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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

Coordination Proceeding
Special Title (Rule 3.550)

CALIFORNIA WATER CURTAILMENT CASES

JUDICIAL COUNCIL
COORDINATION PROCEEDING
NO. **4838**[1]

STATEMENT OF DECISION, PHASE I TRIAL

In Phase I of these coordinated actions, plaintiffs/petitioners seek a writ of mandate and declaratory relief in response to water curtailment efforts by defendant/respondent California

[1] Included Actions: (1) Byron-Bethany Irrigation District v. California State Water Resources Control Board, Superior Court of California, County of Contra Costa, Case No. N150967; (2) The West Side Irrigation District v. California State Water Resources Control Board, Superior Court of California, County of Sacramento, Case No. 34201580002121; (3) Banta-Carbona Irrigation District v. California State Water Resources Control Board, Superior Court of California, County of San Joaquin, Case No. 39201500326421 CU WMSTK; (4) Patterson Irrigation District v. California State Water Resources Control Board, Superior Court of California, County of Stanislaus, Case No. 2015307; (5) San Joaquin Tributaries Authority v. California State Water Resources Control Board, Superior Court of California, County of Stanislaus, Case No. 2015366. The following cases were added-on by Order dated October 26, 2016: (6) The West Side Irrigation District v. SWRCB, Superior Court of California, County of Sacramento, Case No. 34-2016-80002387; (7) San Joaquin Tributaries Authorities v. SWRCB, Superior Court of California, County of Sacramento, Case No. 34-2016-80002389; and (8) Byron-Bethany Irrigation District v. SWRCB, Superior Court of California, County of Sacramento, Case No. 34-2016-80002388.

State Water Resources Control Board (the "Board" or "SWRCB") in the Sacramento-San Joaquin River and Delta watersheds in response to California's recent drought.

Having considered the record and the arguments of counsel, the Court issues the following Statement of Decision:

I. Summary of the Proceedings

In April, May, and June of 2015, the Board issued curtailment notices (the "2015 Curtailment Notices") to water users in the above-described watersheds, including pre-1914, "senior" appropriators[2] who dispute the Board's jurisdiction to curtail their water rights. As discussed below, the notices culminated the Board's years-long effort to respond to an historic drought. Petitioners began to file the included actions in courts across the region, claiming, among other challenges, that the notices were issued without due process of law.

In response to petitioners' challenges, a temporary restraining order ("TRO") was issued in the included action of *West Side Irrigation District v. State Water Resources Control Board* (Case No. 34201580002121) by the Superior Court of California, County of Sacramento in July of 2015. The Sacramento court found that the notices likely violated due process and prohibited the Board from taking any action against certain water rights holders based on the notices. The Board then issued a "Partial Rescission Notice" revising the curtailment notices on July 15, 2015, and the Sacramento court declined to enter a preliminary injunction.

In August of 2015, the Board's petition for coordination was granted and the Judicial Council of California authorized the Presiding Judge of this Court to assign a trial judge in the coordinated actions, which were assigned to the Honorable Peter H. Kirwan. Meanwhile, the Board commenced administrative enforcement proceedings against two of the petitioners, Byron-Bethany Irrigation District ("BBID") and West Side Irrigation District ("WSID"). The

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[2] Appropriative water rights with a priority date before the effective date of the Water Commission Act are commonly referred to as "senior" or "pre-1914" water rights. (Dismissal AR 8386, *In the Matter of Administrative Civil Liability Complaint Against Byron-Bethany Irrigation Dist. and in the Matter of Draft Cease and Desist Order Against the West Side Irrigation Dist.*, Cal. St. Wat. Res. Bd. Order No. WR 2016-0015, 2016 WL 3388132, at *12, fn. 2; Notice AR 4663.)

Court denied BBID and WSID's motions to stay the enforcement proceedings.[3] Following three days of administrative hearings, the enforcement proceedings were ultimately dismissed by the Board on June 15, 2016.

On October 3, 2016, this Court sustained in part and overruled in part SWRCB's demurrers to the five original petitions/complaints and granted motions to intervene by State Water Contractors ("SWC"). Three additional petitions/complaints by existing petitioners, which address the administrative enforcement proceedings, were coordinated as add-on cases by stipulation of the parties. In addition to SWC, the Central Delta Water Agency and South Delta Water Agency (which are also petitioners) and the Department of Water Resources have intervened in one or more of the coordinated actions.

The actions were reassigned to the Honorable Brian C. Walsh on January 3, 2017. SWRCB filed the administrative record associated with the enforcement proceedings on January 17 (the "Dismissal AR") and filed a second administrative record associated with the curtailment notices on February 21 (the "Notice AR"). On May 4, the Court denied without prejudice petitioners' requests for fees and costs incurred in the administrative enforcement actions; overruled the Board's demurrers to three of the original petitions/complaints and sustained with leave to amend its demurrer to BBID's original petition/complaint; and denied without prejudice petitioners' motions to augment the administrative record. The Board answered each of the petitions/complaints, asserting several affirmative defenses.

In July of 2017, the Court ordered that trial would proceed in three phases, with Phase I to address the various petitions for writ of mandate, as well as BBID's eleventh cause of action for declaratory relief in Case No. 2015-1-CV-285182. Petitioners filed a consolidated opening brief on the merits on July 28, 2017. SWRCB and, separately, SWC filed opposition briefs in October of 2017. The Department of Water Resources joined in portions of both oppositions. Petitioners filed a consolidated reply brief in November of 2017, and trial was held on January 26, 2018.

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[3] BBID appealed that order and challenged it by writ of mandate. The Court of Appeal denied the writ on February 2, 2016, and BBID subsequently withdrew its appeal.

II. Evidentiary Issues

The parties raise a number of evidentiary issues by formal objections and otherwise.

A. The Parties' Arguments Regarding the Administrative Record

As previously noted, two administrative records have been submitted by the Board: (1) the "Notice AR," comprised of public and internal documents related to the Board's water availability analysis and other efforts regarding curtailments during the drought and (2) the "Dismissal AR," consisting of materials associated with the administrative enforcement proceedings against BBID and WSID. While they did not file any formal objection to this effect, petitioners argue that the "Notice AR" was improperly designated, because there were no formal "proceedings before the inferior tribunal" in connection with the curtailment notices as contemplated by Code of Civil Procedure section 1094.5, subdivision (a). However, *Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 105 (hereinafter, "*Phelps*") held that Water Code section 1126 "indicates the Legislature's intent that section 1094.5 govern judicial review of all cases relating to state water law," whether or not a hearing is required by law as generally contemplated by that section. While *Phelps* does not address the scope of the administrative record in a case where no hearing occurred, it would be impossible for a court to fairly evaluate the action taken by an agency in the absence of any record of its activities. The Court will accordingly consider the Notice AR, which petitioners themselves discuss throughout their briefing. In any event, petitioners' main issue appears to be with consideration of the water availability analysis supporting the 2015 Curtailment Notices, which the Court will not evaluate in substance for the reasons discussed below. Petitioners' concerns with the Notice AR should thus be obviated.

SWRCB and SWC raise a separate but related issue with regard to the administrative record: they contend that petitioners should be barred from challenging the Board's water availability analysis using evidence from the Dismissal AR. Again, because the Court will not address petitioners' challenges to the water availability analysis in substance, it need not rule on this dispute.

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B. The SWRCB's Objections to Evidence

Beyond the two administrative records, petitioners submit an Appendix of Declarations in support of their trial brief. The declarations primarily address petitioners' legal status and authority, along with details regarding their asserted water rights. The Board objects to the declarations in their entireties on the ground that petitions for writ of administrative mandate are to be decided on the administrative record unless "there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the [administrative] hearing ...." (Code Civ. Proc., § 1094.5, subd. (e).) Here, however, there was no opportunity for any of the petitioners to present evidence at a hearing with regard to the curtailment notices, and several of the petitioners did not participate in the enforcement proceedings. Again, as discussed in *Phelps*, the Water Code provides that section 1094.5 governs judicial review of "all cases relating to state water law," regardless of whether a hearing is conducted. (*Phelps, supra,* 157 Cal.App.4th at p. 105.) It would be inequitable to allow the Board to unilaterally determine the record under these circumstances, without accounting for the unique context resulting from the interplay between the Water Code and section 1094.5. Further, as urged by petitioners, this evidence relates to petitioners' standing to bring these actions in court, an issue that would not have been developed at the administrative level in any event. (See *Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 485 [admitting evidence of administrative bias; "it was only in the course of the superior court action that [petitioner] had the opportunity to ... fully develop" this issue].) Consequently, the Court OVERRULES the Board's objection to the declarations as a whole (Objection No. 1).

SWRCB also objects to portions of several declarations that recite the water rights held by each petitioner on the grounds that these statements lack foundation, are speculative, are outside the personal knowledge of the declarant, lack relevance, assert a legal argument or conclusion, constitute opinion testimony without a proper foundation and oral testimony of the content of writings, and are hearsay. While some of these objections might have merit if the Court were called to determine the validity of specific water rights, for purposes of Phase I, the Board does not dispute that petitioners possess the water rights they claim, and it never purported

to curtail or take enforcement action against petitioners on the ground that their asserted water rights were invalid. Further, the Board does not dispute petitioners' standing to bring these actions on the ground that they and/or their constituent water users do not actually hold the water rights they claim. Consequently, though the Court need not make any findings regarding the validity of specific water rights at this time in order to resolve the claims before it, the Court OVERRULES these objections (Objection Nos. 2-7).

C. The Parties' Requests for Judicial Notice

The Board's request for judicial notice of prior orders in this action (Request Nos. 1, 3, and 6) is GRANTED. (Evid. Code, § 452, subd. (d).) Its request for judicial notice of a water law treatise published by the State of California (Request No. 2) is also GRANTED. (Evid. Code, § 452, subd. (c).) The Board's request is unopposed in these respects.

The Board also seeks judicial notice of notices of water availability that it issued to water users during September through November of 2015 (Request No. 4). According to the Board, these notices "demonstrate that the Curtailment Notices have been rescinded." Along the same lines, the Board requests judicial notice of its resolution (Request No. 5) delegating authority to its Executive Director to take certain actions. Petitioners oppose the Board's request as to these documents, particularly as to the truth of factual statements they contain, but they do not specifically dispute the documents' authenticity and concede that the curtailment notices were rescinded. The Board's requests are GRANTED as to the existence, contents, and legal effect of these documents, but not as to the truth of any factual statements they contain. (Evid. Code, § 452, subd. (c); *Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 185 [when courts take judicial notice of documents, their legal effect may be established where there is no genuine dispute regarding the documents' authenticity and the legal effect is clear from the face of the documents]; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-1568 [courts cannot take judicial notice of the truth of hearsay statements or facts set forth in judicially noticeable documents].)

SWC's request for judicial notice of Water Board Order WR 2016-0015 and Water Board Decision 1641, which is unopposed, is GRANTED. (Evid. Code, § 452, subd. (c).)

Finally, petitioners' request for judicial notice of the Board's opening brief in the relevant case of *Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397 and of orders issued by the Board in two 2011 enforcement proceedings, submitted with their reply papers, are GRANTED. (Evid. Code, § 452, subds. (c) and (d).)

III. Overview of California Water Law and the Board's Role

To put the Board's curtailment efforts and the parties' arguments in context, a basic understanding of the legal landscape in which this dispute arises is needed. While this Court will not attempt an exhaustive summary of the complex body of law governing water rights in California, an overview of its most relevant principles is in order.

A. Relevant General Principles of California Water Law

"California maintains a 'dual system' of water rights, which distinguishes between the rights of 'riparian' users, those who possess water rights by virtue of owning the land by or through which flowing water passes, and 'appropriators,' those who hold the right to divert such water for use on noncontiguous lands." (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1478.) Prior to 1914, appropriative water rights were available, generally speaking, "by simply diverting water and putting it to use." (*People v. Murrison* (2002) 101 Cal.App.4th 349, 361.) In 1913, the Legislature adopted the Water Commission Act, codifying the process for appropriation of water and creating a regulatory scheme to establish those rights. (*Ibid.*) Since 1914, new appropriative rights must issue through a permit or license from the Board, and these rights are circumscribed by the terms of the permit or license. (*Millview County Water District v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 889 (hereinafter, "*Millview*")). "Pre-1914" appropriators need neither a permit nor other governmental authorization to exercise their water rights. (*Ibid.*)

Other than those flowing from the permitting requirement, there are no "substantive difference[s]" between pre-1914 and later appropriative rights. (*People v. Murrison, supra,* 101 Cal.App.4th at p. 361.) Both rights are limited to a particular volume of diversion; for pre-1914 rights, that volume is determined by historical use, while for post-1914 rights it is fixed by

permit. (*Millview*, *supra,* 229 Cal.App.4th at p. 889.) All appropriative rights may be forfeited by the appropriator's failure to make beneficial use of a particular volume of water, up to the entire volume of a claim, for a period of five years. (*Ibid.*)

In times of shortage, the "rule of priority" generally renders the rights of riparian users paramount to those of appropriators, although riparians must curtail their use proportionately among themselves. (*Millview*, *supra,* 229 Cal.App.4th at p. 890.) Appropriators may only divert water when the reasonable needs of riparian users are fully satisfied; as a result, appropriators may be deprived of all use of water when supply is short. (*Ibid.*) Among appropriators, senior users who acquired their rights first in time are entitled to satisfy their reasonable needs, up to their full appropriation, before more junior appropriators are entitled to any water. (*Ibid.*)

All water rights, even riparian and pre-1914 rights, are subject to the police powers of the state. (*People v. Murrison*, *supra,* 101 Cal.App.4th at p. 361.) Specifically, all water rights are limited by the "reasonable use" doctrine, which is enshrined in the California Constitution and has been held to be a valid exercise of the police power. (*Millview*, *supra,* 229 Cal.App.4th at p. 890; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 106.) In addition, the state's navigable waters are subject to the public trust doctrine, providing that "the state, as trustee, has a duty to preserve this trust property from harmful diversions by water rights holders." (*United States v. State Water Resources Control Bd.*, *supra,* 182 Cal.App.3d at p. 106.) Thus, "no one has a vested right to use water in a manner harmful to the state's waters." (*Ibid.*)

B. Overview of SWRCB's History and Authority Over Water Rights

"The Board was created as the State Water Commission in 1913 to administer the appropriation of water for beneficial purposes." (*Light v. State Water Resources Control Bd.*, *supra,* 226 Cal.App.4th at p. 1481.) Originally, "the Board had the 'limited role' of granting use rights to water that was not being applied to beneficial purposes and was not otherwise appropriated." (*Ibid.*, quoting *National Audubon Society v. Superior Court (Dept. of Water and Power of the City of Los Angeles)* (1983) 33 Cal.3d 419, 442.)

In 1928, Article X, section 2 of the California Constitution was enacted, which abolished the right of riparian users to make unreasonable use of water and "established the doctrine of

reasonable use as an overriding feature of California water law" applicable to "[a]ll uses of water." (*National Audubon Society v. Superior Court, supra,* 33 Cal.3d at pp. 442-443.) "The 1928 amendment itself did not expand the authority of the Water Board," but "[m]ore recent statutory and judicial developments … have greatly enhanced [its] power … to oversee the reasonable use of water ...." (*Id.* at pp. 443-444.) However, "notwithstanding its power to protect the public interest, the Board plays a limited role in resolving disputes and *enforcing* rights of water rights holders, a task mainly left to the courts." (*United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at p. 104, italics original.) "[T]he Board's role in examining existing water rights to estimate the amount of surplus water available for appropriation does *not* involve adjudication of such rights." (*Ibid.*, italics original.)

A recent opinion by the Court of Appeal for the First Appellate District summarizes the Board's authority with a focus on riparian and pre-1914 users. It explains that, as currently constituted, the Board's enabling statute describes its function as "to provide for the orderly and efficient administration of the water resources of the state" and grants it the power to "exercise the adjudicatory and regulatory functions of the state in the field of water resources." (*Light v. State Water Resources Control Bd., supra,* 226 Cal.App.4th at pp. 1481-1482, quoting Wat. Code, § 174.) "In that role, the Board is granted 'any powers ... that may be necessary or convenient for the exercise of its duties authorized by law' (§ 186, subd. (a)), including the power to 'make such reasonable rules and regulations as it may from time to time deem advisable....' (§ 1058.)" (*Id.* at p. 1482.)

Again, "[t]he Board's authority to prevent unreasonable or wasteful use of water extends to all users, regardless of the basis under which the users' water rights are held." (*Light v. State Water Resources Control Bd., supra,* 226 Cal.App.4th at pp. 1482.) While riparian and pre-1914 appropriative users "cannot be required to obtain permits as a condition of exercising their right to divert, that does not mean their use of California's waters is free from Board regulation." (*Id.* at p. 1487 [upholding a regulation establishing a process for addressing diversions for frost protection in light of impacts on young salmon populations in the Russian River stream system].) "Limited and particularized prohibitions designed to prevent unreasonable use are different from,

and by no means legally equivalent to, the comprehensive regulation embodied in a water use permit, which, as an allocation of 'excess water,' typically limits the user's rights without regard to the reasonableness of use." (*Ibid.*)

With regard to the adjudication of water rights, the Water Code provides that the Board, in addition to the courts, may make a comprehensive determination of "all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right." (*National Audubon Society v. Superior Court*, *supra,* 33 Cal.3d at p. 448, citing Wat. Code, § 2501.) "Upon petition signed by one or more claimants to water of any stream system, ... the board shall, if ... the facts and conditions are such that the public interest and necessity will be served by a determination of the water rights involved, enter an order granting the petition and make proper arrangements to proceed with the determination." (Wat. Code, § 2525.) This part of the Water Code expressly authorizes the Board to determine the relative priorities of all water rights in a stream system. (See Wat. Code, § 2769 ["The decree shall in every case declare as to the water right adjudged to each party, the priority, amount, season of use, purpose of use, point of diversion, and place of use of the water...."].) However, "the Board's determination is tentative in nature and must be filed in the superior court for hearing and final adjudication. (§§ 2750, 2768, 2769 ...)" (*United States v. State Water Resources Control Bd.*, *supra,* 182 Cal.App.3d at p. 104, fn. 3.)

As this discussion shows, the Board was created to administer new appropriations and has broad regulatory authority over these post-1914 water rights, but its powers have expanded to include limited regulatory and adjudicatory authority over senior users. With this background in mind, the Board's efforts at issue in these actions may be better understood and evaluated.

IV. Factual Findings

In 2014 and 2015, California was experiencing a drought unprecedented in scope and severity during its statehood. As described in an emergency proclamation issued by the Governor of California, the state suffered record dry conditions, water supplies dipped to alarming levels, and the risk of harm to drinking water supplies, agricultural employment,

farmers' long-term investments in their crops, and wildlife, as well as the risk of wildfires, greatly increased. (Notice AR 1581.) In this extremely challenging environment, the Board was called to exercise its powers to uphold California's water rights system and regulate water use for the benefit of the public.

A. Curtailment Efforts in 2014

In January of 2014, the Governor issued his emergency proclamation declaring a state of emergency due to drought conditions. (Notice AR 1581.) Among other commands, the proclamation directed the Board to "put water right holders throughout the state on notice that they may be directed to cease or reduce water diversions based on water shortages." The 2014 proclamation did not discuss or refer to actual curtailments[4] of water rights, nor did it purport to define or expand the Board's authority with respect to curtailments.

"On the same day as the Governor's Proclamation, January 17, 2014, the State Water Board issued a Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions." (Notice AR 1926, Cal. St. Wat. Res. Bd. Resolution No. 2014-0031, 2014 WL 3398115.) "The notice advised that if dry weather conditions persist, the State Water Board will notify water right holders of the requirement to limit or stop diversions of water under their water rights, based on water right priority." (*Ibid.*) This informational notice (Notice AR 1580) was followed by the Board's publication of a "Fact Sheet" (Notice AR 1585) describing it as such and indicating that "notices to curtail water diversion" might follow in the "Next Steps," which would also include efforts by the Board to "assure compliance."

On March 1, 2014, the Governor signed drought relief legislation into law. (Notice AR 1926, Resolution No. 2014-0031.) The legislation amended Water Code section 1058.5, which had previously authorized the Board to adopt emergency regulations "to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote wastewater reclamation, or to promote water conservation," to additionally authorize emergency regulations "to require curtailment of diversions when water is not available under

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[4] SWRCB indicates that "curtailment" is not a term of art in water law, and the Court is not aware of its use anywhere in the Water Code other than in the recent amendment to section 1058.5 discussed herein. Like the Board, the Court uses the term "curtailment" to refer to a voluntary or required reduction or cessation of water diversion.

the diverter's priority of right" and "to require reporting of diversion or use or the preparation of monitoring reports." The Governor proclaimed a continuing state of emergency on April 25, 2014, ordering that "[t]he Water Board will adopt and implement emergency regulations pursuant to Water Code section 1058.5, as it deems necessary to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, to promote water recycling or water conservation, and to require curtailment of diversions when water is not available under the diverter's priority of right." (Notice AR 1788.)

On May 27, 2014, the Board issued curtailment notices similar to those at issue in these actions to all post-1914 water rights holders in the Sacramento and San Joaquin River Watersheds. (Notice AR 1845.) These notices informed recipients "of the need to immediately stop diverting," with exceptions for human health and safety and hydroelectric power generation, and required them to submit a certification of compliance. They included a "Warning" to senior rights holders:

> You may have received this notice because the State Water Board's records show you divert water under a riparian or pre-1914 water right. As such, it is important that you conserve water due to declining supplies. If current conditions persist, the State Water Board may curtail some pre-1914 and riparian water rights in the near future.

(Notice AR 1846.)

On July 2, 2014, SWRCB adopted Resolution No. 2014-0031, entitled "To Adopt an Emergency Regulation for Statewide Drought-Related Curtailment of Water Diversions to Protect Senior Water Rights." The resolution discussed the earlier responses to the drought as summarized above. The Board found that an emergency regulation was needed because "[t]he State's current system for curtailing diversions and enforcing those curtailments will not provide for timely and effective implementation of the State's water right system during the current drought when numerous water diversions require curtailment and enforcement in a short period of time." (Notice AR 1926, Resolution No. 2014-0031.) "The emergency regulation is needed to greatly increase timely compliance with and effective enforcement of the reporting requirements and water diversion curtailments issued by the State Water Board during the drought to ensure that senior water rights are protected." The Board found that, while it "has

existing authority to issue curtailment notices for junior water users, and to initiate enforcement action, it is likely that there will be a high degree of noncompliance during the drought that will impact senior water right holders because water will not be available for their diversions due to unauthorized diversions and failure to report."

The resolution discussed the Board's then-existing curtailment procedures:

> The State Water Board currently requests that recipients of a curtailment notice submit information regarding, among other things, their curtailment or reason for continued diversion. However, if many water right holders fail to respond to the request for reporting information under the curtailment notices issued under the current authorities, it will be exceedingly difficult for the State Water Board to focus curtailment investigations and refine future curtailment analyses to reflect actual hydrologic conditions and actual legal water use[.] ... As opposed to the process required by the State Water Board's existing authorities, which requires case-by-case investigations, issuance of a draft cease and desist order (CDO) or proposed administrative civil liability (ACL), or both, and the opportunity for an evidentiary hearing, a violation of the emergency regulation is itself immediately enforceable by administrative liability. This would be in addition to any ACL for violation of a CDO pursuant to Water Code section 1845 or for unlawful diversion in violation of Water Code section 1052.

First and foremost among the emergency regulations adopted by the Board, "California Code of Regulations, title 23, section 875 provide[d] that the Deputy Director for the Division of Water Rights may issue curtailment orders, and identifie[d] sources of sufficiently reliable information upon which to base a decision to issue those orders." Section 875 further "clarifie[d] that, unlike curtailment notices, curtailment orders issued pursuant to that section are subject to the State Water Board's petition for reconsideration process."

The Board decided that the emergency regulations would not "apply curtailment orders to" holders of riparian and pre-1914 rights. It indicated that

> in light of the complexities regarding the relative priority of riparian and pre-1914 appropriative rights, upon receipt of a complaint alleging interference with a water right by a riparian or pre-1914 water right holder, or information indicating unlawful diversion of stored water by riparians or pre-1914 water right holders, the Deputy Director may issue an order to these diverters requiring the diverter to provide certain information necessary for determining issues of relative priority. Staff are encouraged to investigate whether curtailment notices and potential enforcement under the Board's existing processes should be pursued for these diverters based on the information received[.]

The resolution indicates that public notice of the Board's consideration of the emergency regulations was issued, and the Board also distributed for public review and comment a Finding of Emergency pursuant to State laws and regulations.

The emergency regulations were adopted by the Board on July 2, 2014. However, the Board did not issue any curtailment orders under these regulations. According to a presentation found in the administrative record, this was because "over 9,000 Curtailment Notices [had] already issued" in 2014 and "[i]ssuing Curtailment orders for [the] same diversions would have taken resources away from field investigation activities already in progress." (Notice AR 3184.) The 2014 curtailment notices were ultimately lifted in October and November of that year. (See Notice AR 2274-2275, 2339-2342.)

By the end of 2014, SWRCB had "conducted nearly 950 field inspections to determine compliance with curtailment notices." (Notice AR 3193, Cal. St. Wat. Res. Bd. Resolution No. 2015-0015, 2015 WL 1406115.) "The field inspection program, and the submittal of responses to curtailment notices, found that many persons who received curtailment notices for a post-1914 right claimed a riparian or pre-1914 right for continued diversions." (*Ibid.*) Although reporting of such rights is typically required, "[i]n many instances, the claimed right had never been reported to the Division." (*Ibid.*) The Board also issued two "informational orders" to a total of over 473 pre-1914 and riparian users under another section of the emergency regulations, California Code of Regulations section 879, subdivision (c). (Notice AR 3185.) A limited number of enforcement proceedings were initiated for failure to respond to these orders. (*Ibid.*) As provided by the enabling statute, the 2014 emergency regulations automatically expired in early 2015. (See Wat. Code, § 1058.5, subd. (c) ["An emergency regulation adopted by the board under this section may remain in effect for up to 270 days, as determined by the board ...."].)

B. The Drought Continues in 2015

As the drought continued, the Board issued another informational "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions" on January 23, 2015. (Notice AR 2902.) On March 17, it adopted Resolution No. 2015-0015, "Amending and

Readopting a Drought Emergency Regulation Regarding Informational Orders." The resolution amended Code of Regulations section 879 governing informational orders in order to "extend the Deputy Director's authority to enforce the existing orders and authorize the Deputy Director to issue additional orders." However, it did not extend the other aspects of the 2014 emergency regulations, including section 875 regarding curtailment orders, for reasons that are unclear.[5]

On April 1, 2015, the Governor issued Executive Order B-29-15, finding a continued drought emergency and extending the Governor's proclamations discussed above, along with two prior executive orders. (Notice AR 3266.) In a section entitled "INCREASE ENFORCEMENT AGAINST WATER WASTE," the Governor ordered that "[t]he Water Board shall require frequent reporting of water diversion and use by water right holders, conduct inspections to determine whether illegal diversions or wasteful and unreasonable use of water are occurring, and bring enforcement actions against illegal diverters and those engaging in the wasteful and unreasonable use of water." Although SWRCB's 2014 emergency regulations had expired, the Governor's Executive order did not specifically address curtailments of water rights or the adoption of additional emergency regulations.

C. The Curtailment Notices and Enforcement Actions at Issue Herein

It was the Board's renewed curtailment efforts in 2015, in the absence of emergency regulations authorizing curtailment orders, that ultimately gave rise to these actions. On April 23, 2015, SWRCB issued a curtailment notice to post-1914 right holders in the San Joaquin River Watershed, declaring a need for these users to "immediately stop diverting" and requiring them to complete a form certifying cessation of diversion under their post-1914 rights. (Notice AR 3470.) The notice stated that completion of the form was "mandatory to avoid unnecessary potential enforcement proceedings." The notice cited Water Code sections 1052, 1055, 1831, and 1845. Together, these provisions purport to authorize penalties of $1,000 per day and

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[5] The Board did adopt an emergency regulation for "Curtailment of Diversions due to Insufficient Flow for Specific Fisheries for Mill, Deer, and Antelope Creeks," declaring diversions that would reduce flows below minimums needed to protect specific fish populations to be unreasonable uses of water. (Notice AR 3300.) The Board issued at least one "curtailment order" pursuant to this regulation. (*Ibid.*) Like the 2015 Curtailment Notices at issue in these actions, the "curtailment order" commanded that specific users cease diversions and required recipients to certify their compliance. (*Ibid.*) It indicated that "[v]iolations of this Order shall be subject to further enforcement and any applicable penalties pursuant to Water Code sections 1052, 1831, 1845, and 1846." (Notice AR 3303.)

$2,500 per acre-foot of water for past violations established through the Administrative Civil Liability ("ACL") process, and penalties of up to $10,000 per day if the Board issues a Cease and Desist Order ("CDO") that a user subsequently violates. On May 1, 2015, a curtailment notice with identical language was issued to post-1914 right holders in the Sacramento River Watershed. (Notice AR 3516.) On June 12, 2015, a very similar notice informed pre-1914 appropriative rights holders with a priority date of 1903 or later in both the Sacramento and San Joaquin River watersheds of the need to "immediately stop diverting" water. (Notice AR 4212.) This notice also required the completion of a form certifying that diversions had ceased and indicated that enforcement proceedings might be pursued against those who diverted water beyond that legally available to them under the authorities described above.

Petitioners BBID, WSID, Patterson Irrigation District, and Banta-Carbona Irrigation District submitted separate petitions for reconsideration of the curtailment notices under Water Code section 1122, but the Board rejected them on the ground that the notices were not a "decision" or "order" subject to reconsideration. (Notice AR 5201, 5203, 5270, 5272.) Still, the Board continued to indicate that enforcement actions might result if the petitioners continued to divert.

As already described, after lawsuits challenging the 2015 Curtailment Notices were filed and a TRO issued (Notice AR 4917), the Board issued a "Partial Rescission Notice" on July 15, 2015 (Notice AR 4918). The Partial Rescission Notice stated that it was intended "to rescind the 'curtailment' portions of the unavailability notices you received," including "language that may be construed as an order requiring you to stop diversions under your affected water right" and "language that may be construed as requiring affected water right holders to submit curtailment certification forms." However, it emphasized that "information available to the State Water Board continues to indicate that there is insufficient water available" for recipients to continue diverting and stated in bold: "**Diversion when there is no available water under the priority of your right is an unauthorized diversion and use and is subject to enforcement by the State Water Board.**" The Partial Rescission Notice indicated that the Board was continuing

inspections and re-emphasized that it could pursue enforcement under Water Code sections 1052, 1055, 1831, and/or 1845.

And consistent with that threat, the Board promptly issued a draft CDO against WSID and an ACL Complaint to BBID. The draft CDO threatened fines of $10,000 per day for non-compliance were a CDO to issue (Dismissal AR 0001), while the ACL Complaint sought over $1.5 million in penalties for the period from June 13 to June 25, 2015, when BBID allegedly diverted after receiving the curtailment notice issued on June 12 (Dismissal AR 0010).[6]

As the actions before this Court proceeded, the hearings on the enforcement actions were consolidated and heard beginning on March 21, 2016, and both enforcement cases were dismissed on June 15, 2016. The Board's Dismissal Order affirmed the agency's "authority to take enforcement action pursuant to Water Code section 1052 against the unauthorized diversion of water under claim of a pre-1914 water right," but found that the Board's Prosecution Team had failed to meet its burden to show water was unavailable at the time petitioners diverted. (Dismissal AR 8386, *In the Matter of Administrative Civil Liability Complaint Against Byron-Bethany Irrigation Dist. and in the Matter of Draft Cease and Desist Order Against the West Side Irrigation Dist.*, Cal. St. Wat. Res. Bd. Order No. WR 2016-0015, 2016 WL 3388132, at *8.)

With the state's reservoirs at improved volumes and the enforcement actions now concluded, this Court is asked to review the legal propriety of the Board's efforts before drought again reduces California's water supplies to emergency levels. Petitions for writ of mandate, and one cause of action for declaratory relief, challenging both the 2015 Curtailment Notices and the enforcement proceedings were heard in the Phase I trial on January 26, 2018.

V. Standard of Review Governing Petitions for Writ of Mandate

The parties have a minor dispute regarding the standard of review to be applied to the administrative mandamus claims. As the Court previously ruled in this case, Water Code section

[6] It is unclear why the Board used different enforcement procedures against these entities.

1126 provides that Code of Civil Procedure section 1094.5 governs judicial review of all issues of state water law decided by the Board when performing an adjudicatory function like determining and enforcing water rights. (See *Phelps, supra,* 157 Cal.App.4th at p. 105; see also *United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d at p. 113 ["in undertaking to allocate water rights, the Board performs an adjudicatory function" and its actions are reviewed under section 1094.5].) Under that section, a trial court may issue a writ of administrative mandate if an agency has (1) acted in excess of its jurisdiction, (2) deprived the petitioner of a fair hearing, or (3) committed a prejudicial abuse of discretion. (Code Civ. Proc., § 1094.5, subd. (b).) Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. (*Ibid.*)

"Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5, subd. (c).) Petitioners contend that the Court should apply its independent judgment to each of the issues before it, while the Board asserts that the "substantial evidence" standard applies to petitioners' challenges to the water availability analysis supporting the 2015 Curtailment Notices.

As the parties appear to agree, the majority of the issues raised by petitioners are not claims that the Board's findings are unsupported by the evidence, but are legal questions to be reviewed de novo. (See *Duncan v. Department of Personnel Admin.* (2000) 77 Cal.App.4th 1166, 1174.) Legal questions include "the ultimate questions, whether the agency's decision was ... unlawful or procedurally unfair." (*Ibid.*, quoting *Rosenblit v. Superior Court (Fountain Valley Regional Hospital and Medical Center)* (1991) 231 Cal.App.3d 1434, 1443.) While an agency's interpretation of a statute or ordinance is given a level of deference considering the agency's subject matter expertise, statutory interpretation is ultimately an issue of law for the Court's

independent determination. (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 219.) Notably, "the general rule of deference to [agency] interpretations ... does not apply when the issue is the scope of the agency's jurisdiction," a key issue here. (*Pacific Bell Wireless, LLC v. Public Utilities Com'n of State of Cal.* (2006) 140 Cal.App.4th 718, 729, internal citations and quotations omitted.)

As discussed below, the Court will evaluate the writ requested by petitioners on the grounds that the Board exceeded its statutory jurisdiction, deprived the petitioners of a fair hearing, and did not proceed in the manner required by law, but will not reach the issue of whether the Board's water availability analysis was supported by the evidence. Consequently, the de novo standard of review applies to all of the issues the Court must address, and it need not resolve the parties' dispute regarding the standard governing review of the water availability analysis.

VI. Statement of the Court's Rulings

The Court will address the determinative issues with regard to the Phase I claims roughly as organized in the parties' consolidated briefing, and generally without reference to the individual claims in the various petitions/complaints.

A. Petitioners Lack Standing to Challenge the Dismissal Order

The Board contends that petitioners lack standing to challenge the Dismissal Order because they were not "aggrieved" by that order under Water Code section 1126, since it dismissed the administrative proceedings against them and imposed no consequences on them. (See Wat. Code, § 1126, subd. (b) ["Any party aggrieved by any decision or order may, not later than 30 days from the date of final action by the board, file a petition for a writ of mandate for review of the decision or order."].) Petitioners respond that the Dismissal Order contains incorrect statements of law "assert[ing] an expanded scope of jurisdiction and regulatory authority over Petitioners' water rights," which will harm their water rights in the future if not challenged here.

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To have standing under section 1126, an aggrieved party's interest "must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment." (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 829 [holding petitioner had no standing to challenge a permit condition imposed on another user], citing *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.) This standard is adopted from the standing requirement for appeals from a civil judgment. (*Id.* at pp. 829-830.) In that context, courts have held that a party dismissed from an action is without standing to appeal. (See *Bates v. John Deere Co.* (1983) 148 Cal.App.3d 40, 53; see also *Hensley v. Hensley* (1987) 190 Cal.App.3d 895, 898 [citing *Maxwell Hardware Co. v. Foster* (1929) 207 Cal. 167, 170 for the proposition that "[a] party cannot appeal from a judgment in his favor"].) This standing jurisprudence

> is grounded in the most basic notion of why courts entertain civil appeals. We are here to provide relief for appellants who have been wronged by trial court error. Our resources are limited and thus are not brought to bear when appellants have suffered no wrong .... The guiding principle is one often encountered in daily life: no harm, no foul.

(*State Water Resources Control Bd. Cases, supra,* 136 Cal.App.4th at p. 829, quoting *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1132.) "The same reasoning applies with equal force to a party claiming to be aggrieved by a water rights decision by the Board." (*Id.* at p. 829.)

Here, petitioners have not suffered "immediate, pecuniary, and substantial" harm as a result of the Dismissal Order. Any future harm they fear is entirely speculative. While they seem to believe that statements in the Dismissal Order unnecessary to its resolution of the administrative proceedings in their favor will bind the Board or SWRCB staff, they provide no authority supporting this proposition. Nor do they provide any support for their request that the Court "strike" undesirable statements in an order resolving administrative proceedings in their favor. The Court accordingly finds that petitioners lack standing to challenge the Dismissal Order.

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B. Petitioners Have Not Shown that the Board Failed to Conduct the Enforcement Proceedings in the Manner Required By Law

In addition to attacking the Dismissal Order itself, petitioners challenge other aspects of the administrative enforcement proceedings: they contend that the Board abused its discretion by refusing to entertain BBID's motion to dismiss the ACL Complaint and by rejecting BBID's cost memorandum filed in the administrative proceedings. Since these arguments do not address evidentiary findings by the Board, they raise the issue of whether the Board proceeded in the manner required by law. (See Code Civ. Proc., § 1094.5, subd. (b).)

Petitioners cite no regulatory or other authority that requires the Board to entertain a motion to dismiss enforcement proceedings. They do not argue that the failure to rule on BBID's motion before the hearing amounted to a due process violation, only that the process offered in the enforcement actions failed to cure the due process violations resulting from the 2015 Curtailment Notices. Essentially, petitioners complain that they spent unnecessary time and money on the hearing because the Board would not rule on BBID's motion. But to establish an abuse of discretion, petitioners must show not merely that the Board's approach was imperfect or inefficient, but that the Board has not proceeded in the manner required by law. Petitioners do not even attempt to make this showing here.

Similarly, petitioners cite no authority that would authorize or require the Board to award costs in enforcement proceedings, other than Code of Civil Procedure section 1032, governing cost awards in civil actions. The Court previously struck memoranda of costs incurred during the administrative proceedings, which were filed directly in this action after the Board declined to award costs, noting that petitioners lacked authority supporting the application of section 1032 to administrative proceedings. While they continue to argue that SWRCB erred in declining to award costs under section 1032, petitioners still cite no authority applying this section to administrative proceedings. As before, petitioners rely on argument that administrative proceedings have been deemed "actions" and "proceedings" in other contexts. This argument remains unpersuasive, and there is no basis to find that the Board improperly rejected BBID's cost memorandum.

Petitioners have thus failed to show that the Board failed to conduct the enforcement proceedings in the manner required by law.

C. The Curtailment Notices Were Final Agency Actions Under Water Code Section 1126, But the Court Will Not Issue a Declaration to That Effect

Turning to petitioners' challenges to the 2015 Curtailment Notices, BBID's eleventh cause of action in Case No. 2015-1-CV-285182 seeks declaratory relief "regarding whether curtailment notices issued by the SWRCB to water right holders are orders, decisions or final actions as contemplated by California Water Code sections 1122 and/or 1126, including the legal rights and duties arising therefrom by and between the SWRCB and water right holders." Petitioners contend that it was unclear whether they could challenge the 2015 Curtailment Notices through petitions for reconsideration or petitions for writ of mandate under these statutes, and the issue is likely to recur in the future. The Board did not directly address BBID's eleventh cause of action in its briefing or at trial, but has urged in connection with petitioners' due process claims that the curtailment notices were merely advisory in nature.

To review the statutes at issue, Water Code section 1122 provides that "[t]he board may order a reconsideration of all or part of a decision or order on the board's own motion or on the filing of a petition of any interested person or entity ... filed not later than 30 days from the date the board adopts a decision or order." Water Code section 1126 declares "the intent of the Legislature that all issues relating to state water law decided by the board be reviewed in state courts, if a party seeks judicial review." (Wat. Code, § 1126, subd. (a).) It provides that aggrieved parties "may, not later than 30 days from the date of final action by the board, file a petition for a writ of mandate for review of the decision or order." (Wat. Code, § 1126, subd. (b).) "If no aggrieved party petitions for a writ of mandate within the time provided by this section, the decision or order of the board is not subject to review by any court." (Wat. Code, § 1126, subd. (d).)[7]

[7] Sections 1122 and 1126 are found in a chapter of the Water Code entitled "Reconsideration, Amendment, and Judicial Review of Water Right Decisions and Orders." They apply to SWRCB decisions and orders issued under specified provisions of the Water Code, including those governing both the ACL and CDO processes (sections 1052, 1055, 1831, and 1845), as well as section 1058.5 governing the issuance of emergency regulations authorizing

Returning to BBID's request for relief, *Phelps, supra,* 157 Cal.App.4th 89, a case which the Court has applied to this action before, is binding precedent on both the finality issue and the propriety of declaratory relief. In *Phelps*, individual farmers sought to challenge the Board's imposition of civil penalties under Water Code section 1052 for unauthorized diversion of water following the Board's issuance of curtailment notices. The curtailment notices, which were substantively identical to those at issue here, directed the farmers to "immediately" discontinue diversion under their permits and licenses, which "prohibit[ed] diversion of water when satisfaction of inbasin entitlements require[d] release of stored water ... by the Central Valley Project of the State Water Project." (At p. 97.) The curtailment notices announced the Board's determination that such water was being released, and indicated that failure to curtail "could result in imposition of administrative civil liability" under section 1052. (*Ibid.*)

The farmers did not challenge the curtailment notices directly, and SWRCB issued ACL complaints under section 1055 and imposed penalties after a hearing. (*Phelps, supra,* 157 Cal.App.4th at pp. 97-98.) The farmers then sought to challenge the penalties imposed—the very approach that the Board contends petitioners should have taken here. But both the trial court and the appellate court held that the *Phelps* petitioners' challenge was time-barred under section 1126. The Court of Appeal first held that the petitioners could have challenged the imposition of the condition regarding the release of stored water at the time their permits and licenses were issued. (*Id.* at pp. 101-103.) It went on to hold that they were required to challenge the implementation of the condition through the curtailment notices because the curtailment notices were a final action by the Board. (*Id.* at pp. 103-105.) The Court of Appeal specifically rejected the argument, again raised by the Board here, that the curtailment notices were "merely notices of potential future violations," citing their "unequivocal language"

curtailment orders. (See Wat. Code, § 1120.) There is no provision in the Water Code that addresses a "curtailment notice" as such.

requiring plaintiffs "to *immediately* discontinue diversion of water." (*Id.* at p. 104, italics original.)[8]

Under *Phelps*, the 2015 Curtailment Notices were final agency actions subject to challenge via petition for writ of mandate. That no public hearing preceded their issuance and no formal order was entered is not determinative. (*Phelps, supra,* 157 Cal.App.4th at p. 105 ["[n]othing in subdivision (b) of section 1126 limits the type of proceeding subject to judicial review," and judicial review of board decisions "is not limited to 'proceedings in which by law a hearing is required' " like other writ proceedings]; see also *Temescal Water Co. v. Dept. of Public Works*, *supra,* 44 Cal.2d at p. 102 ["The sufficiency of the administrative findings does not determine the availability of" judicial review, "but is a question to be determined upon ... review ...."].)

However, the Board has also issued truly informational curtailment notices. For this reason, the Court will not issue declaratory relief stating that all curtailment notices are final actions. Further, as the Court previously ruled, *Phelps* specifically held that "declaratory relief is unavailable" to challenge decisions or orders of the Board. (*Phelps, supra,* 157 Cal.App.4th at p. 105; see also *State of California v. Superior Court (Veta Co.)* (1974) 12 Cal.3d 237, 249 ["It is settled that an action for declaratory relief is not appropriate to review an administrative decision."].) Petitioners' arguments will be addressed in the context of their mandamus claims, which is the proper approach under *Phelps*.[9]

D. The Board Does Not Have Jurisdiction to Curtail Pre-1914 Appropriators Under Water Code Section 1052

As an initial matter, the Board contends that the issue of its jurisdiction to curtail pre-1914 appropriators was mooted by the rescission of the 2015 Curtailment Notices and the

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[8] Although *Phelps* held that the writ at issue in that action was untimely on two independent grounds, both grounds are holdings that bind the Court. (See *Varshock v. California Dept. of Forestry and Fire Protection* (2011) 194 Cal.App.4th 635, 646, fn. 7 ["when a decision is based on two separate grounds, neither is dictum"].)

[9] Petitioners also appear to seek a declaration that the Board must entertain petitions for reconsideration of curtailment notices, but did not brief this issue in any detail or clearly explain their request that the Court declare "the legal rights and duties arising [from the issuance of curtailment notices] by and between the SWRCB and water right holders." Considering the permissive language of section 1122 governing petitions for reconsideration ("[t]he board *may* order a reconsideration of all or part of a decision or order ...," italics added), plaintiffs have not shown they are entitled to relief on this point, even if declaratory relief was proper.

dismissal of the enforcement actions. However, as the Court previously held, even if the issue is technically moot, the Court will reach it under the public interest exception to mootness, since "the jurisdictional question posed is of continuing public interest and importance." (*Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, 403 (hereinafter, "*Young*") [rejecting mootness argument where Board had granted petition for reconsideration partially rescinding curtailment order].) Contrary to the Board's argument, drought conditions are likely to recur in the future in California, and the parties will benefit from receiving guidance from the courts on this issue before they again find themselves addressing it in the midst of an emergency. (See *Southern Cal. Edison Co. v. Public Utilities Com.* (1978) 20 Cal.3d 813, 826 ["in California drought can occur at any time"]; *RiverWatch v. County of San Diego Dept. of Environmental Health* (2009) 175 Cal.App.4th 768, 782 ["drought [is] a persistent threat in California".) The temporary and seasonal nature of drought emergencies and of the Board's resulting curtailment efforts support this outcome: as summarized above, during the last drought, multiple rounds of curtailment notices were issued and then rescinded within months, and the drought had ended by the time these cases came to trial. This is a pattern that can be expected to repeat itself in the future. (See *In re William M.* (1970) 3 Cal.3d 16, 23, fn. 14 ["we should not avoid the resolution of important and well litigated controversies arising from situations which are 'capable of repetition, yet evading review' "].)

Turning to the substance of the parties' dispute, petitioners contend that issuing curtailment notices to pre-1914 rights holders was beyond the Board's jurisdiction. The Board cites *Millview, supra*, 229 Cal.App.4th 879 and *Young, supra,* 219 Cal.App.4th 397 to support its position that it has the authority to take enforcement action against "illegal" diverters, even those who claim a riparian or pre-1914 right, under Water Code section 1052.[10]

1. The Water Code Enforcement Provisions at Issue

Subdivision (a) of section 1052, which is found in Division 2 of the Water Code, provides that "[t]he diversion or use of water subject to this division other than as authorized in

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[10] Notably, the Board does not contend that the reasonable use doctrine, the public trust doctrine, or any more general authority to adjudicate or police senior water rights authorized its actions.

this division is a trespass." Subdivision (c) sets forth the maximum liability of any water user who commits such a trespass, which is increased during times of drought, and subdivision (d)(2) provides that "[t]he board may impose civil liability in accordance with Section 1055," following the service of an ACL complaint as well as a hearing upon request (Wat. Code, § 1055, subds. (a) and (b)).

Alternatively, section 1831 of the Water Code permits the Board to issue a CDO, after notice and the opportunity for a hearing, "in response to a violation or threatened violation" of, among other mandates, "[t]he prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division." (Wat. Code, § 1831, subd. (d).)

The Board's Dismissal Order summarizes the history of these enforcement provisions as follows. "Section 1052 codifies section 38 of the Water Commission Act, which stated, '[t]he diversion or use of water subject to the provisions of this act other than as it is in this act authorized is hereby declared to be a trespass.' (Stats. 1913, ch. 586, § 38.)" (Dismissal AR 8386, *In the Matter of Administrative Civil Liability Complaint Against Byron-Bethany Irrigation Dist. and in the Matter of Draft Cease and Desist Order Against the West Side Irrigation Dist.*, Cal. St. Wat. Res. Bd. Order No. WR 2016-0015, 2016 WL 3388132, at *5.) Originally, section 38 authorized the Water Commission to seek a court-issued injunction against such a trespass, but did not grant it independent authority to impose an administrative remedy. (*Ibid.*)

"In the aftermath of the severe drought in California in the 1977 water year, and the report of the Governor's Commission to Review California Water Rights Law, the Legislature expanded the Board's enforcement authority to allow the Board to take its own administrative enforcement actions against unauthorized diversions." (*Ibid.*) "Section 1831, enacted in 1980, authorized the Board to issue a preliminary cease and desist order to enforce the terms of permits and licenses through its own administrative action. (Former Wat. Code, § 1831, added by Stats. 1980, ch. 933, § 13.)" (*Ibid.*) Then, "[i]n 1987, the Legislature amended Water Code section 1052 to authorize the Board to petition the court to impose civil liability for the unauthorized diversion or use of water, in addition to seeking an injunction. (Former Wat. Code, § 1052,

amended by Stats. 1987, ch. 756, § 1.)" (*Ibid.*) "The amendment also granted the Board authority to administratively impose civil liability in critically dry years. (*Id.*, § 1, subds. (a) & (b).)" (*Ibid.*) "In 1991, the Legislature removed the limitation that administrative civil liability only be imposed during years declared to be critical. (Former Wat. Code, § 1052, amended by Stats. 1991, ch. 1098, § 1, subds. (a) & (b).)" (*Ibid.*)

2. Analysis

The issue of whether section 1052 authorizes the Board to curtail senior users turns on that section's definition of a trespass as the "use of water subject to this division other than as authorized in this division." (See *People v. Shirokow* (1980) 26 Cal.3d 301, 304, 306 [holding, in rejecting a claimed prescriptive right, that "[w]hether defendant's diversion of water may be enjoined under section 1052 turns on our interpretation of the phrase 'water subject to the provisions of this division (division 2)' "].) Petitioners contend that Water Code sections 1201 and 1202, which exclude waters subject to riparian and pre-1914 appropriative rights from the unappropriated waters to be allocated by permit under the Code, render these rights beyond the scope of what is "subject to" and "authorized in" Division 2 of the Water Code. (See *id.* at pp. 306, 309 [emphasizing that the "key inquiry" under section 1052 "is whether defendant's use of water is subject to the appropriation procedures of the code"; holding that uses other than those pursuant to "riparian rights and those which have been otherwise appropriated prior to" 1914 are "conditioned upon compliance with the appropriation procedures of division 2"].)

In its briefing, the Board addressed this issue only obliquely, by reference to *Millview* and *Young*. At trial, it argued that Water Code section 1052 incorporates the Board's investigatory powers under section 1051. The Court will address these arguments in turn.

Both *Millview* and *Young* addressed the Board's authority under section 1831 of the Water Code. (See *Young, supra,* 219 Cal.App.4th at pp. 400-401; *Millview, supra,* 229 Cal.App.4th at p. 892.) In *Millview*, the SWRCB had issued a CDO restricting a pre-1914 appropriative right based on a finding that the right had been largely forfeited by a period of diminished use. (*Millview, supra,* 229 Cal.App.4th at p. 884.) Similarly, in *Young*, the Board issued a CDO establishing the amount of water to which a user was entitled pursuant to riparian

or pre-1914 rights. (*Young, supra,* 219 Cal.App.4th at pp. 401-402.) Since there was no argument that these users were violating a water permit or prior Board order, both *Millview* and *Young* addressed the Board's authority to enforce "[t]he prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division." (Wat. Code, § 1831, subd. (d)(1).) Both cases affirmed the Board's authority to "make a preliminary determination for purposes of enforcement whether the diverter has either the riparian or pre–1914 appropriative rights it claims without filing a lawsuit." (*Young, supra,* 219 Cal.App.4th at p. 400; see also *Millview, supra,* 229 Cal.App.4th at p. 895 [citing *Young*].)

As the petitioners correctly note, *Millview* and *Young* did not address the Board's authority to curtail or determine the relative priorities of riparian or pre-1914 rights. Petitioners argue that these cases are properly construed to authorize the Board's preliminary determination of senior users' water rights only where the result of that determination is that additional water claimed by such users is deemed unappropriated water subject to regulation by the Board and appropriation by other users.

The reasoning of *Millview* and *Young* supports this position. Both cases observed that the Board's permitting authority does not encompass senior right holders, with *Young* citing sections 1201 and 1202. (See *Young, supra,* 219 Cal.App.4th at p. 404; *Millview, supra,* 229 Cal.App.4th at p. 894.) The opinions cited *Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.2d 90, where it was held (consistent with discussion in *Meridian, Ltd., v. San Francisco* (1939) 13 Cal.2d 424 cited by the Board) that SWRCB has the authority to make a preliminary determination of whether unappropriated water is available for purposes of issuing a permit. (See *Young, supra,* 219 Cal.App.4th at pp. 404-405; *Millview, supra,* 229 Cal.App.4th at p. 894.) *Millview* and *Young* held that the Board may similarly make a preliminary determination as to whether senior right holders are making an "unauthorized" diversion of water beyond the scope of their senior rights—water that was therefore not previously appropriated under sections 1201 and 1202—for enforcement purposes. (See *Young, supra,* 219 Cal.App.4th at pp. 406-407; *Millview, supra,* 229 Cal.App.4th at p. 895.)

Millview's discussion is the more helpful. *Millview* explained that *Young*'s rationale

> grants the Board the authority to determine the scope of a claimed right as well as its existence. Section 1831 allows the Board to issue an order preventing the unauthorized diversion of water. Unauthorized diversion includes not merely the diversion of water under a claimed but invalid pre-1914 right, but also diversion beyond the proper scope of a valid pre-1914 right, whether because the diversion exceeds the maximum perfected amount of water under the right or because an intervening forfeiture has reduced the proper scope. The Board therefore possesses the jurisdiction to determine all of these issues.

(*Millview, supra*, 229 Cal.App.4th at p. 895.) *Millview* also discussed the Legislature's expansion of the Board's enforcement authority beyond permit violations to encompass "unauthorized" diversions:

> The Legislature's intent to expand the Board's authority into territory formerly occupied by the courts is made clear from the progression of legislation in this area. As originally enacted in 1980, section 1831 allowed the Board to issue a CDO only against violations of the terms of a permit, leaving other types of misuse of water outside the Board's presumed CDO authority. When the Legislature expanded section 1831 by amendment in 2002, it added subdivision (d)(1), which expressly authorizes the Board to issue a CDO against violations of "[t]he prohibition set forth in Section 1052 against the unauthorized diversion or use of water...." At the time, although section 1052 directed the Board to prevent the unauthorized diversion of water, the Board could do so only by requesting the Attorney General to commence an action to enjoin such diversion. Subdivision (d)(1) of section 1831 therefore expanded the Board's authority into the adjudication of unauthorized diversion, which was previously vested in the courts.

(*Millview, supra*, 229 Cal.App.4th at pp. 895-896.) Here—other than the emergency regulation process the Board chose not to pursue—there was no similar legislative expansion of the Board's enforcement authority to encompass curtailments of valid senior rights due to drought.

As shown by the analyses in these cases, as well as in *People v. Shirokow*, *supra*, 26 Cal.3d 301, section 1052 authorizes the Board to determine for enforcement purposes whether any user is diverting water "subject to" Division 2 other than as "authorized in" Division 2. Contrary to the Board's position, neither the relevant cases nor the statute itself establish a broader enforcement jurisdiction over all "illegal" diversions.[11]

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[11] While dicta in *Millview* and *Young* use the term "illegal" as a synonym for "unauthorized" in discussing the Board's statutory authority under these provisions, that dicta must be disregarded for the reasons discussed above. At least some of the statements in *Millview* and *Young* are traceable to dictum in a California Supreme Court opinion

The Board points out that Water Code section 1051, addressing SWRCB's investigatory powers for purposes of Division 2, more broadly authorizes it to "[a]scertain whether or not water heretofore filed upon or attempted to be appropriated is *appropriated under the laws of this State*." (Wat. Code, § 1051, subd. (c), italics added.) However, section 1051 does not grant the Board any enforcement powers, and section 1052 does not incorporate section 1051 but provides its own, narrower definition of a "trespass" subject to enforcement. Section 1051's reference to appropriation "under the laws of this State" stands in contrast to section 1052's "diversion or use of water subject to this division other than as authorized in this division," confirming the Legislature's choice to define the Board's enforcement powers more narrowly than its investigatory powers. The Board's reading of "water subject to" Division 2 to include water subject to its section 1051 investigatory powers does not address the fact that senior users' diversions are not "authorized in" Division 2, but pre-date it. Again, the Legislature could have easily defined a trespass to encompass "illegal" diversions more broadly if it wished. Finally, contrary to the Board's argument at trial, *Millview* and *Young* did not hold that section 1051 authorized enforcement proceedings—in fact, they did not cite section 1051 at all.

3. Conclusion

For the reasons discussed above, the Court finds that section 1052 does not authorize the Board to "curtail" or take enforcement action against pre-1914 appropriators based on their use of water in excess of that available under their priority of right.

However, this does not mean that the Board is wholly without jurisdiction over these users, nor that the Legislature could not authorize it to take enforcement action against them in times of drought. The Board has already been delegated some adjudicatory and enforcement powers over senior users. For example, Water Code sections 2501 et seq. authorize it to make a

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addressing fees assessed against permit holders, *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421. That opinion stated that "[t]he SWRCB does have authority to prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis under which the right is held." (At p. 429.) However, it cited only to Water Code section 275, governing reasonable use, in support of this statement, leaving the reader to guess at the meaning of the reference to "illegal diversions." Most likely, this was a recognition of the Board's authority to prevent *unauthorized* diversions, as in *Millview* and *Young*. (See also *People v. Shirokow, supra,* 26 Cal.3d at p. 304 ["unauthorized diversion" based on asserted prescriptive rights arising from adverse use initiated after the enactment of the code was "diversion of water without first obtaining a permit from the board constitut[ing] a trespass within the meaning of section 1052"].)

comprehensive determination of all rights to water in a stream system, to be reviewed and finalized in the courts. And Water Code section 1058.5 was amended during the drought to authorize emergency regulations "to require curtailment of diversions when water is not available under the diverter's priority of right." The Court expresses no opinion on the Board's authority under these alternative Water Code provisions, under other statutory provisions not addressed by the parties, or pursuant to a future delegation of power by the Legislature.[12]

Ultimately, it may be preferable for the Board rather than the courts to order curtailments during a drought. As the Supreme Court has stated, "there is a limitation inherent in the ability of private lawsuits to provide clarity, certainty, and security to water rights and water users. ... This method of resolving controversies ... is necessarily piecemeal, unduly expensive and obviously unsatisfactory." (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 347-348, internal citation and quotations omitted.) But statutory authorization must provide the foundation to such action.

Finally, petitioners do not challenge the Board's jurisdiction or statutory authorization to curtail post-1914 users, and the Court expresses no opinion on this matter.

E. The Curtailment Notices Violated Petitioners' Due Process Rights

Petitioners contend that the 2015 Curtailment Notices violated their due process rights by curtailing their water rights without providing them with a hearing or other opportunity to challenge the Board's underlying water availability analysis and other findings. The Board argues that petitioners lack standing to bring due process claims as public entities. In addition, it argues that the curtailment notices were advisory notices that did not deprive petitioners of property rights.

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[12] Discussion in *United States v. State Water Resources Control Bd., supra,* 182 Cal.App.3d 82, which addressed the Board's authority to regulate and enforce water quality in the Delta, is similar to the Court's finding here. Analyzing the statute before it, the court noted that, although regulation of property rights for environmental purposes—including limiting water rights—was clearly within the state's police power, the Legislature had "not adequately authorized the Board to exercise the state police power to compel compliance with water quality standards" in that case. (*Id.* at pp. 123-124.) Here, while a strong argument could be made that the police power encompasses curtailments of pre-1914 users in times of drought—and even that the Legislature specifically authorized the Board to take enforcement action against such users through emergency regulations—the Board instead proceeded under pre-existing enforcement authority that does not apply to this circumstance.

As with petitioners' jurisdictional argument, this challenge raises a fundamental issue of broad public interest that is likely to recur, and the Court exercises its discretion to resolve it even if it is technically moot.

1. Standing

In support of its argument that petitioners lack standing to bring due process claims, the Board refers generally to the "long line of cases which hold that a public entity, being a creature of the state, is not a 'person' within the meaning of the due process clause, and is not entitled to due process from the state." (*San Diego County Water Authority v. Metropolitan Water Dist. of Southern Cal.* (2017) 12 Cal.App.5th 1124, 1163, quoting *Santa Monica Community College Dist. v. Public Employment Relations Bd.* (1980) 112 Cal.App.3d 684, 690.) It cites no cases applying this principle against a water district's challenge to actions impacting its users' water rights.

The Board acknowledges but attempts to distinguish *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621 (hereinafter, "*Central Delta*"), which held that two of the petitioners in the instant actions had standing to bring equal protection claims against the Board. As urged by petitioners, equal protection claims are generally not available to public entities under the same reasoning that due process claims are not. (See *San Diego County Water Authority v. Metropolitan Water Dist. of Southern Cal., supra,* 12 Cal.App.5th at p. 1163 ["the Water Authority is not asserting a right to due process of law, or equal protection of the law, rights that understandably are principally for the benefit of natural persons"].) *Central Delta* nevertheless held that petitioners had standing to bring such claims against the Board on behalf of their constituent water users, citing the principle that "a political subdivision of the state may challenge the constitutionality of a statute or regulation on behalf of its constituents where the constituents' rights under the challenged provision are 'inextricably bound up with' the subdivision's duties under its enabling statutes." (*Central Delta, supra,* 17 Cal.App.4th at p. 629.)

The Board contends that "[e]ven assuming *arguendo* that the *Central Delta* case does provide a foundation for standing for two of the Petitioners," the enabling statutes of those

petitioners are distinct from those of the other petitioners. However, the Board does not actually represent that these other enabling statutes are different from those in *Central Delta* in any material way. Petitioners cite to Water Code section 22075, which provides that "[a] district may do any act necessary to furnish sufficient water in the district for any beneficial use." There is no practical distinction between this language and the language relied on by *Central Delta*. (See *Central Delta, supra*, 17 Cal.App.4th 621, 629 ["Because a discharge fee is a 'reclamation matter,' and legal action to determine the validity of such a fee is 'an activity to assist landowners in local districts,' appellants assert that the agencies have standing to bring this challenge pursuant to their statutory mandates. We agree."].) Water districts' duties to furnish sufficient water for their constituents' beneficial use are clearly "bound up with a determination" of whether the curtailment notices violated their constituents' water rights, and the districts accordingly have standing to bring due process claims on behalf of their users. (*Ibid.*; see also *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 833 [holding county water district had standing to challenge environmental impact report affecting the delivery of water to the district, citing the district's authority under Water Code section 31020 to "do any act necessary to furnish sufficient water in the district for any present or future beneficial use"].)

2. Merits of Due Process Claims

"Both the federal and state Constitutions compel the government to afford persons due process before depriving them of any property interest." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 212.) The Board does not dispute the basic premise that water rights are property rights subject to this requirement. (See *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 101 ["It is … axiomatic that once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others or taken by governmental action without due process and just compensation."].)

"[T]he precise dictates of due process are flexible and vary according to context." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ., supra,* 57 Cal.4th at p. 212.)

The essence is that a person in jeopardy of serious loss be given notice of the case against him or her and opportunity to meet it at a meaningful time and in a meaningful manner. (*Ibid.*) To guide this assessment, California has adopted the standard announced in *Mathews v. Eldridge* (1976) 424 U.S. 319, which balances three considerations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

(*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ., supra,* 57 Cal.4th at p. 213, quoting *Mathews v. Eldridge, supra,* 424 U.S. at p. 335.)

The first inquiry in every due process challenge 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 Educ., supra,* 57 Cal.4th at p. 214.) Petitioners have vested rights to the reasonable use of water encompassed by their water rights, so the Court must determine whether the Board's issuance of the curtailment notices "substantially impacted the practical use and administration ... of [their] water." (*Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548, 562-563 [requirement that irrigation district submit a water conservation plan providing for reservoir construction did substantially impact its water rights, but district did not have vested rights to *unreasonable* water use].) While the Board characterizes the 2015 Curtailment Notices as merely informational, they clearly had a substantial practical impact on petitioners' use of their water. The curtailment notices unequivocally ordered petitioners to stop using water at the time of their issuance or risk large fines, and the Partial Rescission Notice perpetuated the practical impairment of petitioners' water rights by again announcing that, while the Board was no longer "ordering" petitioners to stop using water, it might at any time commence enforcement proceedings against them to recover penalties that were already accruing.[13] (See *Phelps, supra,* 157 Cal.App.4th at p. 105 [curtailment notices that

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[13] Again, the notices threatened enforcement under the ACL and/or CDO processes established by Water Code sections 1052, 1055, 1831, and 1845. While penalties under section 1845 do not accrue until a CDO issues after a

unequivocally directed plaintiffs to immediately stop diverting were a decision or order that aggrieved the recipients].) In BBID's case, the Board made good on this threat by pursuing an ACL Complaint seeking penalties for a period beginning the day after the June curtailment notice issued.

While the notices have now been rescinded, even a temporary deprivation of property is subject to the requirements of due process. (See *Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1547 ["Normally notice and an opportunity for a hearing must precede even a temporary deprivation of a property interest."], internal citation and quotations omitted; *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1191, fn. 17, 1192 [even in an emergency situation warranting summary action by the state, a temporary interference with property interests triggers due process requirements].) Although temporary, the deprivation here—the practical rescission of petitioners' water rights—is of a more severe nature than in *Machado v. State Water Resources Control Bd.* (2001) 90 Cal.App.4th 720, where it was held that a cleanup and abatement order addressing a dairy's discharge of animal waste had only a limited impact on a dairy's property rights because it did not impose penalties or "affect the fundamental nature of [the dairy's] business." (At p. 726.) Here, the curtailment notices impaired the petitioners' fundamental functions as water districts. The April and May notices expressly recognized that recipients would be required to obtain water from other sources during an unprecedented drought. (Notice AR 3470-3471, 3516-3517 [directing recipients to identify "the alternate water supply you will use in lieu of the curtailed water right" by completing a mandatory Curtailment Certification Form].)[14] They stated that "[t]here is no exception to the curtailment notice[s] for health and safety needs" and required those who continued to divert for this purpose to report such diversions to the Board, which would "carefully analyze [them] on a case-by-case basis" to unspecified ends. (*Ibid.*) These notices

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noticed hearing, already-accruing penalties were threatened under the section 1055 ACL process. The notices did not specify (and the Board still does not explain) the circumstances dictating whether one enforcement procedure or the other would be used. Consequently, all of the petitioners were under the threat of retroactive section 1055 proceedings as long as the notices remained in effect.

[14] The June notice could be expected to have the same effects, although it did not say so in such explicit terms.

concluded with a statement that the Board "recognize[s] the burden and loss this notice creates for you during the drought ...." (*Ibid.*) In sum, the magnitude of the curtailments announced by the Board was acknowledged by all at the time.

The second *Matthews* factor is the risk of an erroneous deprivation of petitioners' water rights through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. (See *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.*, *supra,* 57 Cal.4th at p. 213.) Again, the Board contends that there was no risk of erroneous deprivation of rights because the notices did not deprive petitioners of their rights. The Board does not address the procedures it employed in issuing the notices or the relative merits of any alternatives. Meanwhile, petitioners persuasively argue that the Board's use of a methodology that was never subject to public challenge to determine whether water was available created a high risk of error. Indeed, in dismissing the enforcement actions, the Board itself ultimately determined that the Prosecution Team had not met its burden of proof on this point. Publishing its methodology and holding a public hearing where water users and outside experts could challenge it would both reduce the risk of erroneously depriving water users of their rights and assist the Board in pursuing effective enforcement measures. Again, notice and a hearing are typically required before even a temporary deprivation of a property interest. (*Koshak v. Malek*, *supra,* 200 Cal.App.4th at p. 1547.) While postdeprivation review was deemed adequate in *Machado v. State Water Resources Control Bd.*, *supra,* 90 Cal.App.4th 720, the issue in that case—whether illegal discharges of animal waste had occurred—was straightforward and the petitioner was provided with an informal opportunity to dispute the Board's determination before the Board took action, along with a clear procedure for prompt postdeprivation review. (At pp.726-727.) The large-scale, complex, and burdensome curtailments here required a public, predeprivation process to satisfy due process.

The final *Matthews* factor is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.*, *supra,* 57 Cal.4th at p. 213.) The Board contends that, during the drought, it had an urgent need to "advise the

regulated community of the severity of the water shortage" and emphasizes that the Governor directed it to "put water right holders throughout the state on notice that they may be directed to cease or reduce water diversions based on water shortages." However, following the Governor's directive, the Board issued purely advisory notices that have not been challenged by the petitioners. As discussed, the notices challenged here did not merely advise that curtailments may occur in the future, but commanded specific water users to immediately cease diverting.

In addition, the Legislature has authorized the Board to issue curtailment *orders* pursuant to emergency regulations. The Board adopted emergency regulations following a public hearing, but allowed them to expire before ordering users to stop diverting based on the regulations. While the Court will not address whether curtailment orders issued under emergency regulations would satisfy due process, the Board's argument that it would be impossible to provide any process before ordering curtailments during a drought emergency rings hollow under the circumstances at issue here. Further, as noted by petitioners, the Board adopted a curtailment methodology to protect water quality following a public hearing through "Term 91," discussed in *Phelps*. While providing a hearing prior to issuing curtailments would require the Board to undertake some fiscal and administrative burdens, the additional burdens would not be unduly onerous considering the need for the Board to adopt a defensible methodology before curtailing and to justify that methodology during enforcement proceedings to achieve compliance with its orders.

The Court is mindful of the difficult challenges faced by SWRCB in fulfilling its mission during an unusually severe drought. Due process jurisprudence recognizes and accommodates these types of challenges. (See *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.*, *supra,* 57 Cal.4th at p. 212 [the requirements of due process "are flexible and vary according to context"].) Nevertheless, due process requires certain minimal protections that were not provided here. In a future drought, the Board is called to fashion a curtailment process that gives users some meaningful opportunity to challenge the underlying findings *before* they are ordered to curtail their water use and *before* fines for noncompliance begin to accrue against them.

Finally, the Board submitted *Santa Clara Waste Water Co. v. County of Ventura Environmental Health Div.* (2017) 17 Cal.App.5th 1082 (hereinafter, "*Santa Clara*") for the Court's consideration as new authority. That opinion reversed the trial court's denial of an anti-SLAPP motion in a lawsuit challenging a county agency's "notice to comply" following an inspection of the plaintiff's facility that revealed materials deemed hazardous waste. The "notice to comply" was not described in detail in the opinion; however, the county was clear in a series of communications with the plaintiff that it did not intend to take any enforcement action itself, but would merely pass its findings along to the District Attorney's office, which already had an active criminal case against the plaintiff. (*Id.* at p. 1086.) Those circumstances stand in contrast to the events here, where the Board repeatedly threatened and then actually prosecuted enforcement actions related to the curtailment notices. Further, the *Santa Clara* plaintiff focused its merits opposition to the county's anti-SLAPP motion on statutory arguments under the Health and Safety Code. In the few sentences it devoted to plaintiff's due process claim, the appellate court noted that the plaintiff "cite[d] no authority that even remotely supports [this] argument." (*Id.* at p. 1091.) For these reasons, the *Santa Clara* opinion is distinguishable and does not aid the Court's due process analysis in this case.

3. Conclusion

In conclusion, petitioners have standing to bring due process claims challenging the 2015 Curtailment Notices and the Board's subsequent actions. The Board violated petitioners' due process rights by issuing the curtailment notices, which ordered immediate curtailments and threatened large fines accruing from the time the notices issued, without first providing water users with an opportunity to challenge the findings upon which they were based. This due process violation was not cured by the Partial Rescission Notice or the dismissal of the enforcement proceedings. Because the requirements of due process are flexible and dependent on circumstances, the Court will not attempt to define the specific process that must be used in a future drought. However, water users must be provided with some meaningful opportunity, including some form of public hearing, to challenge the Board's underlying findings *before* they

are ordered to curtail their water use and *before* fines for noncompliance begin to accrue against them.

VII. Petitioners' Remaining Arguments

At the conclusion of all phases of trial, the Court will issue the writ requested by petitioners based on the findings above. Consequently, it need not reach petitioners' other arguments, including that the curtailment notices violated the Governor's emergency order and violated the rule of priority, that the Board's water unavailability determination was not supported by substantial evidence, that the Executive Director did not have the authority to issue curtailments, and that the curtailment notices improperly amended the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. Particularly in light of the rulings on the fundamental jurisdictional and due process issues above, the Court credits the Board's position that it will likely take a different approach to curtailments in the future, and agrees that it would be improper to litigate the details of the former process at this juncture.

Accordingly, the Court will not issue a writ on any of the alternative grounds raised by petitioners.

Dated: 2-20-18

Honorable Brian C. Walsh
Judge of the Superior Court

INCLUDED ACTIONS

COURT	NUMBER	SHORT TITLE
Superior Court of California County of Contra Costa	N150967	Byron-Bethany Irrigation District v. California State Water Resources Control Board, et al.
Superior Court of California County of Sacramento	34201580002121	The West Side Irrigation District, et al. v. California State Water Resources Control Board, et al.
Superior Court of California County of San Joaquin	39201500326421CU WMSTK	Banta-Carbona Irrigation District v. California State Water Resources Control Board, et al.
Superior Court of California County of Stanislaus	2015307	Patterson Irrigation District v. California State Water Resources Control Board, et al.
Superior Court of California County of Stanislaus	2015366	San Joaquin Tributaries Authority, et al. v. California State Water Resources Control Board
Superior Court of California County of Sacramento	34-2016-80002387	The West Side Irrigation District v. SWRCB
Superior Court of California County of Sacramento	34-2016-80002389	San Joaquin Tributaries Authorities v. SWRCB
Superior Court of California County of Sacramento	34-2016-80002388	Byron-Bethany Irrigation District v. SWRCB