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BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

ENFORCEMENT ACTION ENF01949 DRAFT CEASE AND DESIST ORDER REGARDING UNAUTHORIZED DIVERSIONS OR THREATENED UNAUTHORIZED DIVERSIONS OF WATER FROM OLD RIVER IN SAN JOAQUIN COUNTY In the Matter of ENFORCEMENT ACTION ENF01951 – ADMINISTRATIVE CIVIL LIABILITY COMPLAINT REGARDING UNAUTHORIZED DIVERSION OF WATER FROM THE INTAKE CHANNEL TO THE BANKS PUMPING PLANT (FORMERLY ITALIAN SLOUGH) IN CONTRA COSTA COUNTY	SWRCB Enforcement Action ENF01951 and ENF01949 BYRON-BETHANY IRRIGATION DISTRICT'S OPPOSITION TO THE DEPARTMENT OF WATER RESOURCES' MOTION FOR PROTECTIVE ORDER; RE: PAUL HUTTON

I. INTRODUCTION

The State Water Contractors (SWC) submitted the testimony of Paul Hutton (Hutton) on February 22, 2016 under the guise of rebutting direct testimony of Byron-Bethany Irrigation District's (BBID) experts. However, the testimony submitted by Hutton is almost exclusively comprised of new testimony, including extensive technical analyses, having nothing to do with rebuttal. This untimely attempt to bring new direct testimony into the case with a new expert is a blatant violation of basic rules of procedure and the Hearing Officer's orders, as extensively argued in BBID's Motion in Limine, submitted February 29, 2016. Unless and until the State Water Resources Control Board (SWRCB) excludes Hutton from testifying, BBID must be allowed to conduct discovery on Hutton pursuant to its statutory discovery rights.

BBID immediately noticed Hutton's deposition after receipt of the new testimony. However, instead of simply producing its expert for a deposition in accordance with basic procedural rules, the SWC seeks a Protective Order to prevent BBID from exploring the substance and basis of Hutton's testimony in advance of the hearing. SWC complains about burden and expense and concludes that BBID should blindly cross-examine this witness during the formal hearing regardless of the prejudice to BBID's right to prepare for the hearing in advance by way of discovery it is entitled to perform.

Discovery is meant to be a liberal vehicle for finding evidence that may be helpful or harmful to a party's case in advance of the final adjudication. The idea that BBID's only opportunity to cross-examine this witness should be during the very limited amount of time permitted for cross-examination at the hearing itself is prejudicial, improper, and legally untenable. BBID respectfully requests the SWRCB prevent SWC's attempt to limit BBID's access to discoverable information in advance of the hearing and order that the Hutton deposition proceed as soon as possible and prior to the hearing.[1] BBID alternatively requests that the hearing be continued by at least 30 days to allow sufficient

[1] BBID hereby joins in the "CDWA, SDWA, WSID Opposition to SWC Motion for Protective Order re Deposition of Paul Hutton; Supporting Declaration of Jennifer L. Spaletta" filed by Central Delta Water Agency.

time for the parties to complete this critical discovery. Additionally, SWC's request to restrict the use of Hutton's deposition transcript solely to this proceeding is without precedent and must be denied.

II. STATEMENT OF FACTS

In July 2015, the SWRCB issued a Draft Cease and Desist Order to the West Side Irrigation District (WSID), Enforcement Action ENF01949 (CDO), and an Administrative Civil Liability Complaint to BBID, Enforcement Action ENF01951 (ACL).

On August 19, 2015, the Hearing Team issued a pre-hearing conference order stating, "[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." (Declaration of Michael Vergara in Support of BBID's Opposition to SWC's Motion for Protective Order; Re: Paul Hutton (Vergara Decl.), Exh. A at p. 6, ¶ 9(c).)[2]

On August 28, 2015, the SWC submitted a Notice of Intent to Appear (SWC NOI). (Vergara Decl., Exh. C at p. 1.) No witnesses were disclosed. (*Ibid.*) Instead, SWC indicated that they "intend to participate by cross-examination or rebuttal only." (*Ibid.*)

On January 22, 2016, BBID filed expert witness testimony by Susan Paulsen (Paulsen). On February 22, 2016, SWC submitted Hutton's Rebuttal Testimony. (Vergara Decl., Exh. D.) Hutton purports to rebut the Paulsen testimony. BBID scheduled Hutton's deposition for March 8, 2016. (Vergara Decl., Exh. E.) On February 26, 2016, SWC moved for a protective order prohibiting Hutton's deposition. (Vergara Decl. at ¶ 7.) On February 29, 2016, BBID filed a Motion in Limine to exclude Hutton's testimony. (Vergara Decl. at ¶ 8.)

The CDO and ACL Hearing are currently set to begin on March 21, 2016.

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[2] The Hearing Team repeats this admonition in its Second Pre-Hearing Conference Order, dated February 18, 2016. (Vergara Decl., Exh. B at p. 3.)

III. ARGUMENT

A. The Parties Are Entitled to Take Depositions

Administrative hearings and discovery procedures are governed by the Water Code (Wat. Code, § 1075 et seq.) and SWRCB regulations (Cal. Code Regs., tit. 23, § 648 et seq.), which incorporate portions of the Administrative Procedure Act (Gov. Code, § 11400 et seq., 11513) and the Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.). The Board or any party to a proceeding before the Board may take the deposition of witnesses in accordance with the Civil Discovery Act. (Wat. Code, § 1100.)

Discovery in the SWRCB's proceedings should, as in civil actions in the superior courts, be construed broadly in favor of permitting discovery. As courts have repeatedly explained, "[t]he scope of discovery [in civil actions] is very broad." (*Tien v. Superior Court* (2006) 139 Cal.App.4th 528, 535.) This expansive scope of discovery "enable[s] a party to obtain evidence in the control of his adversary in order to further the efficient, economical disposition of cases according to right and justice on the merits." (*Fairfield v. Superior Court* (1966) 246 Cal.App.2d 113, 119-120.) Consistent with this purpose, the California Supreme Court has consistently held that "discovery statutes are to be construed broadly in favor of disclosure, so as to uphold the right to discovery whenever possible." (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1249 [citing *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107-08; *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 377].)

Further, parties to an adjudicative proceeding are entitled to due process, which includes a full and fair opportunity to participate. (See, e.g., *Sallas v. Municipal Court* (1978) 86 Cal.App.3d 737, 742 ["due process of law requires that an accused ... have a reasonable opportunity to prepare and present his defense ...."] BBID is seeking no more than it is afforded by the Water Code, the Code of Civil Procedure, and the basic tenets of due process rights.

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B. SWC's Failure to Produce Hutton for Deposition in Advance of the Hearing Is Prejudicial, in Violation of Applicable Law and the Hearing Officer's Orders

SWC argues that the Hearing Officer and the parties did not propose to conduct discovery after all written testimony and exhibits were submitted. This argument, however, ignores the fact that the Hearing Officer and parties did not contemplate submission of expert testimony with new evidence supporting its case-in-chief during the rebuttal stage. This rule was made extremely clear in the Hearing Officer's orders – rebuttal was not to be used as a back door to introducing new case-in-chief testimony. (Vergara Decl., Exh. A at p. 6, ¶ 9(c), and Exh. B at p. 5 ["Rebuttal 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."].)

Code of Civil Procedure section 2034.310(b) supports this mandate by limiting the testimony of a late disclosed expert to "the falsity or non-existence of a fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts an opinion." SWC waited until February 22, 2016, less than a month before the hearing, to submit complex expert testimony that should have been part of its case-in-chief. This conduct is unduly prejudicial to BBID's ability to meaningfully prepare its defense.

Now, although Hutton purports to rebut the direct testimony of expert Paulsen, his testimony extends far beyond a simple rebuttal by presenting new evidence outside the scope of Paulsen's testimony. Hutton provides highly technical independent opinions about the effects of salinity levels in the Delta on irrigated agriculture during the summer of 2015. His testimony relies on complex technical models that require large data sets to reach his conclusions and opinions. If SWC had timely disclosed the intention of Hutton to offer case-in-chief testimony, BBID would have immediately sought the data and model runs underlying the analyses and conducted depositions to prepare rebuttal. Now, it is improbable that BBID will be able to (1) timely obtain the data, assumptions,

and modeling used and relied on by Hutton; (2) analyze the data, assumptions, modeling, and expert opinions; (3) take informed expert depositions; and (4) adequately prepare to rebut the expert testimony during the hearings.

BBID has the absolute right to depose Hutton under Code of Civil Procedure section 2034.410. Code of Civil Procedure, section 2034.410 provides "[o]n receipt of an expert witness list from a party, any other party may take the deposition of any person on the list." Thus, if Hutton's testimony is not excluded as untimely case-in-chief expert testimony, it must, at the very least, be subject to the same opportunities for discovery as every other case-in-chief witness. (Wat. Code, § 1100.)

C. There is No Undue Burden or Expense in Producing Expert Witnesses and Documents Relied Upon Pursuant to Statutory Discovery Procedures

SWC repeatedly complains of the "undue" burden and expense of producing Hutton and the documents he relied upon in forming his opinions. Regardless of when Hutton is deposed, the burden and expense of producing a witness and documents is a normal cost of discovery. A party cannot try to protect their witness by producing their testimony and the documents they choose, then claiming the discovery process is too burdensome. Depositions cost money for all parties involved. Notably, the expense of Hutton's deposition is not borne by SWC – it is borne by the parties taking the deposition who are required by law to pay Hutton at his normal hourly rate for his time. Presumably, SWC paid Hutton for the work performed on SWC's behalf, thus taking on the burden and expense associated with expert retention. Having opted to take on the burden and expense of an expert, SWC cannot now assert that it is an "undue" burden and expense when the parties seek to discover the precise opinions the expert was hired to render. That is patently unfair, prejudicial, and legally untenable.

Additionally, SWC is required to show the "quantum of work required" to successfully assert an undue burden and expense defense to a deposition proceeding pursuant to code. (*West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 417 ["The objection based upon burden must be sustained by evidence showing the

quantum of work required."]) SWC merely makes the conclusory allegation that producing Hutton and the accompanying documents would be an "undue burden and expense to SWC" and fails to supply any facts demonstrating the quantum of work required to comply with BBID's discovery requests. SWC's conclusory allegations of undue burden and expense must fail.

SWC additionally argues that it should not have to bear the burden and expense of Hutton's deposition and the accompanying production of documents so close to the hearing. Again, SWC conveniently ignores that the only reason Hutton's deposition is scheduled for March 2016 is because SWC *chose* to sneak his case-in-chief testimony into the proceeding under the guise of rebuttal testimony when he should have been identified as a case-in-chief witness from the outset. It is disingenuous for SWC to attempt to block Hutton's deposition because of its proximity to the hearing when SWC created the problem. BBID is deposing Hutton as soon as practicable, considering SWC did not designate Hutton as a witness until February 22, 2016. SWC has options that do not serve to prejudice BBID: it can seek a continuance of the hearing or simply withdraw Hutton as a witness.

D. SWC's Relevance Objections Are Unfounded and Improper

SWC improperly claims the documents that BBID seek are irrelevant. To the contrary, Code of Civil Procedure section 2017.010 provides that "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action[.]" In an administrative hearing, relevant evidence "is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Gov. Code, § 11513(c).) Although administrative adjudications follow a relaxed standard of admissibility, the evidence still "must be relevant and reliable." (*Aengst v. Bd. of Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283.) Additionally, pursuant to California Evidence Code section 350, no evidence is admissible unless it is relevant. (Evid. Code, § 350.) Relevant evidence is defined by California Evidence Code section 210 as "having any tendency in reason to prove or

disprove any disputed fact that is of consequence to the determination of the action." (*People v. Kelly* (1992) 1 Cal.4th 495, 523; *People v. Haston* (1968) 69 Cal.2d 233, 245.)

BBID requests documents related to (1) the SWRCB's determination of water availability in the Sacramento and San Joaquin River Watersheds and the Delta for 2015, (2) 2015 water right curtailments, (3) current and historical BBID diversions, and (4) documents relied upon by Hutton in forming his testimony and/or referring to his testimony. (Vergara Decl., Exh. E.) This enforcement action is about the SWRCB's 2015 water right curtailments based on its statewide and region-specific water availability analyses, which is in part informed by BBID's current and historical diversions. Certainly, the categories of documents have a tendency to prove or disprove disputed facts in this matter. Moreover, BBID is entitled to production of all documents relied upon by Hutton in forming his opinions. (Code Civ. Proc., § 2034.210(c).)

Further, the standard for production of documents at the discovery stage is whether the documents sought are likely to lead to the discovery of admissible evidence – not whether they are actually admissible at the hearing. (Code Civ. Proc., § 2017.010.) It is improper to assert "relevance" as a justification for refusing to produce documents unless the categories sought are blatantly unrelated to the issues. That is not the case with BBID's document requests and SWC's refusal to produce documents that, at a minimum, are likely to lead to the discovery of admissible evidence is an abuse of the discovery process.

E. Hutton's Lack of Control or Possession of Some Documents Does Not Negate BBID's Right to Discovery

SWC claims that some of the documents sought by BBID are not within Hutton's possession or control. However, the Code of Civil Procedure allows for the discovery of documents in each *party's* possession or control, not limited to documents in a *deponent's* possession and control. (Code Civ. Proc., § 2031.010, subd. (a).) Hutton is being offered by SWC as its expert witness in this proceeding. Discovery encompasses SWC's documents, not just Hutton's, to the extent the documents were reviewed by

and/or relied on by Hutton in forming his opinions. The fact that the deposition notice may seek documents that go beyond what is in his immediate possession and may instead be in the possession of other SWC representatives is not objectional. BBID is entitled to discover reports and writings created by the expert to prepare the expert's opinion (Code Civ. Proc., § 2034.210) and discovery that is admissible or "reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017.010.)

F. BBID Is Not Required to Conduct Its Pre-Hearing Expert Discovery During the Hearing Itself

SWC repeatedly argues that Hutton's deposition is unnecessary and duplicative because BBID will have the opportunity to cross-examine Hutton at the hearing. SWC claims that questioning Hutton through cross-examination would be more convenient, less burdensome, and less expensive than a deposition. SWC fails to mention that it would also be less effective and highly prejudicial.

Hutton's rebuttal testimony presents new evidence based on modeling simulations and conclusions deriving therefrom. BBID is entitled to gain an understanding of the basis for Hutton's opinions and documents in support of the same to be able to develop a proper cross-examination approach for purposes of the hearing. Going through this type of questioning takes time, which is conducive to the structure and process of depositions. The parties' time at the hearing is limited, such that it is unreasonable and prejudicial for BBID to use its limited time for a line of questioning that could occur before the hearing. Questioning Hutton at a deposition will allow BBID to conduct a more efficient and targeted cross-examination at the hearing, and will prevent spending limited hearing time on questioning that could have occurred weeks in advance.

G. SWC's Alternative Request to Limit the Scope of Hutton's Deposition and Document Production Is Unfounded

SWC's alternative request to limit the scope of Hutton's deposition and document production is unfounded and must be denied. BBID has a statutory right to "obtain

discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action[.]" (Code Civ. Proc. § 2017.010.) For the reasons discussed herein above, SWC fails to set forth any facts or legal arguments to reasonably justify any curtailment of BBID's discovery rights. BBID is entitled to prepare its defense and as long as SWC intends to utilize Hutton to support the prosecution efforts against BBID, SWC and Hutton should not be shielded from any aspect of the discovery process.

H. SWC's Request to Limit the Use of the Hutton Deposition Transcript to this Proceeding Must be Denied

SWC devotes two sentences in its entire motion – one in the introduction and one in the conclusion – to its request for an order precluding the use of the Hutton deposition transcript outside of this proceeding. SWC fails to offer any facts, law, or argument in support of such an unprecedented and outrageous request. The request must be denied on that basis alone.

The mere suggestion to limit the use of the testimony to this proceeding discloses SWC's desire to bury whatever testimony Hutton intends to offer to ensure that he can freely change his opinion in the future without any repercussions. A cornerstone of the weight given to expert testimony in a proceeding is that the testimony necessarily follows that expert in his career forever. This, along with the fact that the testimony is under oath and subject to the penalty of perjury, magnifies the fact that experts may one day be challenged or impeached by their own testimony. This fosters truth and authenticity. As such, SWC's request is improper and must be denied.

VII. CONCLUSION

For the foregoing reasons, BBID respectfully requests the SWRCB deny SWC's Motion for Protective Order and allow the deposition of Hutton to proceed as noticed. BBID alternatively requests that the hearing be continued by at least 30 days to allow sufficient time for the parties to complete this critical discovery. Additionally, SWC's request to limit the use of the Hutton testimony to this proceeding must be denied.

Dated: March 4, 2016

SOMACH SIMMONS & DUNN
A Professional Corporation

By: _____
Michael Vergara, Esq.
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PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On March 4, 2016, I served the following document(s):

BYRON-BETHANY IRRIGATION DISTRICT'S OPPOSITION TO THE DEPARTMENT OF WATER RESOURCES' MOTION FOR PROTECTIVE ORDER; RE: PAUL HUTTON

__X__ (**via electronic mail**) by causing to be delivered a true copy thereof to the person(s) and at the email addresses set forth below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 4, 2016 at Sacramento, California.

Yolanda De La Cruz

SOMACH SIMMONS & DUNN
A Professional Corporation

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