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16
17 BEFORE THE
18 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
19

20 HEARING IN THE MATTER OF
21 CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
22 BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF DIVERSION
23 FOR CALIFORNIA WATER FIX

EAST BAY MUNICIPAL UTILITY
DISTRICT'S RESPONSE TO
CALIFORNIA DEPARTMENT OF
WATER RESOURCES' OBJECTIONS
TO EXHIBITS SUBMITTED IN
SUPPORT OF PROTESTANTS' CASES-
IN-CHIEF

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25
26 East Bay Municipal Utility District ("EBMUD") respectfully responds to the objection of
27 California Department of Water Resources ("DWR") to the admission into evidence of four of
28 the exhibits submitted by EBMUD as follows:

1 **I. INTRODUCTION**

2 DWR’s cursory objections to the admission of three documents presented by EBMUD in
3 its cross-examination of DWR (identified as EBMUD-X1 through EBMUD-X3) and EBMUD’s
4 comments on the Draft Bay Delta Conservation Plan Environmental Impact
5 Report/Environmental Impact Statement (“BDCP EIR/EIS”) (identified as EBMUD-176) are
6 without merit and should be overruled. The documents at issue are relevant and properly
7 admissible.

8 DWR’s objection to EBMUD-X1 through EBMUD-X3 is based on its bald assertion that
9 the documents “were not referenced in direct testimony or used during the course of cross
10 examination.” (DWR’s Objections at p. 6:22-23.) This objection is improperly vague and is
11 incorrect. In fact, each of the three documents was presented by EBMUD and discussed in the
12 course of its cross-examination of DWR’s witness, Parviz Nader-Tehrani. The three documents
13 are also relevant to the proceeding and a proper foundation was laid for each.

14 DWR’s objection to EBMUD-176 is similarly insufficient. DWR contends that: (i) the
15 document is somehow outside the scope of Part 1 of this proceeding; (ii) one of the witnesses
16 who discussed the exhibit included certain portions of the exhibit in his direct testimony; and
17 (iii) one of the witnesses who discussed the exhibit did not testify why certain portions of the
18 document are relevant to Part 1 of this proceeding. First, DWR’s objections to EBMUD-176 are
19 untimely. This document was submitted as part of EBMUD’s case-in-chief; it was not used by
20 EBMUD in its cross-examination of DWR’s witnesses. Accordingly, any objection to this
21 exhibit must have been raised no later than September 21, 2016. DWR’s objection to this exhibit
22 should be overruled on this basis alone. Second, the objection is improperly vague. The
23 objection is nothing more than a list of allegations without any detailed discussion of the
24 document at issue or the basis for the objection. Third, this exhibit was relied upon and
25 identified in the written submissions and oral testimony of *two* of EBMUD’s expert witnesses:
26 Dr. Benjamin S. Bray and Xavier Irias. The information in EBMUD-176 cited by Dr. Bray and
27 Mr. Irias is relevant to this proceeding and both witnesses laid a proper foundation for the
28 admission of this document.

1 Accordingly, EBMUD respectfully requests that the SWRCB overrule DWR’s objections
2 and admit the four documents into evidence.

3 **II. DISCUSSION**

4 **A. Standard of Review**

5 Adjudicative proceedings conducted by the SWRCB must be in accordance with chapter
6 4.5 of the Administrative Procedure Act, sections 801-805 of the Evidence Code, and section
7 11513 of the Government Code. (Cal. Code Regs., tit. 23, §§ 648; 648.5.1.) Such proceedings
8 “need not be conducted according to technical rules relating to evidence and witnesses.” (Gov.
9 Code, § 11513, subd. (c).) All relevant evidence is admissible unless otherwise provided by law.
10 (Evid. Code, § 350.) In administrative proceedings, “[a]ny relevant evidence shall be admitted if
11 it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of
12 serious affairs....” (Gov. Code, § 11513, subd. (c).) Additionally, as in a civil action, expert
13 witnesses may rely on hearsay evidence or evidence that is not admissible in establishing their
14 expert opinions. (*See* Evid. Code § 801(b).)

15 **B. The Exhibits EBMUD Used In Its Cross-Examination Should Be Admitted**

16 DWR’s objections to the three documents identified as Exhibits EBMUD-X1 through
17 EBMUD-X3 are vague and unfounded and should be overruled. EBMUD presented and used
18 each of the three documents in its cross-examination of DWR’s witness, Mr. Nader-Tehrani.
19 During its cross-examination of Mr. Nader-Tehrani, EBMUD provided him: (i) the meeting
20 minutes for the May 26, 2009 meeting addressing Modeling of BDCP Impacts on FRWA’s and
21 EBMUD’s Operations, identified as EBMUD-X1, and (ii) the meeting minutes for the June 18,
22 2010 meeting on BDCP Modeling for Modelers, identified as EBMUD-X2, to refresh
23 Mr. Nader-Tehrani’s recollection about those two meetings. (August 24, 2016 Transcript,
24 Volume 14 (“Tr.”) at 90:10-96:18.) Referencing these documents, EBMUD asked Mr. Nader-
25 Tehrani about the type of analysis DWR previously used in examining the impact of North Delta
26 intakes on reverse flows and wastewater effluent in the Sacramento River at Freeport (Tr. at
27 90:10-91:25) and prior consideration of tidal marsh restoration and the changes since DWR’s
28 earlier analysis (Tr. at 93:11-96:18). EBMUD also presented EBMUD-X3 – a DSM-2 model file

1 prepared for this proceeding – to Mr. Nader-Tehrani to confirm the data included in DWR’s
2 modeling. (Tr. at 107:2-107:25.) In response to the questioning based on this document,
3 Mr. Nader Tehrani explained the basis for the period of data relied upon in the modeling. (*See*
4 *id.*) Because each of these three documents was used in the cross-examination of DWR’s
5 witnesses, DWR’s objection is unfounded and should be overruled.

6 Additionally, to the extent EBMUD-X1 and EBMUD-X2 were used to refresh the
7 witness’ recollection, those documents should be admitted for the benefit of the SWRCB to
8 consider along with the testimony provided. The California Evidence Code specifically provides
9 for the admission of a document used to refresh a witness’ recollection. (*See* Evidence Code
10 § 771.) Such documents are admissible for the benefit of the triers of fact, to allow them to
11 consider the source of the information that the witness relied upon to refresh his or her
12 recollection.

13 Because EBMUD used EBMUDX-1 through EBMUD-X3 in its cross-examination of
14 DWR witness Mr. Nader-Tehrani, and a proper foundation was laid for each of the documents,
15 the objection should be overruled and the documents should be admitted.

16 **C. EBMUD’s EIR/EIS Comments Should Be Admitted**

17 DWR’s objection to the admission of EBMUD’s comments to the BDCP EIR/EIS,
18 identified as exhibit EBMUD-176, should also be overruled, because it is untimely and is vague
19 and without merit.

20 First, DWR’s objection to EBMUD-176 should be overruled because it is raised well
21 after the September 21 deadline for such objections. The SWRCB’s December 19, 2016 Ruling
22 on Submittal Deadlines, Rebuttal Process, and Scheduling set a deadline of December 30, 2016
23 for objections to testimony or exhibits introduced during cross-examination, and explicitly stated
24 that such objections “will not be accepted unless they are based on new information that was
25 presented during cross-examination.” (December 19, 2016 Ruling, at p.1.) EBMUD-176 is *not*
26 new information – it was instead part of EBMUD’s case-in-chief, submitted on August 31, 2016
27 – and was relied upon by two of EBMUD’s witnesses in their direct testimony in support of
28 EBMUD’s case-in-chief; the exhibit was not used by EBMUD in its cross-examination. As any

1 evidentiary objections to Part 1B cases in chief were due no later than noon on September 21,
2 2016 (September 9, 2016 Co-Hearing Officer’s Ruling on DWR’s Request for Time Extension
3 (“Sept. 9 Ruling”)), DWR’s December 30, 2016 objection to EBMUD-176 should be overruled
4 as untimely.

5 Second, DWR’s objection to this document is vague and unsupported by sufficient
6 explanation as to the basis of the objection. DWR generally objects to: “[c]hallenges to the
7 environmental review process”; some unidentified portions of the document that Dr. Bray – one
8 of two EBMUD witnesses who addressed this document – included as part of his direct
9 testimony; and some unidentified comments relating to the CEQA/NEPA process. (*See* DWR’s
10 Objections at p. 7:4-10.) Any objections to the admission of evidence must be specific in order
11 to allow the party offering the evidence an opportunity to respond and establish its admissibility.
12 (*See* Sept. 9 Ruling; *see also* *People v. Rivera* (2011) 201 Cal.App.4th 353, 361.) Indeed, as the
13 SWRCB has previously explained, general evidentiary objections are not sufficient to exclude
14 evidence “without specific identification of the evidence to which the party objects and the
15 reason for that objection.” (SWRCB Order WR 2012-0012, p.11, n. 28.) Because DWR fails to
16 identify the specific statements or portions of the document that it alleges to be inadmissible and
17 fails to clearly explain the basis for its objection, the objection should be overruled.

18 Third, the objection should also be overruled on the grounds that the document is relevant
19 and properly identified as a document relied upon by two of EBMUD’s expert witnesses in
20 forming their expert opinions. In support of his expert opinion, Dr. Bray referenced EBMUD-
21 176 in discussing EBMUD’s analysis of the Department of Water Resources’ DSM2 modeling
22 of the BDCP and EBMUD’s DSM2 modeling of BDCP CalSim-II modeling. (*See* EBMUD-152
23 at pp. 19-21.) Mr. Irias cited to EBMUD-176 in support of his expert opinion in discussing
24 EBMUD’s repeated presentations of its concerns over impacts from the Petitioners’ proposed
25 Twin Tunnels on the existing Mokelumne Aqueducts and EBMUD’s planned Delta Tunnel. (*See*
26 EBMUD-153 at pp. 11-12.) This document is also properly admitted as a business and public
27 record, previously prepared and submitted by EBMUD to several state and federal agencies.
28 (*See* Evid. Code, §§ 1270-71, 1280.)

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Accordingly, DWR's objection to the admission of EBMUD-176 should be overruled.

III. CONCLUSION

For the reasons outlined above, EBMUD respectfully requests that the SWRCB overrule DWR's objections to the admission of EBMUD-X1 through EBMUD-X3 and EBMUD-176 and admit these four documents into evidence.

DATED: January 6, 2016

ELLISON, SCHNEIDER, HARRIS & DONLAN L.L.P.

By: 
Robert E. Donlan
Shawnda M. Grady

Attorneys for
EAST BAY MUNICIPAL UTILITY DISTRICT

STATEMENT OF SERVICE

**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

**EAST BAY MUNICIPAL UTILITY DISTRICT'S RESPONSE TO CALIFORNIA DEPARTMENT OF
WATER RESOURCES' OBJECTIONS TO EXHIBITS SUBMITTED IN SUPPORT OF
PROTESTANTS' CASES-IN-CHIEF**

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated **November 15, 2016**, posted by the State Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

	<p>I caused a true and correct hard copy of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:</p> <p>Method of Service: _____</p>
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I certify that the foregoing is true and correct and that this document was executed on **January 6, 2017**.
Date

Signature: 

Name: Anna Haynes

Title: Litigation Secretary

Party/Affiliation: **East Bay Municipal Utility District**

Address: 375 11th St., Oakland, CA 94607