSID’s Separate Statement of Facts, filed concurrently herewith. The Prosecution Team is
27 entitled to summary judgment on Part III.B of WSID’s Motion, regarding improper use of the
28 City of Tracy’s wastewater, because the City did not comply with Water Code section 1211

1 before selling the water to WSID, and because neither WSID nor the City has a valid basis
2 of right to use the wastewater.

3 **1. Summary judgment cannot be granted as to water availability**

4 WSID's motion for summary judgment regarding water availability is completely
5 without merit. (Motion, Part III.A, at p. 5:4-5:10.) There are many significant disputed issues
6 of material fact between the parties about the drought water availability analysis State Water
7 Board staff conducted before issuing the Unavailability Notices. (See, e.g., Prosecution
8 Team's Response to WSID's Separate Statement of Facts ¶¶ 8, 10, 13, 15, 16, 39.) The
9 Division's drought water availability analysis is the central contested issue of this
10 proceeding, and the topic has been assigned its own hearing phase. The Prosecution Team
11 disputes many of the "facts" WSID cites in its separate statement concerning water
12 availability, and stands by the analysis Board staff performed in determining whether there
13 was sufficient water to serve License 1381 and other holders of post-1914 appropriative
14 rights to water in the Sacramento River and Sacramento-San Joaquin Delta watershed.
15 (WR-7 at pp. 1-4, WR-9, WR-11, WR-209, WR-210, WR-211, WR-213, et al.)

16 WSID's central argument on this point is that WSID is entitled to divert Sacramento
17 River water. (Motion, p. 5:5-11.) This ignores key facts, namely, that License 1381 does not
18 rely and is not contingent upon availability of water from the Sacramento River (see, e.g.,
19 Rebuttal Testimony of Katherine Mrowka, WR-209). In addition, the State Water Board has
20 found that diverters in the southern Delta have rights only to San Joaquin River water,
21 because under natural conditions Sacramento River water would not likely reach these
22 areas. (State Water Board Order 89-08 [WR-236], p. 24.) A glaring omission in WSID's
23 argument is that, absent Project releases during extreme conditions such as those present
24 in 2015, the water at WSID's diversion point would not be suitable for beneficial uses such
25 as irrigation very early in the season. (See, e.g., WR-213, p. 31.) In such times, there can be
26 no water available to serve License 1381.

27 Because the parties dispute water availability in 2015, WSID's motion for summary
28 judgment must be denied. (Cal. Code Civ. Proc. § 437c(c); *Aguilar*, 25 Cal.4th at 850.)

1 **2. The City of Tracy wastewater agreements are subject to Water Code**
2 **section 1210; the Prosecution Team is entitled to summary judgment**

3 Summary judgment should be granted to the Prosecution Team on WSID's diversion
4 of the City's wastewater because the undisputed facts show that the City failed to obtain
5 State Board approval under Water Code section 1211, and because neither WSID nor the
6 City has the right to use the wastewater once the City discharges it into the Old River.
7 (WSID's Motion, Part III.B, at pp. 5:11-8:14.) WSID admits that it diverted the City's
8 wastewater in 2014 after the 2014 Unavailability Notice was issued. (See, WR-7 at pp. 13-
9 15, WR-13 at pp. 3, 5.) WSID entered into a similar agreement in 2015, but the City
10 cancelled that agreement prior to WSID's commencement of diversions. (WR-13 at p. 5.)

11 WSID admits that neither it nor the City submitted a wastewater change petition to
12 the State Board under section 1211 for WSID to divert the wastewater. (WSID Motion, at pp.
13 6:5-23.) WSID also admits that it does not have a separate appropriative right to the
14 wastewater.¹ (*Id.* at pp. 6:24-8:14.) But WSID asserts that, as a matter of law, no change
15 petition under section 1211 was needed and that a separate water right was not required to
16 divert the wastewater. (*Id.*) WSID is wrong on both points.

17 The City was obligated to obtain State Board approval of a change petition under
18 section 1211 before selling the wastewater to WSID. Water Code section 1211(a) applies to
19 treated waste water and states, "Prior to making any change in the point of discharge, place
20 of use, or purpose of use of treated wastewater, the owner of any wastewater treatment
21 plant shall obtain approval of the board for that change." (Water Code § 1211(a).) The City's
22 sale of wastewater to WSID changes both the place and purpose of use because the City
23 previously abandoned the wastewater in the Old River where the water was available for
24 appropriation according to priority. (WR-7 at pp. 13-15, WR-13 at pp. 3, 5.)

25 Water Code section 1211(b) limits section (a)'s application, stating "[s]ubdivision (a)
26 does not apply to changes in the discharge or use of treated wastewater that do not result in
27 decreasing the flow of any portion of a watercourse." (Water Code § 1211(b).) WSID initially

28 _____
¹ The Prosecution Team and WSID dispute whether WSID could rely on License 1381 for this purpose, but WSID's motion on this issues argues that no appropriative license is required at all for the wastewater agreements. This legal question is appropriate for summary judgment based on the undisputed facts.

1 claims that it is the Prosecution Team’s burden to show that the exception does not apply,
2 turning the burden of proof on its head. (*Simpson Strong-Tie Company, Inc. v. Gore* (2010)
3 49 Cal.4th 12, 23-24 [“one who claims an exemption from a general statute has the burden
4 of proving that he or she comes within the exemption” (internal citations and quotations
5 omitted)].) WSID then offers as “proof” of the exception only the unsupported assertion
6 WSID’s pump operator did not visually observe any change in flows downstream of WSID’s
7 diversion in 2014. (Motion, at p. 6.) WSID also offers that, based on its expert’s testimony,
8 the diversion of Tracy’s wastewater would cause no measureable decrease in flow or water
9 levels downstream. (*Id.*)

10 Section 1211(b) does not apply to its diversion of the City’s wastewater because
11 WSID’s diversion would necessarily reduce the flow of the Old River. (WR-7 at pp. 13-15,
12 WR-13 at pp. 3, 5.) Further, WSID’s diversion of the City’s wastewater also diminishes the
13 quality of the water available downstream, by reducing the overall quantity of fresh water
14 available in Delta channels which, particularly in 2015, were extremely susceptible to saline
15 water intrusion from the ocean due to extremely low inflow levels, and were only kept fresh
16 by the State and Federal Projects. (See, e.g., WR-213, p. 31.) Therefore, State Board
17 approval of a change petition under section 1211 is required before WSID may divert the
18 City’s wastewater, and the Prosecution Team is entitled to summary judgment (or
19 alternatively summary adjudication) on this issue. (Cal. Code Civ. Proc. § 437c.)

20 Summary judgment should also be granted to the Prosecution Team because WSID
21 and the City do not have a valid right to use the wastewater once it has been discharged
22 into the Old River. The City does not hold any appropriative rights to water in the Old River,
23 and obtains its water through contract deliveries from the South San Joaquin Irrigation
24 District (SSJID), the Bureau of Reclamation, and a small amount of groundwater. (WR-7 at
25 pp. 14.) Consequently, the City’s treated wastewater discharges are foreign in source and
26 foreign in time to the Old River flow, and use of foreign waters is contingent on having a
27 valid appropriative right. (*Id.*) WSID could not rely on License 1381 after May 1, 2015, nor
28

1 Banta-Carbon's Statement 495 after June 12, because there was no water available for
2 those appropriative rights after those dates. (WR-34, WR-36.)

3 Water Code section 1210 grants the City the exclusive right to the treated wastewater
4 as against anyone who supplied the City with that water, unless otherwise provided by an
5 agreement between the supplier and the City. (Water Code § 1210.) But section 1210 does
6 not grant the City the absolute right to the wastewater, nor to divert the wastewater after it is
7 discharged into the Old River. The general rule is diversions of wastewater discharged to a
8 stream channel can occur only under a valid appropriative water right. Water Code sections
9 1485 and 1486 carve out limited exceptions to this rule, in that wastewater dischargers in
10 very specific geographical areas (not applicable to the City of Tracy) may obtain
11 appropriative permits to their own wastewater discharges and such permits are not subject
12 to the normal rules of priority. This encourages such dischargers to treat their wastewater
13 sufficiently to be able to sell their wastewater downstream. WSID reads sections 1485 and
14 1486 to merely allow such dischargers to obtain permits that they do not actually need.
15 (Motion, p. 8:7-14.). Such an interpretation removes all meaning and effect from these
16 sections, or, as WSID suggests, adds unnecessary regulatory layers. These interpretations
17 must be rejected.

18 The legal authority WSID's cites in its motion is not on point because WSID
19 incorrectly assumes that the City has an appropriative right to the wastewater. (WSID
20 Motion, at pp. 6:24-8:14.) WSID's understanding is not correct as a matter of law, and
21 ignores State Water Board precedent. The Board has required wastewater dischargers to
22 obtain appropriative permits in order to withdraw discharged water downstream, for
23 example, in Water Rights Decision 1638² (WR-230), where the City of Thousand Oaks
24 obtained a wastewater change petition and an appropriative permit (App. 29408; Permit
25 20952) in order to divert its wastewater flows downstream from its treatment plant.

26 For these reasons, the Prosecution Team is entitled to summary judgment (or
27 summary adjudication) on the issue of whether the City must obtain approval of a

28 ² http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1638.pdf

1 wastewater change petition under Water Code section 1210 prior to commencing the
2 wastewater agreements, and whether the City and/or WSID must have a valid appropriative
3 right to divert the wastewater discharged into the Old River.

4 **3. Certain diversions of tailwater from the Bethany Drain were**
5 **unauthorized; WSID is not entitled to summary judgment**

6 WSID is not entitled to summary judgment on the tailwater diversion issue because
7 disputed issues of material fact exist concerning the source of the tailwater that WSID
8 pumps from the Bethany Drain. (WR-209 at pp. 14-15; Prosecution Team’s Response to
9 WSID’s Separate Statement of Facts, 20.) Certain diversions from the Bethany Drain count
10 against License 1381, and thus were unlawful after issuance of the 2014 and 2015
11 Unavailability Notices because WSID did not have a valid claim for diversion. (WSID’s
12 Motion, at pp. 8:15-10:26, Part III.C.) Specifically, where tailwater that first originated as a
13 diversion under License 1381, or a neighboring landowners’ appropriative right, is diverted
14 from the Bethany Drain, diversion of that tailwater counts against License 1381 because it is
15 not foreign in source.

16 Water Code section 1202(d) explains that if “water which having been appropriated
17 or used flows back into a stream, lake or other body of water,” then that water becomes
18 unappropriated, meaning that the water is available for appropriation by downstream- rights
19 holders. (Water Code § 1202.) WSID admits that a portion of the water it pumps from the
20 Bethany Drain includes return flows from License 1381, and water from other appropriators
21 that flows into the drain. (WR-13 at 6.) This water is abandoned and subject for downstream
22 appropriation once it enters the stream channel. (Wat. Code § 1202(d).) WSID’s reliance on
23 Water Code section 7075 here is misplaced, as that section applies only to imported water.

24 The tailwater apparently also includes water from other sources, including foreign
25 sources, but WSID does not measure how much water it recaptures from each source.
26 (WR-8, WR-13, WR-209.) And none of the authorities WSID cites allows it to recapture the
27 foreign water discharged into the Old River without adequately measuring the amount of
28

1 water available for re-diversion.³ Therefore, WSID is not entitled to summary judgment on
2 the tailwater issue.

3 **4. WSID has not submitted sufficient evidence to support its summary**
4 **judgment motion**

5 There are disputed issues of material fact precluding issuance of summary judgment
6 as noted above. In addition, there are gaps in WSID's evidence because Jack Alvarez's
7 testimony (WSID 0158) has been stricken from the record, and Rick Martinez's testimony
8 (WSID 060) does not include many of the paragraphs WSID cites to in support of its motion.
9 (See, e.g., Prosecution Team's Response to WSID's Separate Statement of Facts at ¶¶ 26-
10 34.) The Prosecution Team objects to any consideration of Jack Alvarez's declaration given
11 the Hearing Officers' February 18, 2016, ruling,⁴ and objects to Rick Martinez's declaration
12 to the extent WSID cites to paragraphs or statements that are not actually included in that
13 declaration. (See, e.g., Prosecution Team's Response to WSID's Separate Statement of
14 Facts at ¶¶ 26-34.)

15 **B. WSID provides no evidence of violations of the separation of functions or ex**
16 **parte rules to warrant dismissing this proceeding on due process grounds**

17 WSID moves to dismiss on the theory that there is an unacceptable risk that Hearing
18 Officer Spivy-Weber is impermissibly biased in favor of the Prosecution Team as a result of
19 the Board's failure to maintain the requisite separation of functions and adhere to *ex parte*
20 communication rules (Motion, at p. 13:23-25) as required by the Supreme Court's decision
21 in *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45
22 Cal.4th 731 (*Morongo*). *Morongo* holds that the due process guarantee of a fair hearing can
23 be violated upon proof of actual bias on the part of the decision-maker or a showing that the
24 "probability of actual bias...is too high to be constitutionally tolerable." (*Morongo, supra*, 45
25 Cal.4th at p. 737.) In the context of administrative agency adjudications, impartiality of the
26 adjudicator is presumed and this presumption "can be overcome only by specific evidence

27 ³ WSID admits that it diverted in excess of Bethany Drain discharges on at least 22 days during the 2015
28 unavailability period (WR-216, 217, 234).

⁴ http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/byron_bethany/docs/bbidwsid_rulingltr_021816.pdf

1 demonstrating actual bias or a particular combination of circumstances creating an
2 unacceptable risk of bias.” (*Id.* at pp. 741-42.) WSID has made no such showing here.

3 **1. WSID fails to establish any actual bias by Hearing Officer Spivy-Weber**
4 **that would violate due process**

5 In its motion to dismiss, WSID does not and cannot provide evidence of any actual
6 bias on the part of Hearing Officer Spivy-Weber that would constitute a violation of due
7 process and warrant dismissal of this proceeding. To make this showing, the evidence
8 demonstrating bias must clearly be attributable to the administrative hearing officer. (See,
9 e.g., *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 473 [article authored by
10 Planning Commission member attacked project pending before commission].) WSID does
11 not even attempt to show actual bias directly attributable to Ms. Spivy-Weber, thereby
12 conceding that it cannot. Where, as here, a petitioner fails to establish how any alleged bias
13 is attributable to the actual decision-maker, the claim must fail. (*Kenneally v. Lungren* (9th
14 Cir. 1992) 967 F.2d 329, 333-334.)

15 **2. WSID fails to demonstrate the existence of particular circumstances**
16 **creating an unacceptable risk of bias on the part of Hearing Officer**
17 **Spivy-Weber**

18 Unable to establish actual bias, WSID asserts that Prosecution Team members’
19 discussions with Board members regarding potential water rights curtailments and drought-
20 related water availability violate the Board’s internal separation of functions and prohibition
21 on ex parte communications and constitute particular circumstances that create an
22 unacceptable risk of bias on the part of any member of the Board, including Hearing Officer
23 Spivy-Weber. (Motion, at p. 18:11-18; *Morongo, supra*, 45 Cal.4th at pp. 741-42; Gov. Code,
24 § 11425.10, subd. (a)(4).) However, WSID fails to demonstrate how the circumstances of
25 this case result in the risk of bias required to show a due process violation. As demonstrated
26 below, and consistent with the Administrative Procedures Act and the strictures of *Morongo*,
27 the procedural mandates to separate the prosecutorial and advisory functions and to avoid
28 impermissible ex parte communications have been strictly followed in this case to date.
Accordingly, the particular circumstances held to create an impermissible risk of bias in

1 cases such as *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 and
2 *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810 are absent here.

3 **a) The Board has maintained the proper separation of functions during**
4 **this proceeding**

5 WSID argues that Prosecution Team members have impermissibly advised the
6 Board on the issues being litigated in this proceeding in violation of separation of functions
7 rules. *Nightlife* and *Quintero* are helpful to evaluate WSID's claim that the Board has failed
8 to maintain a separation of functions. In *Nightlife*, the Court found that the separation of
9 functions had not been maintained because the attorney advising the hearing officer on
10 appeal had previously advocated for denial of petitioner's permit. (*Nightlife, supra*, 108
11 Cal.App.4th at p. 95.) The key circumstances relied upon in *Quintero* to find a due process
12 violation were that the agency's attorney had acted in both prosecutorial and advisory roles
13 in the same matters, and that the attorney had become the agency's "sole or primary legal
14 adviser." (*Morongo, supra*, 45 Cal.4th at p. 739.) As in *Morongo*, neither of these
15 circumstances is present in this case.

16 First, the Prosecution Team members have not "advised" the Board in the same
17 proceeding in which they are now serving as advocates, or in any other related proceeding
18 before the Hearing Officer. Contrary to WSID's contentions, general informational briefings
19 on staff's water availability analyses, water right curtailment notices and potential
20 enforcement actions are not the same proceeding as the draft CDO against WSID. Under
21 WSID's proposed construction of administrative law, the Board presumably must refuse to
22 hear general informational briefings from its staff regarding any issue that might
23 subsequently invoke an enforcement proceeding for fear that they might commingle agency
24 functions. But such chilling of informed governance is not required by due process, nor
25 would it provide any discernible additional safeguards to petitioners regarding later-initiated
26 administrative proceedings. As evidenced by the Prosecution Team members' careful
27 practice of not discussing how the water availability analysis would apply to a specific
28 diverter or the particulars of any ongoing enforcement actions when updating the Board

1 (see, e.g., BBID-306 at p. 4), the requisite safeguards are already in place and being
2 followed. Accordingly, WSID's right to due process has been preserved.

3 Second, the Prosecution Team members have not "advised" the Board at all, let
4 alone served as the Board's primary advisors. As illustrated by *Nightlife* and *Quintero*, a
5 staff member "advises" a Board by analyzing a set of specific facts and recommending a
6 particular course of action in the context of a pending adjudicatory proceeding. (*Nightlife*,
7 *supra*, 108 Cal.App.4th at p. 95; *Quintero*, *supra*, 114 Cal.App.4th at pp. 815-817.) Here, the
8 Prosecution Team members merely provided updates in the context of non-adjudicatory,
9 informational briefings and did not recommend any course of action as to adoption of the
10 water supply analysis or its application to any particular diverter, let alone WSID. To the
11 contrary, these updates merely provided the basic methodology behind the water availability
12 analysis and cited to the concerns of stakeholders regarding its accuracy. (See, e.g., BBID-
13 316 at pp. 4-5.) WSID fails to cite to a single case in which an administrative officer or board
14 was precluded from acting on a matter simply because it had previously received
15 information regarding matters of a general nature and wide applicability in a non-
16 adjudicatory setting, nor is there any such case.

17 WSID presents no evidence that the Board has violated the separation of functions.
18 WSID's allegations regarding the Prosecution Team and Hearing Officer are factually and
19 legally unsupportable, and WSID makes no allegations and offers no evidence as to any
20 possible separation of functions issues regarding current members of the Advisory Team.
21 Accordingly, WSID has not met its evidentiary burden and its motion to dismiss for violations
22 of due process should be denied.

23 **b) There have been no impermissible ex parte communications**

24 WSID contends that the Prosecution Team members' updates in front of the Board,
25 presentations at public workshops, and emails with Board members regarding water
26 availability and water curtailments constitute impermissible ex parte communications that
27 create an intolerable risk of biased decision making. (Motion, at p. 13:12-14.) This
28 contention is baseless.

1 Government Code section 11430.10 provides that, when an agency adjudicatory
2 proceeding is pending, no employee or representative of the agency who is acting as a
3 party to the proceeding shall communicate directly or indirectly to the presiding officer of the
4 proceeding without notice and opportunity for all other parties to participate in the
5 communication. (Gov. Code, § 11430.10, subd. (a).) A proceeding is “pending” within the
6 meaning of this statute once the agency issues a pleading or there is an application for an
7 agency decision, whichever is earlier. (*Id.* § 11430.10, subd. (c).)

8 Here, WSID claims that Board members were advised during 2014 and 2015 by
9 members of the Prosecution Team on matters related to this proceeding. However, there
10 was no “pending proceeding” within the meaning of the Government Code, and the Board’s
11 ex parte procedures that prohibit such communications did not apply until the enforcement
12 proceedings at issue here commenced when Board staff issued the draft CDO on July 16,
13 2015. (WR-1.) Also, the regular updates provided by staff at public Board meetings and
14 comments at public workshops are not prohibited ex parte communications because they
15 occurred at open, public Board meetings where all interested parties have an opportunity to
16 participate in the communication, as required by the Government Code.

17 Further, none of the emails cited by WSID establishes that there were any prohibited
18 ex parte communications from members of the Prosecution Team to members of the Board,
19 or that there was otherwise a failure to adequately separate the Board staff’s prosecutorial
20 and advisory functions – either after or before the current draft CDO became pending. As
21 the Supreme Court held in *Morongo*:

22 [t]he agency head is free to speak with anyone in the agency...except the
23 personnel who serves as adversaries *in a specific case*...Virtually the only
24 contact that is forbidden is communication in the other direction: a prosecutor
cannot communicate off the record with the agency decision maker or the
decision makers’ advisors *about the substance of the case*.

25 (*Morongo, supra*, 45 Cal.4th at p. 738, original italics.) As discussed above, the
26 communications in question between Prosecution Team members and the Board did not
27 address the substance of this proceeding. These communications did not involve
28

1 application of the water availability analysis to WSID or any other specific facts concerning
2 WSID's diversions, and therefore do not constitute impermissible ex parte communications.

3 For all of these reasons, WSID has failed to establish any violation of the separation
4 of functions or ex parte rules that evidences circumstances creating an intolerable risk of
5 bias on the part of the Hearing Officer. Accordingly, WSID's motion to dismiss based upon
6 violation of due process should be denied.

7 **C. The drought water availability analysis is evidence of a fact, and is not an**
8 **underground regulation**

9 WSID makes essentially the same motion and incorporates BBID's legal arguments
10 and assertions on the underground regulation issue. (WSID Motion, at p. 18:27-19:16.) The
11 Prosecution Team incorporates herein the legal arguments and assertions set forth in Part
12 III.A (commencing on page 2) of the Prosecution Team's Opposition to BBID's Motions to
13 Dismiss and Disqualify Hearing Officer, filed concurrently herewith. WSID's motion to
14 dismiss alleging an underground regulation should be denied.

15 **V. CONCLUSION**

16 The Prosecution Team respectfully requests that WSID's motions be denied, and that
17 the Prosecution Team be granted summary adjudication as to the applicability of Water
18 Code section 1210 to the City of Tracy/WSID wastewater agreements, and the need for a
19 valid appropriative right under those agreements.

20 Date: February 22, 2016

Respectfully Submitted,

21 

22 Andrew Tauriainen
23 **OFFICE OF ENFORCEMENT**
24 Attorney for the Prosecution Team