

June 7, 2016

Via Electronic Mail

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
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P.O. Box 100
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Re: Reply to Prosecution Team's June 3, 2016 Comment Letter on Draft Order Dismissing the Administrative Civil Liability Complaint Against Byron-Bethany Irrigation District and Dismissing the Draft Cease and Desist Order Against the West Side Irrigation District

Dear Ms. Townsend:

The Prosecution Team (PT), in its June 3, 2016 comment letter regarding the Draft Order Dismissing the Administrative Civil Liability Complaint Against Byron-Bethany Irrigation District (BBID) and Dismissing the Draft Cease and Desist Order Against the West Side Irrigation District (WSID) (Draft Order), asks the State Water Resources Control Board (SWRCB) to remand or amend the Draft Order, in part, to clarify the standard hearing officers should apply to evaluate evidence for a motion for judgment, and to declare the type of water availability analysis that should be used in the future to support an enforcement action.

As to the applicable standard to support a motion for judgment, the PT argues for a third time that they are entitled to extraordinary deference pursuant to a nonsuit analysis, as opposed to a Motion for Judgment (C.C.P. § 631.8). This is the identical argument that Andrew Tauriainen made at the hearing on March 23, 2016, and which the PT made in its Opposition to Motion for Nonsuit submitted by the Hearing Team on the same day. BBID and WSID addressed this matter in the Power Point presentation provided to the Hearing Team on March 23, 2016.

Ms. Jeanine Townsend

Re: Reply to Prosecution Team's June 3, 2016 Comment

June 7, 2016

Page 2

Now, the PT again proposes that the Hearing Team make all evidentiary inferences in favor of a prosecution team. This is not appropriate in an administrative enforcement action and, moreover, is applicable to a nonsuit, not a Motion for Judgment. As BBID and WSID discussed at the enforcement hearing, and as confirmed in the Draft Order in Section 4.0 at page 12, tribunals may weigh the evidence and make inferences and determinations of witness credibility. The Hearing Team found the PT's argument for such a deferential standard unavailing when the PT argued for as much at the hearing, and there is no basis to reconsider that determination.

The PT's third argument involves its request that the SWRCB include in its Order a determination as to which water availability analysis will be sufficient in the future to support an enforcement action. This request is adverse to the SWRCB's stated intention to hold a future workshop regarding the best practices for conducting water availability analyses and, moreover, expressly contradicts the Delta Watermaster's own position on this very issue. To that end, Delta Watermaster, Michael George stated publicly at the May 6, 2016 Delta Water Agency meeting that he has no intention of taking any enforcement actions on water rights in the Delta for 2016. Instead, he announced that he wants to bring all parties together to develop a clear set of rules and expressed his goal to come up with a cooperative agreement that does not waive water rights or act as adjudication but serves to gather data and information to better serve all interested parties.

Despite Mr. George's public comments at the May 6 meeting, in the June 6 comment letter to the SWRCB - signed by Mr. George - he is now asking the SWRCB to amend the Order to declare what type of analysis must occur to support an enforcement action, effectively throwing to the wayside the proposal that the parties work together to reach a cooperative agreement protecting the respective parties' rights. This direct contradiction to his prior position should not be entertained. Further, Mr. George already stated that he has no intention of proceeding with any enforcement actions this year, so there is certainly no urgency for the SWRCB to intervene and inject its own determination in lieu of allowing the regulated community to first engage in a cooperative process - a process which the SWRCB itself appropriately proposed in the draft Order. The SWRCB should not amend the Order to definitively render an opinion as to which water availability analysis is appropriate to support future enforcement actions. The parties should work cooperatively in the future towards an agreement that is properly vetted, and protects the interests of everyone involved, as suggested by the SWRCB in the draft Order.

Ms. Jeanine Townsend
Re: Reply to Prosecution Team's June 3, 2016 Comment
June 7, 2016
Page 3

Thank you for taking these comments into consideration.

Best regards,

Michael E. Vergara

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