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EXEMPT FROM FILING FEES
PURSUANT TO GOVERNMENT
CODE SECTION 6103

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

Coordination Proceeding
Special Title (Rule 3.550)

Case No. 1-15-CV-285182

CALIFORNIA WATER
CURTAILMENT CASES

JUDICIAL COUNCIL COORDINATION
PROCEEDING NO. 4838

BYRON-BETHANY IRRIGATION DISTRICT,

Petitioner/Plaintiff,
vs.

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD; et al,

Respondents/Defendants.

Case No.: N150967
Filed: June 26, 2015

PETITIONERS' AND PLAINTIFFS'
BYRON-BETHANY IRRIGATION
DISTRICT'S AND THE WEST SIDE
IRRIGATION DISTRICT, ET AL.S'
CONSOLIDATED REPLY BRIEF TO
STATE WATER RESOURCES
CONTROL BOARD AND STATE
WATER CONTRACTORS'
OPPOSITION BRIEFS ON THE
MERITS FOR PHASE I

Hearing Date: December 15, 2017
Time: 9:00 a.m.
Dept: 1

THE WEST SIDE IRRIGATION DISTRICT;
CENTRAL DETLA WATER AGENCY; and
SOUTH DELTA WATER AGENCY,

Petitioners/Plaintiffs,
vs.

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD, et al.,

Respondents/Defendants.

Judge: Hon. Brian C. Walsh

Action Filed: June 26, 2015

Case No.: 34-2015-80002121
Filed: June 29, 2015

BANTA-CARBONA IRRIGATION DISTRICT,
a California Irrigation District,

Petitioner,

vs.

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD, et al.,

Respondents.

Case No: 39-2015-00326421
Filed: June 18, 2015

PATTERSON IRRIGATION DISTRICT, a
California Irrigation District,

Petitioner,

vs.

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD, et al.,

Respondents.

Case No: 2015307
Filed: June 18, 2015

SAN JOAQUIN TRIBUTARIES AUTHORITY,
OAKDALE IRRIGATION DISTRICT, AND
SOUTH SAN JOAQUIN IRRIGATION
DISTRICT, et al.,

Petitioners/Plaintiffs,

vs.

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD, et al.,

Respondents/Defendants.

Case No.: 2015366
Filed: June 19, 2015

THE WEST SIDE IRRIGATION DISTRICT;
PATTERSON IRRIGATION DISTRICT;
BANTA-CARBONA IRRIGATION DISTRICT,
WEST STANSILAUS IRRIGATION DISTRICT,
CENTRAL DELTA WATER AGENCY, and
SOUTH DELTA WATER AGENCY

Petitioners/Plaintiffs,

vs.

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD, et al.,

Respondents/Defendants.

Case No.: 34-2016-80002387

Filed: July 7, 2016

BYRON-BETHANY IRRIGATION DISTRICT,

Petitioner/Plaintiff,

vs.

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD; et al,

Respondents/Defendants.

Case No.: 34-2016-80002388

Filed: July 7, 2016

SAN JOAQUIN TRIBUTARIES AUTHORITY,

Petitioner/Plaintiff,

vs.

CALIFORNIA STATE WATER RESOURCES
CONTROL BOARD, et al.,

Respondents/Defendants.

Case No.: 34-2016-80002389

Filed: July 7, 2016

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I. INTRODUCTION

Petitioners and Plaintiffs Byron-Bethany Irrigation District (BBID) and The West Side Irrigation District (WSID), et al., submit this consolidated reply to the opposition briefs of State Water Resources Control Board, et al. (Water Board or Respondents), and Intervenor Department of Water Resources (DWR) and State Water Contractors (SWC).

II. STANDARD OF REVIEW

The Water Board asserts that “[t]he parties agree that the substantial evidence standard applies [to judicial review of factual determinations]¹.” (Corrected Respondents’ Opposition Brief on the Merits, Phase I (Res. Opp.), p. 17, fn. 4.) Not so. Petitioners’ Opening Brief (section IV, titled “Standard of Review”) states the “court exercises its *independent judgment* on whether or not an agency’s findings are supported by the evidence when “the right or interest affected by the administrative decision is a ‘vested’ one.” (Petitioners and Plaintiffs BBID’s and WSID et al.’s Consolidated Opening Brief on the Merits for Phase I (Pet. Br., or Petitioners’ Opening Brief), p. 29 citing *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 721 [*SWRCB Cases*] (emphasis added).) Respondents did not address Petitioners’ argument that because the Curtailment Notices affected the vested rights of over 9,000 diverters in the Sacramento and San Joaquin watersheds, the independent judgment standard of review applies here. (*Ibid.*) Respondents also failed to address the holding in the *SWRCB Cases* which found that the “inquiry into whether or not the agency proceeded in the manner required by law is ‘subject to de novo review.’” (*Id.* at 722.)

Respondents’ cite the *SWRCB Cases* to support the argument that, under the substantial evidence standard, “[i]f Petitioners fail to . . . identify all the evidence in the record supporting the finding . . . , they waive the argument that there is not substantial evidence in the record.” (Res. Opp., p. 17:10-13 citing *SWRCB Cases, supra*, 136 Cal.App.4th at 749-750.) The portion of the *SWRCB Cases* cited, however, is not the appropriate standard of review for factual determinations

¹ Although the argument heading on page 50 of Petitioners’ Opening Brief states that “The Water Board’s Finding of Water Unavailability in the Curtailment Notices Was Not Supported by Substantial Evidence,” it is patently inaccurate to characterize this statement regarding the lack of evidence supporting the Water Board’s decision as an admission that the Substantial Evidence Standard of Review applies.

under Code of Civil Procedure section 1094.5. Rather, it represents the *SWRCB Cases* court's determination that the particular facts cited to challenge the factual finding from a Water Board decision were unconvincingly one-sided. (*Ibid.*) Petitioners' Opening Brief cites the appropriate portion of the *SWRCB Cases* discussing the applicable standard of review for factual and legal findings. (Pet. Br., p. 29 citing *SWRCB Cases* at 721 (The trial court is authorized by law to exercise its independent judgment on the evidence when "the right or interest affected by the administrative decision is a 'vested' one"); *Id.* at 722 (questions of law are subject to *de novo* review).)

III. ARGUMENT

A. The Curtailment Notices Were Final Agency Actions

Petitioners' Opening Brief explains that an actual controversy has arisen and now exists between water right holders in California, including Petitioners, and the Water Board regarding whether curtailment notices issued by the Water Board are orders and/or decisions constituting final actions as contemplated by Water Code sections 1122 and/or 1126. The Water Board's opposition fails to respond to this argument. Accordingly, Petitioners' request that this Court issue a declaration that the Water Board's issuance of a curtailment notice to a water right holder is a final agency action triggering a clearly defined process to challenge the action.

B. The Water Board Does Not Have Jurisdiction Over Diversions Under Valid Riparian and Pre-1914 Water Rights

Respondent's Opposition Brief avoids Petitioners' arguments regarding the Water Board's lack of jurisdiction over diversions under valid riparian and pre-1914 water rights. Instead, Respondents mischaracterize Petitioners' arguments, omit discussion of relevant legal authorities, and apply inapt hypotheticals that distract from a thorough examination of the legal issue:

Does the Water Board's authority pursuant to Water Code section 1052 allow it to determine that a diversion within the scope of an otherwise valid riparian or pre-1914 water right is "unauthorized" due to a water supply shortage, or is this the type of "regulation" of senior rights that the *Young*² and *Millview*³ courts said was not within the Board's authority?

² *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397 (*Young*).

³ *Millview County Water District v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879 (*Millview*).

1 **1. The Water Board Lacks Statutory Authority to Curtail Pre-1914 Water**
2 **Rights**

3 In their Opening Brief, Petitioners describe why the Water Board’s statutory authority is
4 limited to unallocated water - i.e., water that was not appropriated under prior laws when the
5 Water Board’s formation in 1914. (Pet. Br., pp 20-21.) Petitioners also explain that no provision
6 of the Water Code or any other statute provides the Water Board with authority to curtail riparian
7 or pre-1914 rights. (*Id.* at 30-31.) Respondents failed to respond. (Res. Opp., pp. 18-22.)

8 **2. The Water Board Lacks Common Law Authority to Curtail Pre-1914 Water**
9 **Rights**

10 There is no common law authority allowing the Water Board to curtail otherwise valid
11 riparian or pre-1914 water rights during times of shortage. *Young* and *Millview* confirmed only
12 the Water Board’s authority over claimed riparian or pre-1914 rights for the narrow purposes of
13 confirming the existence and size of the right and enforcing against diversions in excess of the
14 right. (Pet. Br., pp. 31-33.) Without identifying any facts to support extending the limited *Young*
15 and *Millview* holdings to this case, Respondents assert that *Young* and *Millview* “support the
16 conclusion that the Board has authority to evaluate the availability of water under the priority of
17 the [pre-1914] diverter’s claimed right.” (Res. Opp., p. 22:15-16, and discussion, pp. 20-23.)
18 They do not. Rather, *Young* and *Millview* caution against the Water Board regulation of prior
19 rights: “[...] [T]he Water Code gives the Water Board jurisdiction in enforcement proceedings to
20 determine initially whether a diverter has either the riparian or pre-1914 appropriative right(s) it
21 claims. Once that determination is made, “[n]o one disputes that the Water Board does not have
22 jurisdiction to regulate riparian and pre-1914 appropriative rights.” (*Young, supra*, 219
23 Cal.App.4th at 404.)

24 Respondents argue that evaluating the availability of water under the priority of a valid
25 senior right during drought is the same as determining whether a diversion exceeds the maximum
26 perfected amount of the right. This is absurd, and avoids the most important question when
27 evaluating the Water Board’s jurisdiction: does the issue involve unappropriated water subject to
28 the Water Board’s authority?

1 **a. The Water Board's Authority is Tied to Unappropriated Water**

2 There is a material distinction between situations in which a claimed pre-1914 diversion is
3 unlawful because it exceeds the maximum perfected amount of the pre-1914 water right, and a
4 situation where there is not enough water available for a valid pre-1914 diverter to divert the
5 maximum amount of the perfected pre-1914 water right. The former situation could include a
6 pre-1914 diverter who has lost a portion of his right over time due to non-use (*Millview*), or a
7 claimed pre-1914 diversion that is larger than the perfected amount of the pre-1914 right (*Young*).
8 In these situations, the Water Board may exercise its enforcement authority under Water Code
9 section 1052 against the water right holder of the claimed pre-1914 right because "a permit is
10 required to divert water appropriated pursuant to a claimed pre-1914 water right that was never
11 perfected, or has been forfeited, or is otherwise invalid." (*Millview, supra*, 229 Cal.App.4th at
12 894 [citing *Young, supra*, 219 Cal.App.4th at 404]).

13 Conversely, the latter situation deals with valid senior rights that should not be exercised
14 to their maximum perfected quantity at a given point in time because there is not enough water to
15 meet all of the senior demands from the same source. Under these circumstances, the Water
16 Board cannot exercise its enforcement authority under Water Code section 1052 because the
17 limited supply of water available, by definition, cannot be considered unappropriated water.
18 (Wat. Code, § 1201 [emphasis added] (defining unappropriated water as "[a]ll water flowing in
19 any natural channel, *excepting so far as it has been or is being applied to useful and beneficial*
20 *purposes upon . . . or otherwise appropriated . . .*"); Wat. Code, § 1202.) Rather, during such a
21 shortage, the only water available is previously appropriated water to which the senior rights that
22 predate the Water Board are entitled to divert.

23 Historically, the Water Board has consistently agreed that its authority to enforce Water
24 Code section 1052's prohibition on the unauthorized diversion or use of water in cases involving
25 pre-1914 rights depends on the existence of unappropriated water that would be subject to its
26 permitting authority. (See *Appellant State Water Resources Control Board's Opening Brief*⁴,
27 *Dianne E. Young, et al., v. State Water Resources Control Board*, 2012 WL 5024308 (Cal.App. 3

28 ⁴ See Petitioners' Request for Judicial Notice Exhibit A.

Dist.), at *20 (citations omitted) (emphasis added) (Wat. Code, § 1202 defines “unappropriated water” to include “[w]ater that has never been appropriated,” “[w]ater subject to a pre-1914 right, but which was not perfected by putting the water to beneficial use with due diligence,” and “[w]ater for which a right had been perfected by putting the water to use under a pre-1914 right, but where the use later ceased,” and explaining that “[u]nder this definition of unappropriated water, only the water claimed under a pre-1914 right that exceeds the actual right constitutes unappropriated water subject to the State Water Board’s regulation.”) See also *In the Matter of Draft Cease and Desist Order Against Unauthorized Diversions by Woods Irrigation Company*, Order No. WR 2011-0005, February 1, 2011, 2011 WL 684674, at *6 (citing Wat. Code, §§ 1201, 1202) (“the diversion of water consistent with a valid riparian or pre-1914 appropriative right would not constitute an unauthorized diversion of water subject to division 2 of the Water Code.”⁵); *In the Matter of the Threat of Unauthorized Diversion and Use of Water by Thomas Hill, Steven Gomes, and Millview County Water District*, Order WR 2011-0016⁶, October 18, 2011, 2011 WL 5375142, at *13. (“[a]ccordingly, the diversion of water as authorized under a valid pre-1914 appropriative right would not be subject to enforcement pursuant to Water Code sections 1052 and 1831, subd. (d)(1).”)

b. Millview Footnote 11 and Temescal Are Inapplicable

Respondents rely on footnote 11 in the *Millview* opinion for the proposition that the Water Board has jurisdiction over pre-1914 water rights. Footnote 11 noted only the Water Board’s authority to determine if diversions are within or outside of the scope of a perfected pre-1914 water right. It does not discuss Water Board authority to regulate diversions within the scope of a perfected pre-1914 right. Footnote 11 discusses *Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.2d 90 (*Temescal*). (Res. Opp., pg. 22.) (*Millview*, *supra*, 229 Cal.App.4th at 404, citing *Temescal* at 103-104). In *Temescal*, the question was whether the Water Board could determine if there was unappropriated water available as a prerequisite to the Water Board’s jurisdiction to issue a permit. The *Temescal* court concluded that in order to determine whether to

⁵ See Petitioners’ Request for Judicial Notice Exhibit B.

⁶ See Petitioners’ Request for Judicial Notice Exhibit C.

grant a new appropriative permit, the Water Board must first make the “threshold determination” whether there is, in fact, unappropriated water available. (*Ibid.*) To make this threshold determination, the Water Board had to define the boundaries of perfected pre-1914 rights so that it could identify whether or not these senior rights used all or only part of the total available water supply. If the Water Board determined that senior rights used only part of the available supply, there was unappropriated water available, and subject to the Water Board’s permitting authority.

By contrast here, the Water Board’s assessment of how much water is available for pre-1914 water rights with varying priority dates during a shortage is not a “threshold determination” necessary to any of the Water Board’s other jurisdictional functions. Even if the Water Board concluded that the water at issue should be allocated to more senior appropriators, it would have no “responsibility [or authority] to regulate” such water under Water Code section 1052 because the right to its use would be subject to prior rights of appropriation, which are not subject to the Water Board’s permitting authority. Such action would cross the barrier set by *Millview* and *Young* that the Water Board may not regulate diversions by senior rights.

Respondents perfunctory claim that “[t]here is no logical, much less legal, basis to distinguish between the Board’s authority to prevent the diversion of water that is unauthorized because it is in excess of the quantity, place of use, or purpose of use of a diverter’s valid right, and the diversion of water that is unauthorized because water is not available under a diverter’s priority of right,” fails. (Res. Opp., p. 22:17-21.) The legislature has not given the Water Board jurisdiction over water already appropriated or subject to riparian rights as of 1914. (Wat. Code, §§ 1052, 1202.) Without such authorization, the Water Board’s jurisdiction is statutorily limited.

The *Young* and *Millview* courts based their decisions of this limit on the Water Board’s statutory authority. Indeed, because Water Code section 1052 applies to water that is not subject to riparian and pre-1914 water rights (unappropriated water), the *Young* and *Millview* courts found that the Water Board’s jurisdiction must necessarily include the authority to investigate whether a particular diversion is pursuant to valid riparian or pre-1914 water rights. (*Young, supra*, 219 Cal.App.4th at 404-406; *Millview, supra*, 229 Cal.App.4th at 894-895.) If a diversion is not supported by a valid riparian or pre-1914 right (e.g., if the diversion exceeds the amount

1 perfected), the amount diverted in excess of that right is an unauthorized diversion of
2 unappropriated water subject to the Water Board's jurisdiction under Water Code section 1052.
3 (*Ibid.*) However, *Young* and *Millview* carefully expressed the ultimate limit on the Water Board's
4 authority: "water diverted under a valid pre-1914 water right is protected from . . . regulation
5 [under Water Code section 1831]." (*Millview, supra*, 229 Cal.App.4th at 894, citing *Young*.)

6 Thus, when there is not enough water in the system for anyone with a priority date later
7 than 1914, there is no justification, under the premise of preventing diversions of unappropriated
8 water, to find that a diversion within the scope of an otherwise valid pre-1914 right is
9 unauthorized pursuant to Water Code section 1052. Although the Water Board may determine
10 the validity of riparian and pre-1914 water rights, it may not exercise regulatory jurisdiction over
11 them. (*Millview, supra*, 229 Cal.App.4th at 894, citing *Young, supra*, 219 Cal.App.4th at 404.)
12 The Curtailment Notices cross the line between determining validity and regulating. In order to
13 issue the Curtailment Notices, the Water Board must "fix" and "establish" the relative priorities
14 of pre-1914 water rights to divert an amount of available supply that is determined by Water
15 Board Staff. (Pet. Br., p. 30.) Respondents make no effort to explain how this is not "regulation"
16 of riparian and pre-1914 rights or otherwise address the *Millview* and *Young* prohibition on
17 regulating these rights. (Resp. Opp., pp. 18-23.)

18 **C. Petitioners Have Standing to Assert Constitutional Due Process Claims**

19 **1. Petitioners Have Third Party Standing to Assert Due Process Claims**

20 The Water Board's assertion that the right of due process claims under the Constitution is
21 principally for the benefit of natural persons overlooks the well-recognized exception of third party
22 standing, which Petitioners satisfy. While constitutional claims typically must be brought by the
23 individual to whom they belong, the U.S. Supreme Court and California courts allow a third party
24 to assert constitutional claims in appropriate circumstances. (*Sanchez v. City of Modesto* (2006)
25 145 Cal.App.4th 660, 676 (*Modesto*), (citing *Singleton v. Wulff* (1976) 428 U.S. 106, 114
26 (*Singleton*); *Selinger v. City Council* (1989) 216 Cal.App.3d 259, 271 (*Selinger*); *Central Delta*
27 *Water Agency v. State Water Resources Control Board* (1993) 17 Cal.App.4th 621, 630 (*Central*
28 *Delta*).)

1 In *Selinger*, the Court of Appeal restated the U.S. Supreme Court's two-pronged test for
2 third party standing, which examines: 1) the relationship between the litigant and the third party
3 whose right the litigant seeks to assert, which includes whether the third party's right is
4 "inextricably bound up with" the litigant's activity; and 2) whether a genuine obstacle prevents
5 the third party from asserting its own right. (*Selinger, supra*, 216 Cal.App.3d at 270-271, citing
6 *Singleton, supra*, 428 U.S. at 106, 114 -116). Third party standing is granted to a political
7 subdivision when its statutory duties are "inextricably bound up with" its constituents' rights, and
8 was granted to the water districts in *Central Delta* that sought to assist their landowners. (*Central*
9 *Delta, supra*, 17 Cal.App.4th at 630-631.)⁷ Third party standing was intended to protect the
10 rights of constituents, such as the landowners within Petitioners' districts, who formed districts to
11 acquire and exercise water rights and to represent them, as allowed by the Water Code.

12 Here, the Legislature has expressly authorized Petitioners to pursue actions such as this
13 one to represent the water-related interests of their end users. (See Wat. Code, § 22075 ["district
14 may do any act necessary to furnish sufficient water in the district for any beneficial use."]
15 (emphasis added); Stats. 1973, Ch. 113 § 4.2(b) ["agency may assist landowners [] and water
16 right holders within the agency's boundaries in the protection of vested water rights and may
17 represent the interests of those parties in water right proceedings and related proceedings before
18 the [Water Board] and the courts of this state[.]"; Stats. 1987, Ch. 1089, § 4.5(b) [authorizing the
19 same actions for South Delta Water Agency as section 4.2(b) provides for Central Delta Water
20 Agency.])⁸

21 Petitioners WSID, Patterson Irrigation District (PID), Banta-Carbona Irrigation District

22 ⁷ The Water Board contends that *Central Delta* does not apply to the present case because "no due process claims
23 were asserted" in *Central Delta*. (Res. Opp., p. 25:8). The Water Board neglects to disclose that the claim in *Central*
24 *Delta* was an equal protection claim, which is also a constitutional claim that usually only benefits natural persons.
Yet, the *Central Delta* court nonetheless determined that the districts had standing because they were formed under
special district acts and had standing to act on behalf of their landowners.

25 ⁸ The Petitioners properly pled standing in their Petitions. (See, e.g., BBID's Fourth Amended Petition for Writ of
26 Mandate and Complaint for Declaratory Injunctive Relief and Damages, ¶ 60 ("BBID holds water rights and other
27 property in trust for the benefit of, among others, landowners within BBID. The [Curtailment] Notice was directed
28 to BBID[,] and BBID is under direct threat of enforcement for failure to comply with the mandates contained in the
[Curtailment] Notice. BBID therefore has standing to challenge the Notice. Moreover, other activities alleged
herein adversely affect BBID in that they either materially affect the availability of water under BBID's pre-1914
appropriative water right and/or fail to comply with the California law of water rights, thereby injuring BBID and
the landowners with BBID."))

(BCID), Oakdale Irrigation District (OID), South San Joaquin Irrigation District (SSJID), and BBID exist for the primary purpose of diverting and delivering water for the ultimate use and benefit by the thousands of landowners and end users within their respective jurisdictional boundaries. In this litigation, Petitioners represent and advocate redress for the rights and interests of their beneficiaries. If the districts did not divert and deliver water to the end users, and if the end users did not beneficially use that water, the water right would not exist. By statute, Petitioners' duties and the constituents' rights are "inextricably bound up," as envisioned in *Central Delta*.

It is not judicially feasible for the "natural person" end users to challenge the Water Board's actions. The Petitioners supply water to more than 90,000 acres of land within the Delta region owned by thousands of end users. Through its untenable standing argument, the Water Board effectively invites claims by each and every one of these end users, promoting great judicial inefficiency. Additionally, in response to such individual claims, the Water Board would surely argue that the individual landowners have no standing because they do not hold the water right in their name, and Petitioners would need to be joined in the lawsuit. The principle of third party standing protects against such "catch-22" situations. The Water Board misapplies the general rule of standing to Petitioners in an attempt to circumvent judicial review of its own actions, when Petitioners nevertheless have third party standing to bring constitutional claims against the Water Board.

2. The General Standing Rule Regarding Constitutional Claims Is Inapplicable

The Water Board's assertion that Petitioners lack standing because a public agency may not sue "its creator" is misplaced. (Res. Opp., p. 23:20-22.) "The point of the no-standing rule is to prevent local governments, whether as plaintiffs or defendants, from using certain provisions of the federal constitution to obtain invalidation of laws passed by their creator, the state." (*Modesto, supra*, 145 Cal.App.4th at 676.) Here, Petitioners are challenging the Water Board's failure to afford due process prior to issuing their Curtailment Notices. These Curtailment Notices are not part of the Water Board's or the State of California's statutory scheme. Thus,

Petitioners are not challenging a law passed by their “creator,” i.e. the state.⁹ Thus, this argument is misplaced.

D. The Curtailment Notices Violated Petitioners’ Due Process Rights

The Water Board does not dispute the fact that water rights are real property subject to due process protection. Instead, the Water Board argues that its failure to provide due process was appropriate under a three-factor balancing test from *Mathews v. Eldridge* (1976) 424 U.S. 319 (*Mathews*). However, this test demonstrates Petitioners were entitled to more due process than what the Water Board afforded them – which was no process at all. The three *Mathews* factors are analyzed below.

1. First *Mathews* Factor: The Curtailment Notices Infringed Upon Petitioners’ Legally Protected Property Interests

The first factor in the *Mathews* balancing test “is whether the plaintiff has been deprived of a protected interest in ‘property’ or ‘liberty.’” (*Today’s Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 214 (internal quotations omitted).) The Water Board does not dispute that the water rights at stake are protected real property interests, but instead reframes the question as whether Petitioners have a right to be free from notices from the Water Board. To the contrary, water rights – not the right to be free from notices – are the interests for which the Water Board should have afforded Petitioners due process. Specifically, the right affected by the Curtailment Notices is the usufructory property interest of the Petitioners’ water rights. This usufructory interest encompasses Petitioners’ ability to divert water to which they hold valid water rights when that water is flowing by, and is the interest that should be analyzed under the *Mathews* factors.

The Water Board’s coercive Curtailment Notices infringed upon Petitioners’ property interest because they threatened that any diversions were unlawful and subject to substantial

⁹ Petitioners note that they have not sued their “creator,” rather another political subdivision of the state. Indeed, the Water Board was created by the Legislature in the same manner as the Petitioners. For some, specifically Modesto and Turlock Irrigation Districts (members of the San Joaquin Tributaries Authority), their existence predates the creation of the State Water Commission – the first iteration of a Water Board. (See Water Commission Act, Stats. 1913, Ch. 586, 1012-33; *Western Union Tel. Co. v. Modesto Irrigation Co.* (1906) 149 Cal. 662, 666; *Turlock Irrigation Dist. v. Williams* (1888) 76 Cal. 360, 367).)

penalty, despite the fact that all the diversions were within the scope of Petitioners' water rights. The Water Board's repeated assertion that it intended merely to notify recipients of water availability is contrary to water rights generally and the procedural history of this case. (Res. Opp., p. 33.) Notably, in the order granting a temporary restraining order, Sacramento Superior Court Judge Chang stated, "the language of the Curtailment Letters goes beyond informational and is instead coercive such that a recipient is likely to believe they are no longer allowed to divert." (Water Board's Amended Administrative Curtailment Record (SB-AR), 004917.) This Curtailment Notice constituted an infringement upon Petitioners' water rights because it deprived them of their protected property interests under the first *Mathews* factor.

2. Second *Mathews* Factor: Implementation of Additional Procedures Would Have Reduced the Risk of Erroneous Deprivations of Petitioners' Water Rights

The second prong of the procedural due process analysis under *Mathews* is whether the procedures risked erroneous deprivation, and whether additional procedures would have been of value. (*Mathews, supra*, 424 U.S. at 348.) The Water Board claims that there was no risk of erroneous deprivation based on the inaccurate premise that the interest at stake was the interest in being free from government notices. (Res. Opp., p. 32:23-33:3.) Again, the usufructory property interest of the Petitioners' water rights is at stake, not any purported interest in being free from government notices. The Water Board also fails to address the value of alternative procedures.

The Water Board Staff's erroneous determination that water was unavailable was the undisputed basis for issuing the Curtailment Notices to over 9,329 water right holders. The water availability determination and methodology occurred solely within the Water Board, with no formal public review process, using an analysis that its own Hearing Officers derided as inconsistent and poorly explained after scrutinizing the analysis during the hearing in the Enforcement Actions.¹⁰ (AR 008399-8401.) Further, the Water Board refused to review or reconsider its issuance of the Curtailment Notices as requested by Petitioners; self-servingly concluding that the Curtailment Notices were neither "orders" nor "decisions." (SB-AR 005201-

¹⁰ In the Dismissal Order for the Enforcement Actions, the Water Board Hearing Officers, who are also Board Members, concluded that the Water Board Staff's analysis was insufficient to support a finding that water was unavailable. (Enforcement Administrative Record (AR), 008397-8401.)

1 5203.) Thus, Petitioners could not challenge the Curtailment Notices at the administrative level
2 unless and until the Water Board brought an enforcement action. This left Petitioners in the
3 untenable position of either ceasing all water diversions in accordance with the Curtailment
4 Notices at the risk of losing valuable agriculture, or continuing to divert water and risk an
5 enforcement action and substantial monetary penalties.

6 The Water Board Hearing Officers ultimately dismissed the Enforcement Actions because
7 the water availability analysis was so mistaken, incomplete, and prone to error that the Water
8 Board could not carry its burden of proof as prosecutor. (AR 008397-8401.) Given this outcome,
9 it can hardly be reasoned that such a process would produce “the best currently available
10 information[,]” as proclaimed by the Water Board. (Res. Opp., p. 33:15.) Thus, the Water
11 Board’s procedures to determine when water was available to groups of water right holders and
12 how to curtail those groups risked erroneous deprivation, as evidenced by the findings of the
13 Water Board Hearing Officers in dismissing the Enforcement Actions. Also notable is that the
14 Water Board curtailed water right holders in massive groups of thousands, rather than
15 individually. Without any attempt to analyze the rights of any individual water rights holder, and
16 water availability subject to each specific water right, the risk of erroneous deprivation was
17 effectively guaranteed.

18 The Water Boards reliance on *Today’s Fresh Start* is puzzling. In *Today’s Fresh Start*,
19 the petitioner was afforded an investigation report, notice of revocation, multiple hearings, and an
20 opportunity for extensive written comment before its charter was revoked.¹¹ The California
21 Supreme Court acknowledged the level of procedural due process afforded, stating “[the school]

22
23 ¹¹ In *Today’s Fresh Start*, the nonprofit mutual benefit corporation which was granted a charter (School) was advised,
24 in advance, of the Los Angeles County Office of Education’s (County Office) plans to investigate specific concerns
25 within the school. The school was provided with a report of “Findings and Recommendations,” which identified
26 deficiencies in specific areas of concern and included a Corrective Action Plan which detailed the School’s actions
27 necessary to bring it back into compliance. The results of the investigation were discussed at a multiple Los Angeles
28 County Board of Education (School Board) meetings, where no less than 16 advocates addressed the School Board
on behalf of the School. The School Board gave notice to the School of its intent to revoke the School’s charter,
which was first approved by a vote of the School Board. The School submitted to the School Board over 900 pages
of written materials in support of the School’s position. The School Board then voted in favor of revoking the
School’s charter. The School subsequently appealed the revocation to the State Board of Education, who heard
arguments from speakers on behalf of both the School and the County Office and considered another report from the
Department of Education on the matter before affirming the decision to repeal.

1 was given the opportunity to be heard at a meaningful time and in a meaningful manner”
2 (*Today’s Fresh Start*, *supra*, 57 Cal.4th at p. 230.) Petitioners here had no opportunity to be
3 heard, nor afforded a scintilla of the process granted to the School in *Today’s Fresh Start*.

4 The Water Board further argues that no process was necessary to prevent erroneous
5 deprivation, because the Curtailment Notices did not purport to impose any consequences or
6 adjudicate water rights. This argument is untenable. Indeed, the Water Board concedes that the
7 Curtailment Notices addressed “limitations on water usage authorized.” (Res. Opp., p. 34:24.)
8 Petitioners fail to see how something may impose limitations, yet have no consequences. The
9 plain reading of the Curtailment Notices necessitates a different interpretation: Petitioners’ water
10 rights were in fact adjudicated, and they faced consequences for noncompliance. “Those who are
11 found to be diverting water beyond what is legally available to them may be subject to
12 administrative penalties, cease and desist orders, or prosecution in court.” (SB-AR 004212-
13 4213.) The use of the term “available” rather than “entitled to” demonstrates the limitation
14 placed upon Petitioners’ water rights in the Curtailment Notice; it narrowed the scope of what
15 Petitioners were able to divert, and precluded Petitioners from diverting any water under their
16 water rights. Those found diverting at all would face civil penalties – consequences.

17 An investigation into the water availability, issuance of the draft findings, and adequate
18 notice of opportunity to be heard would all have had significant value here. Specifically, these
19 safeguards would have provided Petitioners with an opportunity to know the extent to which their
20 water rights would be affected, and an opportunity to inquire as to the methodology supporting
21 the water availability determination serving as an impetus for the Curtailment Notices – before
22 they were barred from diverting under their water rights. Through such a process, stakeholders
23 also could have identified the serious flaws in the analysis so that Water Board Staff could
24 remedy them and prepare a defensible determination. Lack of such a process resulted in a flawed
25 water availability determination that was ultimately set aside for lack of proof, and Petitioners
26 being required to curtail diversions based on this incorrect determination or risk significant
27 penalties.
28

1 **3. Third Mathews Factor: Providing Additional Safeguards to Petitioners Is Not**
2 **Onerous**

3 The third and final prong of the due process analysis is the government’s interest in
4 avoiding the fiscal and administrative burdens that it would bear from providing greater or
5 substitute safeguards. (*Mathews, supra*, 424 U.S. at 335.) The Water Board claims that the
6 Curtailment Notices were needed to effectuate the Governor’s directives and transmit information
7 in a timely manner. (Res. Opp., pp. 35:20-22; 37:1-4.) However, their assertion that providing
8 process would “have undermined [the Water] Board staff’s ability to transmit critically important
9 information” defies logic. (Res. Opp., p. 37:1-2.) Nothing in the Due Process Clause precludes a
10 governmental entity from disseminating information. Here, however, the Curtailment Notices did
11 not just disseminate information; they demanded conduct – stop diverting water or be faced with
12 an enforcement action. The purpose was not to *inform*, but rather it was to *coerce*. When the
13 information disseminated from a governmental entity infringes upon the exercise and/or
14 entitlement to property interests, due process demands more than a mere citation to expediency.
15 (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 288-289 (citing *Mathews* at 348-349) “The
16 essence of due process is the requirement that ‘a person in jeopardy of serious loss be given
17 notice of the case against him and opportunity to meet it.’”))

18 While any process afforded prior to the issuance of a curtailment notice would create
19 some burden, the Water Board has implemented substantial due process protections for the
20 curtailment of water for water quality purposes.¹² Little burden would have been required to do
21 the same here. Knowing that the Water Board can and does provide greater due process for
22 curtailments under Term 91, it becomes clear that the Curtailment Notices functioned as a
23 shortcut around Constitutional and procedural due process requirements. The Water Board itself
24 speaks to the timeliness factor, by admitting that it had been updating its board on the water

25 ¹² Term 91 is a condition in water licenses. It provides a curtailment methodology with which the Water Board
26 complies prior to curtailing diversions of junior water right holders in order to protect the water quality of stored
27 water releases. (*Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, 95-96 (*Phelps*).) Term
28 91 was the product of coordination between the Water Board, the U.S. Bureau of Reclamation (USBR), and affected
 parties pursuant to the Water Code. (See Wat. Code, §§ 1253; 1394.) A public hearing on the calculations subsumed
 in Term 91 was even held in 1981 at which parties were able to appear and present evidence. (Pet. Br., p. 38:11-14)
 (citing Order WR 81-15 at 1.)

availability situation for months before issuing the Curtailment Notices. (Res. Opp., p. 36:20-23.) The drought was a relatively slow-moving emergency, unlike a fire or earthquake, and the Water Board could have provided due process protections during the months leading up to the Curtailment Notices. Of course, the Water Board has an interest in minimizing time and costs to perform its duties, but it still must use the resources necessary to provide water right holders with at least basic, fundamental due process.

Taken together, the three factors of the *Mathews* balancing test required the Water Board to provide Petitioners with due process.

E. Petitioners Have Standing Under Water Code Section 1126

The Water Board ineptly argues that Petitioners lack standing under Water Code section 1126 to challenge the Dismissal Order because (1) the Dismissal Order does not aggrieve Petitioners, (2) Petitioners' interest in the matter is nominal and remote, and (3) Petitioners obtained their desired outcome in the Dismissal Order. (Res. Opp., pp. 43-44.)

The Water Board's interpretation of the scope of its jurisdiction, as part of a final order, became challengeable the day the Water Board issued the Dismissal Order. (*North Gualala Water Company v. State Water Resources Control Bd.* (2006) 139 Cal.App.4th 1577, 1606-1607 (*North Gualala*) [finding petitioner waived its ability to challenge a term in its permit by not challenging within 30 days of issuance, as required by Section 1126]; *Phelps, supra*, 157 Cal.App.4th at 103-105 [dismissing challenges that were not raised within 30 days of the Water Board issuing curtailment notices].) *North Gualala* and *Phelps* illustrate that water users must challenge any problem with a Water Board decision or order within the 30 days provided in Water Code section 1126, or lose the opportunity.

The Water Board also incorrectly relies on the *SWRCB Cases*, which addressed the parties' Water Code section 1126 standing to challenge California Environmental Quality Act (CEQA) mitigation requirements imposed on the USBR – not the petitioners in that case. (*SWRCB Cases, supra*, 136 Cal.App.4th at 828-831.)

Moreover, the Water Board's argument mischaracterizes the effect of the Dismissal Order and the reality that Petitioners face. The Dismissal Order asserted an expanded scope of

jurisdiction and regulatory authority over Petitioners' water rights, which would affect Petitioners' ability to utilize their water rights and the scope of their property interest into the future if not challenged here. The threat is not speculative, nominal, or remote, as the Water Board's interpretation is the same one it used to justify the Curtailment Notices and multi-million-dollar Enforcement Actions against Petitioners in 2015. Case law is clear that even if a Water Board decision or order grants the water user's overarching request, the objectionable portions must still be challenged under Water Code section 1126 within the required 30-day time period. (*North Gualala, supra*, 139 Cal.App.4th at p. 1607) (dismissing for untimeliness a challenge to a term in Water Board orders that granted the petitioner's request for a change in point of diversion).)

F. The Issuance of the Revised Curtailment Notice and the Dismissal of the Enforcement Actions Does Not Moot the Issues Raised in the Petitions

Respondents argue that Petitioners' challenges to the Curtailment Notices and the Dismissal Order are moot. (Res. Opp., pp. 44-45.) However, Petitioners challenge the Water Board's incorrect legal conclusions regarding its jurisdiction over pre-1914 water rights, which were the basis for the Curtailment Notices and created the need for the Dismissal Order in the first place. Whether or not the Water Board has jurisdiction to determine that diversions within the scope of otherwise lawful and perfected riparian or pre-1914 water rights are "unauthorized" under Water Code section 1052 remains an actual controversy between the Water Board and the Petitioners. This actual controversy will repeat itself every time there is a water shortage short of the Court's action on this Petition. This Court can take judicial notice of the fact that water shortages occur in cycles in California, and while it is certain that there will be another drought, no one knows if it will be next year or 10 years from now. The most recent drought taught us that the Water Board and diverters do not agree on which agency, if any, may curtail senior rights during times of shortage. This lack of clarity had, and continues to have, significant social costs. Resolution of the disputed issues is critical to allowing the parties, and the rest of the State, to move forward with their respective responsibilities for managing California's vital water supplies in those years when management is most important.

Respondents make a strained attempt to support the assertion that the claims are moot by

comparison to the facts in *National Assn. of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741 (*National Assn.*), where a challenge to a bulk grape marketing order was moot because the non-assent of growers terminated the underlying order. (Resp. Opp., p. 45:5-11, citing *National Assn.* at 741.) However, this case is not analogous to *National Assn.* Unlike the completely terminated marketing order in *National Assn.*, the Water Board replaced its Curtailment Notice with the nearly identical Revised Curtailment Notice, which contains the same incorrect legal findings as the Curtailment Notice, minus some of the coercive language. (Pet. Br., pp. 26-27.) Further, even though Petitioners succeeded in convincing the Water Board that its staff erred in the water availability analysis supporting the Curtailment Notices, the Water Board's Dismissal Order recites incorrect legal conclusions about the scope of its jurisdiction to curtail pre-1914 rights during times of shortage. (AR 008391-8396.) The fact that Respondents continue to advance this legal position is further evidence of the live controversy.

Respondents' acknowledge an exception to the mootness doctrine, applicable when issues are "capable of repetition, yet evading review," but argue that the exception is inapplicable here. (Resp. Opp., p. 45:12-13, citing, *In re William M.* (1970) 3 Cal.3d 16, fn. 14, citing *Moore v. Ogilvie* (1969) 394 U.S. 814, 816; Resp. Opp., p. 45:14-24.)

The Water Board's argument was raised and soundly rejected by the appellate court in *Young*. (See *Young, supra*, 219 Cal.App.4th at 403.) *Young* involved a writ of mandate challenging a Water Board enforcement action against a pre-1914 diverter, where the Board issued an order finding that the diverter was diverting more water than the maximum perfected amount under its pre-1914 right. (*Id.* at 401-402.) The trial court issued the writ on two grounds: (1) the Water Board had violated the due process rights of landowners with respect to the procedure used for the enforcement hearing, and (2) the Water Board did not have jurisdiction to pursue the enforcement against the pre-1914 diverter. The Water Board appealed. (*Id.* at 402.) During litigation of the case, the Water Board issued a reconsideration order that re-opened the enforcement hearing in an attempt to cure the due process violation. (*Id.* at 403.) Real parties argued on appeal that the entire case was moot and should be dismissed. However, the appellate court strongly disagreed that the case was moot as to the jurisdictional dispute and proceeded to

1 rule on the issue. (*Ibid.*)

2 The *Young* court explained that the Water Board’s reconsideration order, similar to the
3 Dismissal Order in this case, “did not reverse the Water Board’s resolution of the fundamental
4 question raised in [the Petitions].” (*Young, supra*, 219 Cal.App.4th at 403.) Rather, as with the
5 Dismissal Order here, the Water Board’s reconsideration order specifically kept intact the
6 portions of its prior challenged order relating to claimed jurisdiction. The *Young* court explained
7 that “the broad jurisdictional question has major implications for the Water Board’s ability to
8 prevent the unlawful diversion of water” and “even if the reconsideration order had reversed the
9 Water Board’s assertion of jurisdiction, we would invoke the public interest exception to
10 mootness.” (*Ibid.*)

11 To the extent this Court determines that the Revised Curtailment Notice and the Dismissal
12 Order moot the issues raised in the Petitions, the Court should nevertheless decide the matter
13 because it “raises issues of continuing public importance.” (*In re Marriage of LaMusga* (2004)
14 32 Cal.4th 1072, 1086; see also *Young, supra*, 219 Cal.App.4th at 403.) The remedy sought
15 includes mandating that the Water Board amend or redact its Dismissal Order, consistent with this
16 Court’s ruling, so that Water Board precedent will reflect California law. Such a remedy is
17 logical, available, and is not a purely academic exercise.

18 **G. The Curtailment Notices Violated the Governor’s Emergency Orders**

19 For the sake of brevity, Petitioners rely on the arguments in their Opening Brief at Section
20 V(D), which were not addressed in the Water Board’s opposition.

21 **H. The Water Board Is Subject to the Rule of Priority, Which the Curtailment Notices**
22 **Disregarded**

23 **1. The Water Board Improperly Asserts That It Can Curtail Water Rights**
24 **Without Proof of Injury and Regardless of Priority**

25 Petitioners will not further argue that the Water Board issued the Curtailment Notices as
26 actual curtailments - the language of the Curtailment Notices and the actions of the Water Board
27 speak for themselves. Incredibly, the Water Board argues that it can curtail valid water rights
28 without a showing of injury using its police powers. Even under the Water Board’s erroneous

1 argument that California case law does not bind its actions, express restrictions in the Water Code
2 support Petitioners' claims:

- 3 • The Water Board acknowledges that its power to curtail derives from section 1052(a):
4 "The diversion or use of water subject to this division other than as authorized in this
5 division is a trespass." (Wat. Code, § 1052(a).)
- 6 • Section 1381 provides that once issued, a permit gives the right to take and use water
7 to the extent and for the purpose allowed in the permit. (Wat. Code, § 1381.)
- 8 • Section 1201 determines that all water in any natural channel is available for
9 appropriation "excepting so far as it has been or is being applied to useful and
10 beneficial purposes upon, or in so far as it is nor may be reasonably needed for useful
11 and beneficial purposes upon lands riparian thereto, or otherwise appropriated[.]"
12 (Wat. Code, § 1201.)
- 13 • The rule of priority is expressly recognized in section 1455: "[t]he issuance of a
14 permit continues in effect the priority of right as of the date of the application and
15 gives the right to take and use the amount of water specified in the permit (Wat.
16 Code, § 1455.)

17 These Water Code provisions incorporate the legal principles confirmed in the cases cited
18 in Petitioners' Opening Brief at pages 46-48, and confirm that a permittee has the right to divert
19 until the Water Board establishes that the diverter is violating its permit terms or the rule of
20 priority. To determine whether either of these is occurring, the Water Board must have
21 *substantial evidence*. As discussed below, there is *no evidence* in either the Curtailment AR or
22 the Enforcement AR that any curtailed water right holder violated its permit terms or threatened
23 to injure any other water user.

24 **2. The Water Board Never Established A Violation of Any Permit Terms, or**
25 **Injury to Prior Right Holders**

26 The Water Board admits that it had no evidence or direct measurements specific to any
27 curtailed water right holder. Rather, it relied on *generalized* storage and inflow projections to
28 issue the Curtailment Notices. (Res. Opp., p. 49:11-13.) As such, it had no evidence to
determine that any curtailed diverter was violating the conditions of its permit, or violating its
priority of right. The Water Board's storage and inflow projections provided only general

information on water availability at certain locations on a complex stream system. From such basic information, the Water Board could not determine whether or not water was available to a particular diverter at its point of diversion, which is the precise information needed to determine if a diverter was violating its permit terms, or the rule of priority.

In an after-the-fact attempt to develop specific information, and without evidence, the Water Board asserts that there was “potential injury” to the DWR and SWC. (Res. Opp., p. 48:19-21.) “Potential” is defined as “existing in possibility” and/or “capable of development into actuality.”¹³ However, even if any such evidence existed, it does not appear in the record, and the Water Board did not put it in either the Curtailment Notices or in the Enforcement Proceeding. To be sure, there was no evidence which even suggested a potential injury.

The Water Board acknowledges that it did not confirm whether all – or even a majority – of junior priority diverters receiving the April and May Curtailment Notices had ceased diverting prior to issuance of the June Curtailment to more senior diverters. Its defense is that the erroneous storage and inflow projections were the best information it could come up with, and that doing more would be “unworkable.” (Res. Opp., p. 49:26.) This excuse does not support the Water Board’s actions. Curtailing the water right of an agricultural user in the middle of irrigation season is a serious action that could result in failed crops and lost livelihoods. Such an action requires more than generalized projections – it requires actual substantial evidence of the violation of a permit term or injury to a prior user.

I. The Executive Director Had No Authority to Sign the Curtailment Notices

The Water Board argues that Resolution No. 2012-0061, which authorizes the Executive Director to “implement [] the Water Board’s policies and regulations,” gave its Executive Director specific authority to issue the Curtailment Notices. This argument fails. For the Executive Director to implement a policy or regulation on curtailments, the Water Board must first establish such a policy or regulation, *which it did not*. The Water Board further argues that

¹³ <https://www.merriam-webster.com/dictionary/potential> (last visited November 7, 2017.)

1 because the issuance of Curtailment Notices was not expressly included in the list of actions not
2 delegated to the Executive Director, that power must have been delegated.

3 In the end, the Water Board's own action is the best evidence supporting Petitioners'
4 arguments. In Resolution No. 2014-0031 the Water Board created an emergency regulation for
5 the curtailment of water rights (SB-AR 001926-1931) that specifically delegated authority to
6 issue water right curtailment notices to "the Deputy Director for the Division of Water Rights."
7 (*Id.* at 001928, ¶ 12; 001932.) These emergency regulations expired on April 14, 2015, (*Id.* at
8 001930, ¶ 4) before the Water Board issued the Curtailment Notices. If, as the Water Board
9 argues, the general delegation authority contained in Resolution No. 2012-0061 authorizes the
10 Executive Director to issue the Curtailment Notices, the Water Board would not have adopted
11 emergency regulations specifically delegating the authority to do so.

12 **J. Petitioners Should Prevail on Their Claims That the Curtailment Notices Were**
13 **Unsupported**

14 The Water Board and SWC's argument that Petitioners waived their claims that the
15 Curtailment Notices were not supported by substantial evidence, or were otherwise fatally flawed,
16 ignores the procedural history of this case - which required Petitioners to litigate the validity of
17 the water availability determination at the administrative enforcement hearing. As discussed
18 below, the cites provided in Petitioners' Opening Brief fully capture the entire (but insufficient)
19 substantive support for the Curtailment Notices from both the Enforcement AR and the
20 Curtailment AR as the substantive information relevant to the water availability determination in
21 both ARs is exactly the same.

22 The Water Board and SWC's excuse for the Water Board's failure to account for the tidal
23 nature of the Delta in the water availability methodology is similarly unavailing. The instant
24 issue is not how the Water Board should have addressed the tidal delta in the methodology - we
25 agree that is reserved for a future phase. Rather, the issue at this phase is whether the fact that the
26 tidal delta exists and affects water availability, and yet was not addressed at all by the Water
27 Board in the water availability methodology, means the curtailments lacked substantial evidence.
28

1 **1. Petitioners Have Not Waived Their Claims That the Curtailment Notices**
2 **Were Unsupported and Have Cited to Proper Record Evidence**

3 A brief review of the procedural history illustrates that the substance of the Curtailment
4 AR is from the same sources as the Enforcement AR.

5 After the Water Board issued the Curtailment Notices in April, May, and June of 2015,
6 Petitioners sued the Water Board in June of 2015. The Water Board then initiated its enforcement
7 proceedings in July of 2015. In September 2015, Petitioners moved to stay the administrative
8 enforcement proceedings. Because the lawsuits challenging the Curtailment Notices predated the
9 enforcement proceedings, Petitioners argued that they were entitled to have their day in court
10 before the enforcement proceedings commenced. (Order After Hearing Judicial Council
11 Coordinated Proceedings (JCCP) 4838, Sept. 22, 2015, p. 2.) However, this Court denied the
12 requested stay, requiring Petitioners to litigate the validity of the water availability analysis
13 underlying the enforcement actions at the administrative hearing. (*Id.* at 5-6.)

14 The Water Board determined that the water availability issue was so fundamental to the
15 proceeding that it created a separate Phase I hearing for it. (AR 001364-1366.) The Prosecution
16 Team based their explanation of how they determined water availability entirely on the
17 methodology used to issue the Curtailment Notices. (See AR 008397-8399.) The Prosecution
18 Team witnesses were also the very same Water Board Staff who developed the basin-wide
19 spreadsheets. (AR 008455-8470; 008474-8475.) Indeed, after the Prosecution Team presented
20 its 2015 water availability determination methodology, the Water Board dismissed the
21 Enforcement Actions because of the flaws in the analysis. (AR 008399-8401.)

22 By citing to the portions of the Dismissal Order (AR 008397-8401, specifically
23 AR 008399) and the Water Board Staff's explanations, under oath, of how they determined water
24 availability for the Curtailment Notices (AR 007450:9-14; AR 007401:17-7402:13; 007415:12-
25 7416:3; 007416:4-7; 007416:13-7417:17); (AR 007397:9-7398:2; AR 007434:3-19; AR 007482:8-
26 7483:11; 007484:19-7485:16), Petitioners presented to this Court the most concise and complete
27 explanation of what the Water Board did for the Curtailment Notices - from the Water Board's
28 own admissions. Such a preparation is far from "one-sided" or "cherry-picking." In fact, the

enormous excel workbooks contained in the Curtailment AR, without the context of the Water Board testimony from the enforcement hearing to explain what was done, are largely indecipherable. (See e.g. SB-AR Native File Document Nos. 468 in the Curtailment AR.)

There is also no dispute that the spreadsheet models on water availability used for the enforcement proceeding (See AR 008399, Pet. Br. citing Exhibits WR-47 and WR-48) are the same exact models used for the Curtailment Notices. The fact that Petitioners are forced to use their page limit to state the obvious is frustrating, to say the least. Exhibits WR-47 and WR-48 are the graphs generated by Water Board Staff's spreadsheet models for the May 1, 2015 and June 12, 2015 Curtailment Notices, respectively, and used in the enforcement hearing. (AR 008601; AR 008602; AR 008399.) These exact same supply and demand graphs are found in the Curtailment AR at SB-AR 003512 and SB-AR 004196, immediately in time before each of the respective Curtailment Notices issued. It is evident that the spreadsheet models used to generate these graphs are the same in the two records upon comparing the native files for the June 12, 2015 notice in each AR (SB-AR Native File No. 468 in the Curtailment AR with AR Native File No. 9138 in the Enforcement AR), and the native files for the May 1, 2015 notice in each AR (SB-AR Native File No. 370 with AR Native File No. 9085.) The supply and demand graph that was used to support the June 12, 2015 Curtailment Notice (WR-48, AR 008602 and SB-AR 004196) is the tab labeled "Senior Chart" in each native file for the June notice and the graph used to support the May 1, 2015 Curtailment Notice (WR-47, AR 008601 and SB-AR 003512) is the tab labeled "Prorated Chart" in each native file for the May notice. Water Board Staff also testified that the water availability analysis for the Curtailment Notices was the same analysis used for the enforcement proceeding. (AR 008430; AR 008451-72; 008474-91.)

There is nothing else of substantive value in the Curtailment AR that could support the curtailments. For example, several documents cited by Respondents to support the water availability analysis contain either no substantive support for the Curtailment Notices (such as press releases) or post-date issuance of the Notices. (See, e.g., AR 003020-3022; 003273; 003380; 004541; 004542; 004584-4587; 004814-4816; 004929-4931; see also Exhibit A, attached hereto.) The Curtailment AR also includes hundreds of pages of raw data that were

1 included in the final supply and demand spreadsheets and are merely duplicative. (See Exhibit
2 A.) The Water Board and SWC argue that because the Enforcement AR cites to this same
3 substantive evidence they are somehow the type of later discovered relevant evidence that should
4 be subject to a motion to augment the AR under Code of Civil Procedure section 1094(e). This is
5 nonsense. The citations to the Enforcement AR include the same substantive documents that are
6 in the Curtailment AR, only with an explanation from the Water Board Staff.

7 The Water Board and SWC's assertion that Petitioners are strictly bound to cite only to
8 the Curtailment AR, because this is a case where the Curtailment Notices are "decisions or
9 orders" subject only to Code of Civil Procedure section 1094.5 review of the limited Curtailment
10 AR, is absurd. When Petitioners tried to request reconsideration of the Curtailment Notices, the
11 Water Board rejected the requests, stating that the Curtailment Notices were not reviewable
12 decisions or orders. (See e.g. SB-AR 005201-5202.) The Water Board then opposed Petitioners'
13 request to stay the enforcement actions, insisting that Petitioners had to "exhaust their
14 administrative remedies" because the Curtailment Notices were not reviewable decisions, and all
15 issues regarding water availability should first be tried in the enforcement hearings, and only then
16 subject to review by writ of mandate. (See Consolidated Opposition to Ex Parte Application of
17 WSID and BBID to Stay or Enjoy the Water Board's Enforcement Action filed Sept. 17, 2015,
18 pp 15-19). As explained above, the Water Board was very clear in the enforcement proceeding
19 that its water availability methodology for enforcement actions was exactly the same as for the
20 Curtailment Notices. Now that Petitioners have completed the process which the Water Board
21 requested, and prevailed on the water availability issue, the Water Board should not be allowed to
22 inequitably divorce itself from that clear defeat.

23 **2. The Water Board's Failure to Address Water Available in the Delta in Its**
24 **Water Availability Analysis Is a Fatal Flaw**

25 Petitioners' points of diversion are in the tidally influenced Delta. Thus, it is important to
26 Petitioners that the water supply available in the tidal Delta be part of any water availability
27 analysis used for curtailments. The Water Board excluded any evaluation of the water available
28 in the Delta in its 2015 water availability analysis for curtailment not because it made a finding

that the water was unusable or otherwise dedicated to a different set of users, but rather because it chose not to address it. (AR 007401-7402.) As Petitioners explained in their Opening Brief, this choice directly contradicts decades of Water Board precedent recognizing the “vast reservoir” of water in the Delta. (See e.g. SWRCB Water Rights Decision 100, p. 11.)¹⁴

The Water Board and SWC try to avoid this omission by again arguing that Petitioners’ cites to staff testimony in the Enforcement AR is improper. As explained above, the cited testimony is to Kathy Mrowka, the very same staff person who worked on the water availability analysis for the Curtailment Notices and clearly stated that the 2015 water availability analysis for the enforcement hearings and the Curtailment Notices were the same. (AR 008430.) However, because the Water Board failed to hold a hearing for interested parties to ask staff about the water availability methodology, the only way to cite to the Curtailment AR on this issue is to state that the AR is devoid of any analysis, and that the supply and demand spreadsheets do not include any data indicating that the “vast reservoir” of water in the tidal delta was included in the supply analysis. (See e.g. SB-AR Native File Document No.468; AR Native File Document No. 9138.)

The remainder of Respondents’ arguments regarding how the Water Board should evaluate the Delta water supply, if it chose to do so, are untimely. The parties have different views regarding the quality, quantity, and source of water in the Delta channels during drought – further supporting Petitioners’ arguments that the Water Board should have held an evidentiary hearing on the issue before deciding to ignore it completely and effectively exclude all Delta channel water from its 2015 water availability determination. In Phase I, Petitioners merely seek an order from this Court declaring that the Water Board’s decision to ignore the available water in the tidal Delta channels from its water availability analysis was a fatal flaw.

K. The Curtailment Notices Improperly Reallocated Responsibility for Meeting the Objectives in the Bay-Delta Water Quality Control Plan

In response to Petitioners’ argument that the Curtailment Notices improperly reallocated

¹⁴ All water rights decisions by the Water Board are available at the following website: http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/, (last visited November 7, 2017).

1 responsibility for meeting the water quality objectives in the Bay-Delta Water Quality Control
2 Plan from DWR and USBR (collectively “the Projects”) to Petitioners, the Water Board
3 misconstrues Petitioners’ argument. The Water Board asserts that such an argument is a claim by
4 Petitioners for a right to divert the Projects’ stored water and in so doing, the Water Board
5 simultaneously fails to respond to the substance of the argument.

6 The Water Board’s Curtailment Notices were based on a watershed-wide water availability
7 analysis. For reasons already stated, this type of analysis was improper. Nevertheless, in using
8 this analysis, the Water Board should not have issued Curtailment Notices to senior water right
9 holders in the watershed, such as Petitioners, while at the same time issuing to the Projects, junior
10 water right holders Temporary Urgency Change Petition (TUCP) orders relieving the Projects of
11 their water quality obligations under Water Rights Decision 1641 (D-1641), and permitting them
12 to continue exporting water from the Delta under their junior water rights. By curtailing senior
13 water right holders in the watershed, the Water Board effectively shifted the responsibility for
14 meeting water quality objectives onto those senior users. Because the Water Board did not adhere
15 to the due process requirements set forth in California Code of Regulations, title, 23, section 648
16 when it sought to reallocate this responsibility, it failed to proceed in a manner required by law.

17 **L. The Water Board Was Required to Rule on BBID’s Administrative Motion to Dismiss**

18 The Water Board argues it was not required to rule on BBID’s motion to dismiss because
19 such a motion is not expressly authorized by law and ruling on the motion is not expressly
20 required by law. (Res. Opp., pp. 58-59.) This is simply incorrect.

21 Early in this case as part of the Petitioners’ unsuccessful motion to stay the enforcement
22 proceedings, the Water Board convinced Judge Kirwan that the enforcement hearings would be
23 “before a tribunal that is required to be impartial, fair and neutral” (Order After Hearing on
24 Sept. 22, 2015, pp. 5:28-6:15.) Judge Kirwan stated that “[t]o the extent that the Plaintiffs claim
25 the process is procedurally deficient (i.e., biased or pre-determined), they will have opportunity to
26 raise those issues to the Court, but there simply is not enough evidence at this point for the Court
27 to reach that conclusion.” (*Ibid.*) That was in 2015, before the Water Board determined its exact
28 procedures for the Enforcement Actions.

1 Before the enforcement action hearing, the Water Board Hearing Officers requested pre-
2 hearing legal briefs and set mandatory deadlines for Petitioners' motions to dismiss.
3 (AR 000847, 001365.) The Water Board Hearing Officers clarified that it wanted specific pre-
4 hearing briefing in addition to motions to dismiss, and that the motions to dismiss may be based
5 on matters outside of the Administrative Civil Liability Complaint (ACL) ENF01957 and Cease
6 and Desist Order (CDO) ENF01949 allegations. (AR 001408.) After BBID filed its multiple
7 motions to dismiss as separate motions, the Water Board Hearing Officers required BBID to
8 consolidate its motions, requiring substantial editing to adhere to a new page limit, and refile in
9 less than two days. (Procedural Ruling, Feb. 1, 2016, p. 2.) BBID complied. The Water Board
10 Hearing Officers ruled on at least 15 other motions before the hearing, but not BBID's motion to
11 dismiss. (AR 000723-727; AR 001275-1281; AR 006317-6329; AR 006682-6694.)

12 BBID asserted procedural deficiencies in its motion to dismiss and, as instructed by Judge
13 Kirwan, are now asserting those deficiencies here due to the Water Board's refusal to rule on the
14 motion previously. The Water Board Hearing Officers' refusal to rule on the motion to dismiss,
15 after leading Petitioners to believe their motion would be ruled on, and yet ruling on several other
16 motions constitutes the type of bias of which Judge Kirwan was wary. The Water Board should
17 not be able to evade review by promising this Court that Petitioners would receive a fair
18 proceeding, specifically allow motions to dismiss, refuse to determine crucial and determinative
19 matters, and then assert that this Court cannot review these issues because the Water Board was
20 never required to hear the issues in the first place.

21 The Water Board's failure to rule on BBID's motion to dismiss was an abuse of
22 discretion. The two issues below, argued in BBID's consolidated motion to dismiss, invalidate
23 the Enforcement Actions.

24 **1. The Delta Watermaster Did Not Properly Redelegate, and Verbal**
25 **Authorization Is Inadequate**

26 The Water Board concedes that, at the time it issued the Enforcement Actions, Resolution
27 No. 2012-0048 delegated the authority to issue ACL complaints in the Delta to the Delta
28 Watermaster, Michael George. (Res. Opp., pp. 58-59.) They argue that John O'Hagan, the

Assistant Deputy Director of Water Rights, had the authority to issue the enforcement actions because the Watermaster *verbally* authorized him to do so. (*Id.* at 59.)

The Water Board’s position fails for two reasons. First, the Water Board quotes Mr. George’s verbal authorization out of context. Mr. George declared that he believed his delegated authority had expired, so he relied on his statutory authority to verbally authorize Mr. O’Hagan to issue the enforcement actions. (AR 004171:16-20; 004172:7-15.) However, the Watermaster has no statutory authority to redeligate his exclusive authority to issue ACLs and CDOs to Delta diverters. (See Wat. Code, § 85230(b).) Thus, Mr. George merely attempted to delegate nonexistent authority. Second, even if Mr. George had tried to redelegate his delegated authority, his verbal delegation was inadequate. Resolution No. 2012-0048 specifically revoked the Deputy Director’s authority to issue CDOs and ACL complaints for diversions in the Delta. (AR 004181.) The only exception was if “the Delta Watermaster *expressly* authorizes the Deputy Director for Water Rights or appropriate staff within the Division of Water Rights to proceed.” (*Id.*, emphasis added.) With an explicit revocation of authority and redelgation allowed only upon express authorization, it defies credulity that verbal authorization, with no memorializing documentation, would be adequate. Because the Enforcement Actions were not issued lawfully, the resulting Order is void.

2. The Enforcement Actions Were Based on Underground Regulations and Should Be Dismissed

The Water Board’s argument that its water availability methodology is not an underground regulation misunderstands a “rule of general application.” The Water Board states that its methodology cannot be a rule of general application because it had discretion not to apply the methodology, the methodology was simply one component of the proceeding, and it dismissed the enforcement actions. (Res. Opp., pp. 59-60.)

A rule of general application is one where the same rule is applied “to all of the members of a class[,] kind, or order,” (*Roth v. Dep’t of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630) and is met when a standard is applied to similarly situated entities instead of an individual. (*Winzler & Kelly v. Dept. of Industrial Relations* (1981) 121 Cal.App.3d 120, 127.) “Whether the

1 action of a state agency constitutes a regulation does not depend on the designation of the action,
2 but rather on its effect and impact on the public.” (*Ibid.*)

3 The *Modesto City Schools* case cited by the Water Board held that an audit guide is not an
4 underground regulation when it is an optional resource that does not prescribe which auditing
5 procedures must be used. (*Modesto City Schools v. Education Audits Appeal Panel* (2004)
6 123 Cal.App.4th 1365, 1382.) The Water Board’s methodology is not analogous. Unlike the
7 *optional* school audit guide, the Water Board methodology was systematically used to curtail
8 large groups of water right holders and justify multi-million dollar enforcement actions. There
9 was no alternative methodology, for it was applied universally, nor discretion depending on the
10 diverter or the lead Water Board Staff.

11 Further, there is no authority for the Water Board’s proposition that in order to be an
12 underground regulation, the rule must be more than a component of the proceeding. A regulation
13 can apply to a limited subject area and still be a regulation. While the Water Board downplays its
14 methodology as a mere “component” or “piece” of its water availability determinations, in reality,
15 the entire enforcement proceeding was based on Water Board Staff’s water availability
16 determination, derived from staff’s water availability methodology. All issues in the proceeding
17 stemmed from Water Board Staff’s decision that no water was available for Petitioners to divert,
18 which was based upon staff’s flawed methodology.

19 The Water Board’s statement that the Dismissal Order is proof that the methodology is not
20 an underground regulation incorrectly assumes that the challenged agency must successfully
21 enforce an underground regulation in order to act unlawfully. Case law analyzing underground
22 regulations does not require successful application or implementation. (See *Morning Star Co. v.*
23 *State Bd. of Equalization* (2006) 38 Cal.4th 324, 335 [“a ‘rule of general application’ that
24 ‘interprets the law []’” is an underground regulation].) The Dismissal Order actually supports
25 that the methodology is an underground regulation, because the Hearing Officers concluded that
26 the methodology could be acceptable if applied correctly. (AR 008399, 8401.)

M. Petitioners May Be Granted Both a Writ of Mandate and an Injunction Because Each Redress a Specific Injury

Petitioners seek two forms of relief via two distinct remedies: (1) rescind the Curtailment Notices and vacate the Dismissal Order pursuant to a writ of mandate; and (2) enjoin the Water Board from issuing future curtailment notices based upon the same jurisdiction asserted in the present matter and/or achieved via the same process as the Curtailment Notices. The Water Board concedes, and it is clear, that should Petitioners prevail on the Curtailment Notices and Dismissal Order, Petitioners are entitled to a writ of mandate as the appropriate remedy in this case. (Res. Opp., p. 57:20-27.) However, the Water Board's assertion that an injunction is also not an appropriate remedy in this action lacks legal authority. (See Code Civ. Proc., § 1094.5(f).)

A writ of mandate is used to compel a specific administrative action and is an appropriate remedy when an administrative entity exceeds its jurisdiction in an adjudicatory matter. (Code Civ. Proc., § 1094.5(b).) "A party aggrieved by a final decision of the State Water Board may obtain review of the decision by filing a timely petition for writ of mandate in the superior court." (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 879.) An injunction is also an appropriate remedy when a public official's action exceeds his or her power. (*Financial Indem. Co. v. Superior Court (McConnell)* (1955) 45 Cal.2d 395, 402. As set forth *supra*, at section III(B), the Water Board does not have jurisdiction over diversions under valid riparian and pre-1914 rights. As such, the Water Board may be enjoined from taking actions in excess of its jurisdiction. Petitioners seek to enjoin the Water Board's issuance of future curtailment notices in the same manner and with the same coercive effect as the Curtailment Notices. If not enjoined, the Water Board will continue to issue curtailment notices both in excess of its jurisdiction and in violation of water right holders' due process rights.

N. BBID's Memorandum of Costs Filed With the Water Board

The Water Board implausibly asks this Court to "affirm its demurrer ruling denying BBID's cost claim." (Res. Opp., p. 61:1.) In so arguing, the Water Board mischaracterizes briefing in this case by arguing that BBID has "resurrected its claim" that was "dismissed by this

Court.” (*Id.* at 61:2-6.) That is not accurate. This Court did not dismiss BBID’s writ of mandate and declaratory relief causes of action addressing cost issues that are currently before this Court, and the Water Board has never sought dismissal of the causes of action by way of a demurrer or otherwise.¹⁵

By referencing the historical dispute on costs, the Water Board attempts to obfuscate what is currently at issue herein. In BBID’s First Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, originally filed in Sacramento County and coordinated herein (BBID’s Sacramento Petition), BBID seeks a judicial declaration that an enforcement action is an “action or proceeding” within the meaning of Code of Civil Procedure section 1032 (Fifth Cause of Action). BBID also seeks a writ of mandate concluding that the Water Board prejudicially abused its discretion in rejecting BBID’s cost memorandum without first reaching a determination on the merits arising from BBID’s prevailing party status at the completion of the enforcement action (Third Cause of Action).

Whether the prevailing party in an enforcement action before the Water Board may seek recovery of prevailing party costs pursuant to Code of Civil Procedure section 1032 is an issue of first impression. Indeed, the underlying dismissal of the Enforcement Actions against BBID and WSID by the Water Board appears to be the first dismissal of any enforcement action by the Water Board in the history of California water law. Thus, no Court has ever addressed this issue of whether an enforcement action is an “action or proceeding” within the meaning of section 1032.

In arguing that an enforcement action is not an “action or proceeding,” the Water Board downplays its legislatively created quasi-judicial role as the enforcer, judge and jury over certain California water rights issues, by arguing form over substance (i.e., pointing to the absence of a “clerk’s register” or “notice of entry of judgment”), and virtually ignores the power and authority

¹⁵ The Water Board did file a Motion to Tax Costs in 2016, in response to memoranda of costs filed by BBID and WSID, both of which were seeking recovery of costs incurred in the Enforcement Action. Although this Court granted the Motion to Tax Costs in its Order After Hearing on April 28, 2017, during oral argument the Court also clarified that the motion was granted without prejudice to BBID and WSID to raise the issue again once there is a prevailing party in this action.

9 Additionally, and looking to the Water Board's conduct in the underlying dismissal of the
10 Enforcement Action herein, the Water Board itself designated the action to be a "proceeding,"
11 appointed formal Hearing Officers, structured the presentation of witnesses and evidence
12 pursuant to the Evidence Code, and ultimately issued the Dismissal Order after making
13 evidentiary findings and determining that its own Prosecution Team failed to meet the burden of
14 proof. (AR 000025-40; 000273-278; 001364-1370; 001380-383; 008386-8401.) Further, after
15 the parties asked the Water Board Hearing Officers to delay the adjudicative proceeding pending
16 resolution of this litigation in this Court, the Water Board determined that the Water Board -- not
17 the Superior Court -- was the proper body to consider "factual and legal questions regarding water
18 availability and the application and administration of water rights . . . in the first instance."
19 (AR 000274.) The Water Board further noted that it "is the state agency charged with the
20 'orderly and efficient administration' of water rights," citing to Water Code section 174. (*Ibid.*)
21 It is disingenuous and self-serving for the Water Board to claim in one instance that it is the
22 proper body to institute, procedurally administer, preside over and rule upon an enforcement
23 proceeding with potentially millions of dollars to be assessed against an opposing party, and then
24 disavow the same quasi-judicial authority when the Water Board itself is at risk of a financial
25 penalty arising from its own conduct.

For the foregoing reasons, and as set forth in Petitioners' Opening Brief and supporting documents, Petitioners respectfully request that this Court issue a writ to the Water Board

1 declaring:

2 (1) The 2015 Curtailment Notices were final agency actions that (a) violated
3 Petitioners' due process rights, (b) violated the rule of priority, (c) violated the Governor's

4 (2) Emergency Orders, (d) were not supported by substantial evidence, (e) improperly
5 sought to regulate pre-1914 rights which are outside of the Water Board's jurisdiction, and (f)
6 improperly sought to amend the water quality control plan in violation of law;

7 (3) The Dismissal Order incorrectly stated that the Water Board has the authority to
8 bring enforcement actions against pre-1914 rights in times of shortage to enforce priority of
9 rights, and Section 3 of the Dismissal Order must be stricken;

10 (4) The Water Board is enjoined from curtailing pre-1914 appropriative rights or
11 bringing enforcement action to curtail pre-1914 appropriative rights; and

12 (5) The Water Board abused its discretion by failing to rule on BBID's motions to
13 dismiss and memorandum of costs in the Enforcement Actions.

14 Further, Petitioners respectfully request that this Court issue a declaration that a
15 curtailment notice issued by the Water Board to a water right holder in California constitutes a
16 final agency action.

17
18 Respectfully submitted,

19 SOMACH SIMMONS & DUNN
A Professional Corporation

20 Dated: November 9, 2017

21 By: _____
22 Michael E. Vergara
23 Theresa C. Barfield
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26 SPALETTA LAW PC

27 Dated: November 9, 2017

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Dated: November 9, 2017

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EXHIBIT A

**EXHIBIT A TO PLAINTIFFS'/PETITIONERS' REPLY BRIEF
TO ADDRESS SB-AR CITES ON PAGE 53, LINES 1:5 of
WATER BOARD CORRECTED OPPOSITION BRIEF**

Water Board Cites to SB-AR	Description of Documents Cited	Relevance of Documents Cited
591-662	California Central Valley, Unimpaired Flow Data (DRAFT), Report by DWR Bay-Delta Office, May 2007. [591-642]; Estimating California Central Valley Unimpaired Flows, Presentation by DWR Bay-Delta Office, January 6, 2011. [643-662]	Duplicative - Part of supply data incorporated into final Water Board staff spreadsheet model used for curtailment notices
2823-2837	SWRCB Dry Year Program Report, Div. of Water Rights, Jan. 2015.	Irrelevant - describes process used in 2014, not 2015
3014-3015	Water Rights Used in Demand Analysis: Merced Watershed (2/25/2015). Map showing the POD locations for the water rights involved in the Merced Watershed Demand Analysis. [3014]; Bulletin 120 Unimpaired Run-Off Projections for 2015 (2/26/2015). [3015].	Duplicative - Part of supply and demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
3020-3022	Press Release: Reclamation Announces Initial Water Supply Allocation for 2015 (2/27/2015)	Irrelevant - press release
3026	Pg. 1 from the March Update to DWR Bulletin 120. Summary of Water Conditions, March 1, 2015.	Duplicative - Part of supply data incorporated into final Water Board staff spreadsheet model used for curtailment notices
3041	Pg. 16 from the March Update to DWR Bulletin 120. A graph from Bulletin 120 that depicts Precipitation/Snow Fall Conditions as of 3/1/15.	Duplicative - Part of supply data incorporated into final Water Board staff spreadsheet model used for curtailment notices
3252-3257	Location of Water Rights Used in Demand Analysis: Stanislaus Watershed (3/23/2015). Map showing the POD locations for the water rights involved in the Stanislaus Watershed Demand Analysis. [3252]; CA Snow Water Content, March 24, 2015 [3253]; Location of Water Rights Used in Demand Analysis: Tuolumne Watershed (3/23/2015). Map showing the POD locations for the water	Duplicative - Part of supply and demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices

**EXHIBIT A TO PLAINTIFFS'/PETITIONERS' REPLY BRIEF
TO ADDRESS SB-AR CITES ON PAGE 53, LINES 1:5 of
WATER BOARD CORRECTED OPPOSITION BRIEF**

	rights involved in the Tuolumne Watershed Demand Analysis. [3254]; Location of Water Rights Used in Demand Analysis: San Joaquin Watershed (3/23/2015). Map showing the POD locations for the water rights involved in the San Joaquin Watershed Demand Analysis. [3255]; Bulletin 120 Update (3/26/2015) [3256].	
3262-3265	2015 Sacramento/San Joaquin River Water Year Forecast Breakdown for April 1, & May 1, 2015.	Duplicative - Part of supply data incorporated into final Water Board staff spreadsheet model used for curtailment notices
3273	Press Release, 4/1/2015: Governor Brown Directs Statewide Mandatory Water Use Reductions.	Irrelevant - press release
3276-3296	Bulletin 120: April 1, 2015 Update. [3276-3291]; 2015 Merced River Basin Supply/Demand Estimate (4/2/2015). [3292]; 2015 San Joaquin River Basin Supply/Demand Estimate (4/2/2015). [3293]; 2015 Stanislaus River Basin Supply/Demand Estimate for All Water Rights (4/2/2015). [3294]; 2015 Stanislaus River Basin Supply/Demand Estimate for Pre-1914/Riparian Water Rights (4/2/2015). [3295]; 2015 Tuolumne River Basin Supply/Demand Estimate (4/2/2015). [3296]	Duplicative - Part of supply and demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
3380	Agenda: Sacramento River Stakeholder Group Meeting on April 16, 2015.	Irrelevant - agenda for private meeting that did not involve Petitioners or provide findings for public review process
3386	2015 San Joaquin River Basin Supply/Demand Estimate (4/21/2015).	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
3512-3513	2015 Sacramento River Basin Supply/Demand Estimate (4/29/2015) [3512]; 2015 San Joaquin River Basin Supply/Demand Estimate (4/29/2015) [3513].	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices

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4125	2015 Sacramento River Basin Senior Supply/Demand Analysis With Proportional Delta Demand (Putah/Cache Creek Demand Removed) (6/4/2015).	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
4132-4188	2012 – 2015 Delta Salinity Conditions under a Without Project Scenario (6/5/2015), Prepared for SWCs by CH2M Hill. This study purports to represent the salinity conditions that would occur in the Delta during drought years without water released from upstream dams.	Irrelevant - Study submitted to Water Board by State Water Contractors as part of a complaint filed by the State Water Contractors that the Water Board has not acted on or made any findings regarding, or even asked Petitioners' to respond to.
4196-4199	2015 Combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis (6/10/2015) [4196] ; 2015 Combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis with North Delta Demands (6/10/2015) [4197] ; 2015 Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demands (6/10/2015) [4198] ; 2015 San Joaquin River Basin Senior Supply/Demand Analysis with Proportional Delta Demands (6/10/2015) [4199] .	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
4204-4211	2015 Combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis (6/11/2015) and Additional Information for Supply/Demand Graph [4204-4205] ; 2015 Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand (6/11/2015) and Additional Information for Supply/Demand Graph [4206-4207] ; 2015 Sacramento River Basin Senior Supply/Demand Analysis with North Delta Demand (6/11/2015) and Additional Information for Supply/Demand Graph [4208-4209] ; 2015 San Joaquin River Basin Senior Supply/Demand Analysis with Proportional Delta Demand (6/11/2015) and Additional Information for Supply/Demand Graph [4210-4211] .	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices

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4221	2015 Combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis (6/15/2015).	Post-dates curtailment notices. Also Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
4225-4228	2015 Sacramento River Basin Senior Supply/Demand Analysis With Proportional Delta Demand (6/15/2015) and Additional Information for Supply/Demand Graph [4225-4226]; 2015 San Joaquin River Basin Senior Supply/Demand Analysis With Proportional Delta Demand (6/15/2015) and Additional Information for Supply/Demand Graph [4227-4228].	Post-dates curtailment notices. Also Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
4233-4462	SWCs Complaint Against Unlawful Diversion of State Water Project Stored Water Supplies, Plus Attachments (June 16, 2015). A letter to SWRCB, with voluminous technical studies attached, setting forth the factual and legal bases for the SWCs' assertion that in-Delta diversions are unlawfully taking water to which SWCs are entitled.	Irrelevant - Study submitted to Water Board by State Water Contractors as part of a complaint filed by the State Water Contractors that the Water Board has not acted on or made any findings regarding, or even asked Petitioners' to respond to.
4541-4542	2015 Combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis (6/18/2015) [4541]; 2015 Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand (6/18/2015) [4542].	Post-dates curtailment notices. Also Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
4577	2015 Combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis (6/22/2015)	Post-dates curtailment notices. Also Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
4584-4587	2015 Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand (6/22/2015) and Additional Information for Supply/Demand Graph [4584-4585]; Summary of Curtailment	Post-dates curtailment notices. Also Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for

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	Certification Responses Through June 22, 2015 [4586]; 2015 San Joaquin River Basin Senior Supply/Demand Analysis With Proportional Delta Demand (6/23/2015) [4587].	curtailment notices
4814-4816	2015 Combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis (7/2/2015) [4814]; 2015 Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand (7/2/2015) [4815]; 2015 San Joaquin River Basin Senior Supply/Demand Analysis With Proportional Delta Demand (7/2/2015) [4816].	Post-dates curtailment notices. Also Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
4928-4931	2015 San Joaquin River Basin Senior Supply/Demand Analysis With Proportional Delta Demand (6/2/2015) [4928]; 2015 San Joaquin River Basin Senior Supply/Demand Analysis With Proportional Delta Demand (6/18/2015) [4929]; 2015 Combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis (6/23/2015) and Additional Information for Supply/Demand Graph [4930-4931].	Post-dates curtailment notices. Also Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
Water Board Cites to NATIVE FILES in SB-AR, by doc. #		
331	Excel Spreadsheet – Sacramento and San Joaquin River Basins Supply/Demand (4/5/2015).	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
347	Excel Spreadsheet – Riparian and Pre-1914 Diversions, 2014	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices

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370	Excel Spreadsheet – Sacramento Basin Charts with Water Rights Use Data Set (5/1/2015)	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices - SAME AS NATIVE FILE 9085 (WR-75) IN ENFORCEMENT AR.
460	List of Diversions Removed from Supply/Demand Analysis (6/5/2015)	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
466	Excel Spreadsheet – Water Rights Use Data Set	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices.
487	Excel Spreadsheet – 2015 Combined Sacramento/San Joaquin River Basin Senior Supply/Demand Analysis (6/15/2015)	Post-dates the Curtailment Notice, and Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
472	Excel Spreadsheet – 2015 Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand (6/10/2015)	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices. NOTE: Water Board failed to cite to Native Doc. No. 468 - the analysis actually used for the June 12, 2015 Curtailment. (See AR 8602 (WR-48) Supply and Demand Graph from Enforcement Hearing which matches “Senior Chart” tab in SB-AR Doc. No. 468)
475	Excel Spreadsheet – 2015 San Joaquin River Basin Senior Supply/Demand Analysis with Proportional Delta Demand (6/10/2015)	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices

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493	Excel Spreadsheet – 2015 Sacramento River Basin Senior Supply/Demand Analysis with Proportional Delta Demand (6/15/2015)	Post-dates curtailment notices; Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices]
495	Excel Spreadsheet – 2015 San Joaquin River Basin Senior Supply/Demand Analysis with Proportional Delta Demand (6/15/2015)	Post-dates curtailment notices; Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
497	Excel Spreadsheet – Water Rights Use Data Set (WRUDS) – Delta Bridge (6/15/2015)	Post-dates curtailment notices; Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
532	Excel Spreadsheet – Water Rights Use Data Set (WRUDS) for the Sacramento, San Joaquin, Russian, Watersheds (6/24/2015) and Eel River	Post-dates curtailment notices; Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices
568	Excel Spreadsheet – List of Curtailed Pre-1914 Water Rights (7/2/2015)	Provides no support for curtailment decision, just the list of rights curtailed
594	Excel Spreadsheet – 2015 Sacramento River Basin Senior Supply/Demand Analysis With Proportional Delta Demand Based on 50% FNF Forecast (6/4/2015)	Duplicative - Part of supply/demand data incorporated into final Water Board staff spreadsheet model used for curtailment notices