
State Water Resources Control Board

March 9, 2016

VIA ELECTRONIC MAIL

TO: ENCLOSED REVISED SERVICE LIST OF PARTICIPANTS

RULING ON THE FOLLOWING MOTIONS FILED IN THE MATTERS OF ADMINISTRATIVE CIVIL LIABILITY (ACL) COMPLAINT AGAINST BYRON-BETHANY IRRIGATION DISTRICT AND DRAFT CEASE AND DESIST ORDER (CDO) AGAINST THE WEST SIDE IRRIGATION DISTRICT:

1. MOTION FOR PROTECTIVE ORDER BY STATE WATER CONTRACTORS.
2. MOTION FOR PROTECTIVE ORDER BY CALIFORNIA DEPARTMENT OF WATER RESOURCES.
3. MOTION TO QUASH SUBPOENA DUCES TECUM, OR IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER BY STATE WATER CONTRACTORS.
4. MOTION TO QUASH SUBPOENA DUCES TECUM, OR IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER BY CH2M HILL ENGINEERS, INC., MR. CHANDRA CHILMAKURI, AND MR. KYLE WINSLOW.
5. MOTION IN LIMINE WITH RESPECT TO THE TESTIMONY OF MR. PAUL HUTTON AND MR. PAUL MARSHALL BY CENTRAL DELTA WATER AGENCY AND BANTA-CARBONA IRRIGATION DISTRICT.
6. MOTION IN LIMINE WITH RESPECT TO THE TESTIMONY OF MR. PAUL HUTTON AND MR. PAUL MARSHALL BY THE WEST SIDE IRRIGATION DISTRICT AND PATTERSON IRRIGATION DISTRICT.
7. MOTION IN LIMINE WITH RESPECT TO THE TESTIMONY OF MR. PAUL HUTTON AND MR. PAUL MARSHALL BY BYRON-BETHANY IRRIGATION DISTRICT AND SOUTH DELTA WATER AGENCY.

Procedural Background

On February 22, 2016, State Water Contractors submitted written rebuttal testimony by Mr. Paul Hutton relevant to the consolidated Phase 1 of the hearings in the matters of the ACL Complaint against Byron-Bethany Irrigation District (BBID) and the Draft CDO against The West Side Irrigation District (WSID). On February 23, 2016, Central Delta Water Agency and South Delta Water Agency served a notice of deposition on Mr. Paul Hutton. On February 24, 2016, BBID also served a notice of deposition on Mr. Hutton. Both notices include a request for production of documents. On February 26, 2016, State Water Contractors filed a motion for protective order prohibiting the deposition of Mr. Hutton and shielding the requested documents from production.

California Department of Water Resources (DWR) first identified Mr. Paul Marshall as a witness in their Notice of Intent to Appear in the hearings on the ACL Complaint against BBID and Draft CDO against WSID. BBID, Central Delta Water Agency, and WSID served notices of deposition

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

on Mr. Marshall, setting and re-setting his deposition for November 24, 2015, then December 30, 2015, and then February 2, 2016. On December 7, 2015, DWR produced documents in response to requests for production included in the original notices of deposition.

On January 19, 2016, DWR submitted an amended Notice of Intent to Appear indicating that it would participate in the hearings by cross-examination and rebuttal only. On January 28, 2016, BBID, Central Delta Water Agency, and WSID notified DWR that they did not intend to depose Mr. Marshall "at this point." (Exhibit J to DWR's Motion for Protective Order.) On February 22, 2016, DWR submitted written rebuttal testimony by Mr. Marshall. On February 23, 2016, Central Delta Water Agency served a notice of deposition on Mr. Marshall. On February 24, 2016, BBID also served a notice of deposition on Mr. Marshall. Both notices include a request for production of documents that differ in scope from the request to which DWR responded on December 7, 2015. On February 29, 2016, DWR filed a motion for protective order prohibiting the deposition of Mr. Hutton and relieving DWR of any obligation to produce additional documents.

On February 29, 2016, Central Delta Water Agency and Banta-Carbona Irrigation District, WSID and Patterson Irrigation District, and BBID and South Delta Water Agency, each filed motions in limine. These motions include requests to exclude testimony by Mr. Hutton and Mr. Marshall as untimely case-in-chief expert testimony. On March 4, 2016, State Water Contractors and DWR filed responses to the parties' motions in limine related to the testimony of Mr. Hutton and Mr. Marshall.

On February 24, 2016, BBID served subpoenas duces tecum on Mr. Kyle Winslow and Mr. Chandra Chilmakuri. On March 2, 2016, State Water Contractors filed a motion to quash the subpoenas. On March 3, 2016, BBID served amended subpoenas duces tecum on Mr. Winslow, Mr. Chilmakuri, and the custodian of records for CH2M Hill. In addition to other documents, BBID seeks the production of documents and communications related to a technical report prepared by Mr. Chilmakuri titled "2012 – 2015 Delta Salinity Conditions under a Without Project Scenario" (Technical Report). On March 4, 2016, CH2M Hill Engineers, Inc., Mr. Winslow, and Mr. Chilmakuri filed a motion to quash, or in the alternative, a motion for protective order with respect to the subpoenas. On March 8, 2016, BBID filed a consolidated opposition to the motions to quash filed by State Water Contractors, Mr. Winslow, Mr. Chilmakuri, and CH2M Hill.

Motion to Quash and Motions for Protective Orders

Any party to a proceeding before the State Water Resources Control Board (Board) may take the deposition of witnesses in the manner described by title 4 (commencing with section 2016.010) of part 4 of the Code of Civil Procedure. (Wat. Code, § 1100.) The attorney of record for a party may issue a subpoena or subpoena duces tecum to compel attendance of a witness or production of documents. (Gov. Code, § 11450.10.) The Code of Civil Procedure allows parties to obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Civ. Code Proc., § 2017.010.) The scope of discovery shall be limited if the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood of discovering admissible evidence. (Civ. Code Proc., § 2017.020.) The use of depositions may be restricted if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. (*Id.*, § 2019.030, subds. (a)(1)-(2).) The Administrative Procedure Act authorizes the presiding officer in an adjudicative

proceeding to issue an order that is appropriate to protect the parties or witness from unreasonable or oppressive demands. (Gov. Code, § 11450.30.) A party seeking a protective order bears the burden of demonstrating good cause for the order sought. (*Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 318.)

The deadlines for submission of evidence in support of the parties' cases-in-chief and rebuttal passed on January 19, 2016, and February 22, 2016, respectively. Because the parties to these proceedings may not submit any additional evidence – absent compelling circumstances – the only proper purpose for the depositions and requests for documents, including the subpoenas directed to CH2M Hill and its employees, are to aide in the cross-examination of witnesses. The cross-examinations of Mr. Hutton and Mr. Marshall will be limited to the scope of their rebuttal testimony. As a result, any questioning or production of documents beyond the scope of their rebuttal testimony is not reasonably calculated to lead to the discovery of admissible evidence.

State Water Contractors and DWR have already produced the exhibits in support of Mr. Hutton's and Mr. Marshall's testimony. The opposing parties have also requested and received documents from DWR on December 7, 2015, related to Mr. Marshall's testimony.

If allowed to proceed, the depositions would have to be scheduled very shortly before the start of the hearing. The requests for documents are also broad enough that significant time and expensive will be required to gather, review, and produce the responsive documents. The burden on all of the parties and non-parties of responding to discovery at this point in the proceedings and on such short deadlines is substantial. The time and cost to conduct discovery will impact the parties' ability to prepare for the hearing, and it is likely that we would be unable to address any new discovery or evidentiary disputes before the hearing begins. There is also a serious risk of prejudicing the parties if we were to re-open the deadline for submission of evidence at this late date. A less burdensome and less costly means of obtaining relevant information is by cross-examination of Mr. Hutton and Mr. Marshall at the time scheduled for this purpose during the hearing. The parties will have the opportunity to question both witnesses and examine the bases for their testimony.

The opposing parties object that cross-examination is not a sufficient opportunity to explore the underlying assumptions of the model runs on which Mr. Hutton and Mr. Marshall rely in their testimony. These model runs were not disclosed in these proceedings by State Water Contractors or DWR until the submission of rebuttal evidence. As discussed later in this ruling, we find that the appropriate remedy is to discount the weight of this evidence if we find that these model runs cannot be sufficiently explored and understood through cross-examination. The same is true of the Technical Report prepared by CH2M Hill. If State Water Contractors is unable to lay a proper foundation to demonstrate the reliability of the information contained in the Technical Report, then we will discount the weight of this evidence accordingly, as well as any portion of Mr. Hutton's testimony that relies upon it.

For these reasons, we hereby **vacate** the notices of deposition and requests for production of documents served on Mr. Hutton by Central Delta Water Agency, South Delta Water Agency, and BBID, dated February 23, 2016, and February 24, 2016; the notices of deposition and requests for production of documents served on Mr. Marshall by Central Delta Water Agency and BBID, dated February 23, 2016, and February 24, 2016; and the subpoenas served on Mr. Winslow, Mr. Chilmakuri, and CH2M Hill dated February 24, 2016.

Motions in Limine

When conducting an evidentiary hearing, the Board is not bound by the technical rules relating to evidence and witnesses. (See Gov. Code § 11513, subd. (c); Cal. Code Regs., tit. 23, § 648.) Any relevant evidence is admissible as long as it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code § 11513, subd. (c).) Though the Board typically does not require the designation of rebuttal witnesses in advance, the Board does limit the scope of rebuttal; “[r]ebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party’s case-in-chief, and it does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence.” (See Hearing Notices dated August 19, 2015, and February 18, 2016.) Rebuttal may not be used to delay submission of evidence that is properly part of a party’s case-in-chief.

In distinguishing whether the testimony of Mr. Hutton and Mr. Marshall is properly characterized as rebuttal evidence, we find instructive Federal Rule of Civil Procedure 26 and associated case law. Rule 26 defines rebuttal expert testimony as “evidence [] intended solely to contradict or rebut evidence on the same subject matter identified by another party....” (Fed.R.Civ.P. 26(a)(2)(D)(ii).) Rebuttal expert testimony “permits the litigant to counter new unforeseen facts brought out in the other side’s case.” (*Blake v. Securitas Sec. Servs., Inc.* (D.D.C. 2013) 292 F.R.D. 15, 17-18 [quoting *Faigin v. Kelly*, (1st Cir. 1999) 184 F.3d 67, 85.]) “Rebuttal expert reports are not the proper place for presenting new arguments. (*R&O Const. Co. v. Rox Pro Intn’l Group, Ltd.* (D.Nev., July 18, 2011) 2011 WL 2923703, *2.) “If the purpose of expert testimony is to ‘contradict an expected and anticipated portion of the other party’s case-in-chief, then the witness is not a rebuttal witness” (*Amos v. Makita, U.S.A., Inc.* (D.Nev., Jan. 6, 2011.) 2011 WL 43092 at *2 [quoting *In re Apex Oil Co.* (8th Cir. 1992) 958 F.3d 243, 245.]) “The plaintiff who knows that the defendant means to contest an issue that is germane to the prima facie case (as distinct from an affirmative defense) must put in his evidence on the issue as part of his case in chief.” (*Braun v. Lorillard, Inc.* (7th Cir. 1996) 84 F.3d 230, 237.)

The testimony by Mr. Hutton that relies on model runs described in the Technical Report is both “true rebuttal” and “new theory.” (*Adams v. United States* (D. Idaho, April 9, 2009) 2009 WL 982034, *3 [citing Wright and Gold, *Federal Practice & Procedure*, § 6164 at p. 383 (1993).]) Mr. Hutton’s testimony raises arguments to challenge the conclusion by Ms. Susan Paulsen that 1931 presented similar hydrologic conditions in the Delta as did conditions in 2015. These arguments are rebuttal arguments. They are based in part, however, on model runs conducted in a study undertaken by CH2M Hill and memorialized in the Technical Report, of salinity conditions in south Delta channels under a “without project” scenario, using hydrology from January 1, 2012 to August 31, 2015. The Technical Report includes model runs not previously disclosed in these proceedings by State Water Contractors. The opposing parties object that Mr. Hutton’s modeling is not in the public domain and includes modeling parameter modifications that are unavailable for review.

Part X of Mr. Marshall’s testimony is also based on DSM2 model runs, which show the progression of salinity intrusion under various conditions. The opposing parties raise the same objection that the testimony describes model run results that are not in the public domain or otherwise available for review. BBID and South Delta Water Agency assert that “[t]he modeling and data analyses relied on by both [Mr. Hutton and Mr. Marshall] are simply too complex to be dealt with in such a short period of time, particularly given the other tasks to be completed between now and the hearing.” (Motion in Limine by BBID and South Delta Water Agency.)

The DSM2 model is in the public domain. Ms. Paulsen and Mr. Burke, BBID and WSID's experts, used the DSM2 model to develop their own expert testimony. According to Ms. Paulsen, "modeling tools such as the DSM2 have been available and in widespread use for decades...." (BBID-384, Report of Ms. Susan Paulsen, p. 73.) Ms. Paulsen helpfully explains the process for using the DSM2 model, as follows:

"DSM2 users must specify a series of input parameters to operate the model, including inflows from the Sacramento River, San Joaquin River, Cosumnes River, Mokelumne River, and Calaveras River; the stage at Martinez, DICU flows and electrical conductivity; conductivity at Martinez and Freepoint; and conductivity of the east-side streams and the San Joaquin River. Diversions and exports must also be specified in the model. Model inputs can be taken either from measured data (e.g., stage at Martinez, river inflows, salinity at model boundaries, measured diversions, and exports) or from synthetic data sets (e.g., data from Dayflow, a computer program maintained by DWR that uses daily river inflows, water exports, rainfall, and agricultural depletions to estimate daily average Delta outflow)."

(BBID-384, Report of Ms. Susan Paulsen, p. 75.)

The Technical Report appears to include enough information about the inputs used to create the specific model runs that the underlying assumptions can be understood and, if appropriate, challenged by the opposing parties. We also recognize that the rebuttal disclosure date is not the first time that most of the parties have seen the Technical Report. In fact, the Technical Report was submitted by BBID as an exhibit with its case-in-chief. BBID submitted a copy of a complaint letter sent by State Water Contractors to the Board in June 2015, to which the Technical Report was attached. BBID and the other parties were aware of, or should have been aware of, the Technical Report since at least the deadline for submittal of case-in-chief evidence. State Water Contractors' attorney also testifies that the Technical Report was sent to the attorneys for BBID, South Delta Water Agency, and Central Delta Water Agency in June 2015, and has been publicly available on the Board's website.

It appears to us that the parties have the ability to analyze and understand the model runs described in the Technical Report and the parties will be able to conduct a thorough examination of the bases for Mr. Hutton's testimony through his cross-examination. To the extent that certain information is not available, or could not be understood and analyzed by the parties in preparation for Mr. Hutton's cross-examination, we will take that into account when assessing the relative weight and reliability of Mr. Hutton's testimony.

Based on our understanding of DSM2 parameters, it also appears that the parties have the information necessary to re-create and understand the model runs included by Mr. Marshall in Part X of his report, even though his description of those model runs is brief. To the extent that certain information is not available, or could not be understood and analyzed by the parties in preparation for Mr. Marshall's cross-examination, we will take that into account when assessing the relative weight and reliability of Mr. Marshall's testimony.

The following discussion addresses specific portions of Mr. Hutton and Mr. Marshall's testimony to which the opposing parties objected:

1. Mr. Hutton's Testimony, Paragraph 17, Paragraphs 20 and 21.

Opposing parties object that Paragraphs 17, 20, and 21 of Mr. Hutton's testimony presents new opinions on Delta salinity based on his modelling work. We find that his testimony is appropriately submitted in rebuttal to challenge the claim by Ms. Paulsen that 1931 presented similar hydrologic conditions in the Delta as did conditions in 2015, and that water of suitable quality for irrigation would have been available for diversion absent Project operations.

2. Mr. Hutton's Testimony, Paragraphs 18 and 19.

Opposing parties object that Paragraphs 18 and 19 of Mr. Hutton's testimony includes new non-expert testimony on DWR's attempts to satisfy Bay-Delta Water Quality Control Plan obligations in 2015. Paragraph 18 of Mr. Hutton's testimony addresses conditions that may have affected the quality of water available to BBID and WSID in 2015 at their points of diversion, rebutting BBID and WSID's claims that water of suitable quality would have been available absent operation of the Projects. This testimony is rebuttal testimony. Paragraph 19 appears to describe injury caused by the allegedly unauthorized diversions. This testimony should have been submitted as part of State Water Contractor's case-in-chief. The issue of injury was identified as a key issue in these proceedings, and is not a matter that can be deferred until rebuttal. To the extent the testimony relates solely to injury caused by the allegedly unauthorized diversions, it is excluded.

3. Mr. Hutton's Testimony, Paragraphs 26 through 33.

Opposing parties object that Paragraphs 26 through 33 of Mr. Hutton's testimony include new opinion testimony on Delta salinity, crop damage, costs of salinity damage, and water quality. Paragraphs 26 through 30 of Mr. Hutton's testimony address the quality of water in the Delta for irrigation prior to the development of the Projects. This testimony appears to rebut evidence and testimony presented by the opposing parties that water would have been available and of a suitable quality for irrigation absent Project operations. Therefore, we find that it is timely submitted rebuttal evidence.

Paragraphs 30 through 33 of Mr. Hutton's testimony merely summarize his prior testimony. To the extent the testimony relates solely to injury caused by the allegedly unauthorized diversions, it is excluded.

4. Mr. Marshall's Testimony, Parts I through VI.

Opposing parties object that Parts I through VI of Mr. Marshall's testimony improperly includes new testimony summarizing State Water Project and Central Valley Project operations, Delta water quality standards, and BBID historical diversions. Any portion of this testimony that DWR does not demonstrate is in response to another party's previously submitted evidence may be excluded or stricken from the record as improper rebuttal evidence. We note, however, that some of this testimony summarizes information of which we may take administrative notice, such as the holding of D-1641.

To the extent that Mr. Marshall's testimony addresses the injury caused by the allegedly unauthorized diversions, the testimony should have been submitted as part of DWR's case-in-chief. The issue of injury was identified as a key issue in these proceedings, and is not a matter that can be deferred until rebuttal. We will exclude testimony relating solely to injury caused by the allegedly unauthorized diversions.

5. Mr. Marshall's Testimony, Part VII.

Opposing parties object that Part VII of Mr. Marshall's testimony only tangentially addresses the testimony of Ms. Paulsen and Mr. Burke, and relies on hearsay memoranda. This portion of Mr. Marshall's testimony purports to address the acceptability of certain salinity levels for irrigation, rebutting testimony by Ms. Paulsen that "water was of suitable quality for use." (BBID-384, Report of Ms. Susan Paulsen, pp. 8 & 62.) Therefore, it is proper rebuttal testimony.

In our administrative proceedings, "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Gov. Code, § 11513, subd. (d).) The rules of evidence also allow an expert to testify based on otherwise inadmissible evidence if the evidence is "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801.) We will take into account when weighing Mr. Marshall's testimony whether DWR has demonstrated that these reports and analyses are of the type reasonably relied upon by experts in the field.

6. Mr. Marshall's Testimony, Part X.

Opposing parties object that Part X of Mr. Marshall's testimony is new expert testimony that should have been included in DWR's case-in-chief. Mr. Marshall's testimony in Part X consists of plots of DSM2 model runs showing the progression of salinity intrusion under various conditions. In addition to assessing the reliability of Mr. Marshall's testimony based on the ability of the opposing parties to adequately elicit the underlying assumptions and inputs of the model runs through cross-examination, any portion of Mr. Marshall's testimony that does not respond to another party's previously submitted evidence will be excluded or stricken from the record.

Sincerely,



Frances Spivy-Weber, Vice-Chair
WSID Hearing Officer



Tam M. Doduc, Board Member
BBID Hearing Officer

Enclosures: Revised Service Lists

**SERVICE LIST OF PARTICIPANTS
THE WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER HEARING
(October 8, 2015, Revised 12/18/15)**

Parties	
THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)	
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**SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING
(09/02/15; Revised: 09/10/15; Revised 10/06/15; Revised 10/22/15, 12/18/15)**

<p>PARTIES</p> <p>THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p>	
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