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6 WATER RESOURCES

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8 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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10 **In the matter of the Draft Cease and Desist**
11 **Order issued to The West Side Irrigation**
12 **District, Enforcement Action ENF01949;**

13 **and**

14 **In the Matter of the Administrative Civil**
15 **Liability Complaint issued to**
16 **Byron-Bethany Irrigation District,**
17 **Enforcement Action ENF01951.**

CALIFORNIA DEPARTMENT OF
WATER RESOURCES' MOTION FOR
PROTECTIVE ORDER

18 California Department of Water Resources ("DWR") requests that the Hearing Officers in
19 the above-referenced enforcement actions issue protective orders pursuant to Code of Civil
20 Procedure sections 2019.030 and 2025.420 prohibiting the deposition of Paul Marshall and
21 accompanying requests for production of documents served by Byron-Bethany Irrigation District
22 ("BBID") and the Central Delta and South Delta Water Agencies (referred to jointly as
23 "CDWA"). The deposition and production of documents are unreasonably duplicative and
24 cumulative, would impose undue burden, and the noticing parties are able to obtain the
25 information from a more convenient, less burdensome, and less expensive source during cross
26 examination that will occur during the hearing, which commences in three weeks. Indeed, DWR
27 already produced some of the documents that BBID and CDWA requested in response to requests
28 for production of documents that were included in prior notices for the deposition of Mr.
Marshall, which were cancelled.

1 **I. INTRODUCTION**

2 Even though all written direct and rebuttal testimony and exhibits have been submitted at
3 this point in the enforcement actions and DWR has already produced documents, BBID and
4 CDWA are *again*¹ demanding a deposition of Mr. Marshall to occur before March 21, 2016 when
5 Phase I of the hearings begins. In the recent deposition notices, they also seek from Mr. Marshall
6 duplicative and additional documents.² The rebuttal testimony of Mr. Marshall in most part
7 responds to misrepresentations or inaccuracies of BBID and WSID that are outside the scope of
8 the enforcement actions. DWR also objected to extraneous and irrelevant arguments in the legal
9 briefs submitted by the parties, but nevertheless was compelled to correct the record. Filing
10 rebuttal to irrelevant direct testimony does not result in the waiver of the original objection or
11 request that the unresponsive legal briefs be struck from the record. These same parties are
12 looking to use the discovery process this late in the process to further develop erroneous
13 arguments and expand the scope.³ These efforts will not further the efficiency and expediency of
14 these hearings, but will result in additional confusion of relevant issues. A more efficient and less
15 burdensome process is for BBID and CDWA to rely on the upcoming hearing process and cross-
16 examination of witnesses.

17 In an attempt to meet, confer, and compromise regarding the recent Deposition Notices and
18 Requests for Production of Documents, a conference call between BBID, CDWA, DWR, and
19 State Water Contractors (“SWC”) occurred on February 25, 2016. (See Declaration of Robin
20 McGinnis in Support of DWR’s Motion for Protective Order (“McGinnis Decl.”), at ¶ 16). It
21 became clear from statements made during the call that the noticing parties intend the scope of
22 the proposed deposition to be unlimited.

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24 _____
25 ¹ BBID and WSID previously set the Deposition of Mr. Marshall to occur on November 24, 2015, along
26 with a Request for Production of Documents. After DWR changed its participation as a party to a limited role, the
27 parties decided not to depose Mr. Marshall.

28 ² On December 7, 2015, DWR responded to document requests by the parties that were included in the
original deposition notices.

³ For example, BBID requested documents concerning or relating to the *current and/or historical* diversions
of water by BBID, which is not relevant to the question of whether it was legally diverting water during June of
2015, the period subject to curtailment and the enforcement action.

1 In her October 23, 2015 procedural ruling in the WSID matter, Hearing Officer Spivy-
2 Weber indicated the parties could seek a protective order to prohibit or postpone the deposition of
3 a particular individual based on undue burden, the unreasonably duplicative or cumulative nature
4 of the request, or the ability of the noticing party to obtain the information from a more
5 convenient, less burdensome, or less expensive source. This Board has prevented depositions in
6 previous proceedings when the information sought had already been or would be provided
7 pursuant to the Board's hearing procedures and was thus obtainable from a more convenient, less
8 burdensome, and less expensive source.⁴

9 The undue burden and expense of producing Mr. Marshall for deposition and production of
10 a potentially large volume of documents, many of which are not relevant, most of which are not
11 in the possession and control of Mr. Marshall, and some of which have already been produced,
12 weeks before the commencement of the hearing, far outweighs any purported importance of such
13 discovery to the noticing parties. Moreover, any information sought from Mr. Marshall at his
14 deposition would be duplicative of the information the noticing parties have already obtained
15 through the exchange of rebuttal testimony and exhibits and could obtain through the opportunity
16 for cross-examination of rebuttal witnesses afforded by the evidentiary hearing process that will
17 soon commence. Therefore, good cause exists for the issuance of DWR's requested protective
18 order.

19 **II. STATEMENT OF FACTS**

20 On July 16, 2015, the State Water Resources Control Board ("Board") issued a draft Cease
21 and Desist Order to The West Side Irrigation District ("WSID") pursuant to Water Code Sections
22 1052 and 1831. In response, WSID requested a formal hearing on August 7, 2015. On July 20,
23 2015, the Board issued an Administrative Civil Liability Complaint to BBID pursuant to Water
24 Code Sections 1052 and 1055. In response, BBID requested a formal hearing on August 6, 2015.

26 ⁴*Water Right Hearing Regarding Proposed Cease and Desist Order Against Millview County Water*
27 *District, Thomas P. Hill, and Steven L. Gomes*, December 3, 2009, available at:
28 http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/millview/docs/hearofficerruling120309.pdf.

1 The initial hearing notices issued in the enforcement actions did not contemplate
2 submission of rebuttal evidence prior to the commencement of the evidentiary hearing. (See
3 Notices of Public Hearing dated August 19, 2015 (BBID) and September 1, 2015 and November
4 10, 2015 (WSID).) On October 2, 2015, via e-mail, the hearing officer in the BBID matter
5 continued the hearing date to March 21, 2016 and set a deadline for submission of written
6 testimony and exhibits for cases-in-chief of January 18, 2016 and a deadline for submission of
7 written rebuttal testimony and exhibits of February 22, 2016. A revised notice of public hearing
8 was issued on October 20, 2015 correcting the deadline for submission of cases-in-chief to
9 January 19, 2016. By ruling on December 16, 2016, the hearing officer in the WSID matter
10 consolidated the proceeding with the BBID matter adopting the deadlines for submittal of
11 cases-in-chief and rebuttal testimony. A Notice of Revised Schedule for Public Hearings for both
12 proceedings was issued on January 8, 2016.

13 On September 2, 2015, DWR submitted a Notice of Intent to Appear in ENF01951
14 indicating that Mr. Marshall would be an expert witness and testify regarding “Effects of Delta
15 Diversions.” (See McGinnis Decl., at ¶ 4.) On October 2, 2015, DWR submitted a Notice of
16 Intent to Appear in ENF01949 indicating that Mr. Marshall would be an expert witness and
17 testify regarding “Effects of Delta Diversions.” (See McGinnis Decl., at ¶ 5.) BBID, CDWA,
18 and WSID noticed the deposition of Mr. Marshall for November 24, 2015, reset the deposition for
19 December 30, 2015, and reset it again for February 2, 2016. (See McGinnis Decl., at ¶ 6–8.) On
20 December 7, 2015, DWR produced documents in response to requests for production of
21 documents included in the original notices of deposition. (See McGinnis Decl., at ¶ 9.) On
22 January 19, 2016, DWR submitted an Amended Notice of Intent to Appear indicating that it
23 would participate in the hearing on cross-examination and rebuttal only. (See McGinnis Decl., at
24 ¶ 10.) On January 28, 2016, BBID, CDWA, and WSID notified DWR that they did not “see a
25 need to depose Paul [Marshall] at this point.” (See McGinnis Decl., at ¶ 11.) On February 22,
26 2016, DWR submitted its rebuttal testimony and exhibits relied on. (See McGinnis Decl., at ¶
27 12.)
28

1 On February 23, 2016, CDWA served a “Notice of Taking Deposition of Paul Marshall,”
2 which included a request for production of documents. (See McGinnis Decl., at ¶ 13.) In
3 CDWA’s notice, they request documents including those: describing the “controlling factor” for
4 State Water Project Delta Operations for each day from January 1, 2015 through December 31,
5 2015; explaining or computing “Net Channel Depletions to meet Delta Consumptive Use”;
6 explaining or identifying “authorized in-basin needs”; relating to how “Project operators adjust
7 the exports scheduled at the SWP and CVP pumping plants to further prevent salinity incursion
8 into the Delta”; explaining when, during 2014 and 2015, DWR failed to meet the “modified
9 salinity objectives”; and relating to how “in-Delta users will continue to impact delta water
10 quality despite the tools available to Project operators.” (*Ibid.*)

11 On February 24, 2016, BBID served an “Amended Notice of Deposition of Paul Marshall
12 and Request for Production of Documents.” (See McGinnis Decl., at ¶ 14.) In BBID’s notice, it
13 requests documents including those: concerning or relating to water right curtailments in 2015⁵;
14 and concerning or relating to the *current and/or historical* diversions of water by BBID. (*Ibid.*)

15 In both, the deposition is noticed for March 3, 2016 at 9:30 a.m. in the same location.
16 DWR made a reasonable and good faith attempt at an informal resolution of the issues raised in
17 this motion with BBID and CDWA as required by Code of Civil Procedure section 2025.420,
18 subsection (a). (See McGinnis Decl., at ¶ 15.) DWR, SWC, BBID, and CDWA had a
19 teleconference on February 25, 2016, but were unable to resolve the issues raised in this motion.
20 (See McGinnis Decl., at ¶ 16.) On February 26, 2016, I notified BBID and CDWA that the
21 deposition cannot go forward until there is a ruling on this motion. (See McGinnis Decl., at ¶ 17.)

22 **III. ARGUMENT**

23 The Water Code governs the Board’s hearing and discovery procedures, and incorporates
24 elements of the Administrative Procedure Act and the Civil Discovery Act (Title 4 [commencing
25 with Section 2016.010] of Part 4 of the Code of Civil Procedure). (See generally Wat. Code, §
26 1100; Gov. Code, § 11400 et seq.; Cal. Code Regs., tit. 23, §§ 648, 648.4.) The Board or any

27 ⁵ BBID argued in its Jan. 25, 2016 “Notice of Position” that the Board’s authority to curtail pre-1914 water
28 rights is not at issue in this proceeding.

1 party to proceedings before the Board may take depositions of witnesses in accordance with the
2 Civil Discovery Act. (Wat.Code, § 1100.)

3 But the right to discovery is not unlimited. The Hearing Officer may issue a protective
4 order prohibiting or limiting depositions in order to protect a party or deponent from undue
5 burden and expense. (Code Civ. Proc., § 2025.420, subd. (b).) The Hearing Officer may issue a
6 protective order if the discovery sought would be “unreasonably cumulative or duplicative, or is
7 obtainable from some other source that is more convenient, less burdensome, or less expensive.”
8 (Code Civ. Proc., §§ 2025.420, subd. (b), 2019.030, subds. (a), (b).)

9 Board Hearing Officers have issued protective orders or otherwise limited discovery in
10 other Board proceedings. In the *Water Right Hearing Regarding Proposed Cease and Desist*
11 *Order Against Millview County Water District, Thomas P. Hill, and Steven L. Gomes*, the
12 Hearing Officer denied Millview, et al.’s request for pre-hearing discovery including depositions.
13 (Hearing Officer’s Ruling dated December 3, 2009.) The Hearing Officer found that a protective
14 order was warranted because the discovery sought was obtainable from a more convenient, less
15 burdensome, and less expensive source. (*Id.*, at p. 2.) The Hearing Officer explained that the
16 information sought by Millview, et al. had already been or would be provided pursuant to the
17 Board’s hearing procedures. (*Ibid.*) Formal discovery was not warranted because the Prosecution
18 Team identified its expert witnesses and would have to serve its written testimony and exhibits in
19 advance of the hearing. (*Ibid.*) Thus, the information sought could be obtained in a less
20 burdensome manner and formal discovery was unnecessary. (*Id.*, at p. 3.) The Court of Appeal
21 upheld the Millview Hearing Officer’s ruling. (*Millview County Water Dist. v. State Water*
22 *Resources Control Bd.* (2014) 229 Cal.App.4th 879, 906, as modified on denial of reh’g (Oct. 14,
23 2014), review denied (Dec. 17, 2014).) Similarly, here the Board has a strong basis to issue the
24 requested protective orders, finding that the upcoming hearing process and cross-examination
25 provides an efficient, less burdensome, and less expensive method to obtain the information.

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1 **A. Additional Discovery Following Submission of All Written Testimony and**
2 **Exhibits Was Not Contemplated by the Parties or Hearing Officers.**

3 No allowances were made for the conduct of discovery after the submittal of rebuttal
4 testimony just prior to the hearing. Generally, written rebuttal testimony and exhibits are not
5 required to be submitted prior to the start of the hearing. (See Cal. Code Regs., tit. 23, §
6 648.4(f).) For example, in the enforcement proceeding against WSID, submission of rebuttal
7 testimony was initially scheduled after the commencement of the evidentiary hearing. (See
8 Notice of Public Hearing dated November 10, 2015, at p. 2.) As stated by Hearing Officer
9 Doduc, the purpose of requiring the submittal of written rebuttal testimony and exhibits before
10 presentation at hearing was to improve hearing efficiency. (September 25, 2015 Pre-Hearing
11 Conference Transcript, at p. 45:10-16.) To now allow depositions of rebuttal witnesses does not
12 further efficiency but increases the likelihood of introducing irrelevant evidence and
13 inappropriately expanding the scope of the hearings.

14 Further, no party proposed to conduct discovery after the submission of all written
15 testimony and exhibits. In the prehearing conferences, a number of parties argued for time to
16 conduct extensive discovery prior to the submission of testimony to enable the preparation of
17 their cases-in-chief, the timing of which was opposed by the Prosecution Team. (See e.g.,
18 September 25, 2015 Pre-Hearing Conference Transcript, at pp. 18:24–20:3, 38:11–39:4; October
19 19, 2015 Pre-Hearing Conference Transcript, at pp. 16:7–18:14, 23:7–24:13.) Dan Kelly,
20 attorney for BBID, stated that he anticipated completing all discovery prior to the submittal of
21 BBID’s direct written testimony. (October 19, 2015 Pre-Hearing Conference Transcript, at p.
22 43:8–24.) In fact, continuances of the hearing dates were provided, in part, to specifically allow
23 the parties discovery prior to the submission of direct written testimony. (See October 2, 2015
24 hearing officer’s email addressing procedural issues in the BBID enforcement proceeding, at p. 1;
25 October 23, 2015 procedural ruling in the WSID enforcement proceeding, at p. 2.) Now that all
26 direct testimony has been submitted, as well as written rebuttal to this testimony, the hearing
27 should proceed where all parties can ask questions through cross-examination, making further
28 depositions unnecessary.

1 **B. The Information Sought by Noticing Parties through the Deposition of Paul**
2 **Marshall is Duplicative of Information Already Available in a More**
3 **Convenient, Less Burdensome, and Less Expensive Manner.**

4 As required by hearing procedures, Mr. Marshall will be made available to all parties for
5 cross-examination on his rebuttal testimony at the evidentiary hearing, providing parties with the
6 opportunity to question him concerning the bases for his testimony. Thus, the hearing procedures
7 adopted for the enforcement proceedings fully provide the noticing parties with the ability to gain
8 the information sought regarding Mr. Marshall’s rebuttal testimony in a more convenient, less
9 burdensome, and less expensive manner than noticing a continuing deposition of Mr. Marshall
10 with an extensive request for the production of documents. (Code Civ. Proc. § 2019.030, subd.
11 (a)(1); McGinnis Decl., at ¶¶ 13–14.) As of the date of service of the deposition notices, BBID
12 and CDWA were already in possession of Mr. Marshall’s submitted written rebuttal testimony,
13 documents relied on therein, and documents produced by DWR on December 7, 2015 in response
14 to the original notices of deposition.

15 For these reasons, the information sought by the noticing parties is duplicative of
16 information already available to the parties in a manner more convenient, less burdensome, and
17 less expensive, namely the submission of written rebuttal testimony prior to the evidentiary
18 hearing, the opportunity to cross-examine all rebuttal witnesses during the hearing, and the
19 previous document production. (Code Civ. Proc. § 2019.030, subd. (a)(1).) As Hearing Officer
20 Doduc noted in her November 25, 2016 procedural ruling (p. 5), because the Board’s hearing
21 procedures require disclosure of evidence in advance, allow cross-examination of witnesses not
22 limited to the scope of their direct testimony, and do not strictly follow the rules of evidence
23 applicable to civil actions, the burden and cost of pre-hearing discovery and the likelihood that
24 the same information could be obtained through other, less expensive means, typically outweigh
25 the expected benefit to the discovering party.

26 **C. The Noticed Deposition Constitutes an Undue Burden and Expense on DWR**
27 **that Will Not Lead to the Discovery of Admissible Evidence.**

28 DWR will and hereby does object to the requests for production of documents to the extent
 they seek documents in the possession of DWR and any “representative” of DWR not in the

1 possession or control of the deponent. The deposition of Mr. Marshall and the request for
2 production of documents constitute an undue burden and expense that far outweigh the likelihood
3 that any of the information sought will lead to the discovery of any further admissible evidence.
4 (Code Civ. Proc., §§ 2017.020(a); 2025.420(b).) At this point in the proceedings, all of the direct
5 and rebuttal written testimony and exhibits have been submitted in the consolidated proceedings
6 per the adopted procedural rulings. Nothing in the documents or the deposition testimony sought
7 to be produced will contribute to the admission of additional evidence, in particular for the cases-
8 in-chief. (See Notices of Public Hearing dated August 19, 2015 (BBID) and September 1, 2015
9 (WSID); October 2, 2015 hearing officer's email addressing procedural issues in the BBID
10 enforcement proceeding, at p. 4.)

11 If the noticing parties simply seek information regarding Mr. Marshall's rebuttal testimony,
12 the hearing procedures provide each party with the opportunity to cross-examine rebuttal
13 witnesses. By noticing Mr. Marshall's deposition, however, the noticing parties seek the ability
14 to question Mr. Marshall, for hours or days, in advance of the evidentiary hearings on topics that
15 are beyond the scope of his rebuttal testimony. For example, BBID seeks to question Mr.
16 Marshall not only on his actual rebuttal testimony but on any and all facts, opinions, or
17 documents that more broadly refer to or relate to his testimony. (See McGinnis Decl., at ¶ 14.)

18 In addition, the noticing parties seek the production of documents in addition to those
19 documents submitted as exhibits by DWR and cited by Mr. Marshall in his testimony. The
20 deposition notices request the production of not only documents concerning or relating to Mr.
21 Marshall's rebuttal testimony but documents well beyond the scope of Mr. Marshall's rebuttal
22 testimony, some of which are also beyond the scope of these enforcement actions. They also,
23 inappropriately, seek documents not within the possession or control of Mr. Marshall, including
24 documents in the possession or control of anyone at DWR. (*Ibid.*)

25 In these proceedings, the noticing parties have been afforded the opportunity to review
26 documents previously produced and written rebuttal testimony and exhibits in advance of the
27 hearing, as well as the opportunity to cross-examine rebuttal witnesses at the evidentiary hearing.
28 DWR should not be forced to bear the burden and considerable expense of producing its rebuttal

1 witness for a continuing deposition, just weeks prior to the evidentiary hearings, or the burden
2 and expense of producing extensive documents, after the deadline for submission of evidence in
3 these consolidated proceedings has passed and having already produced documents. The undue
4 burden and expense to DWR far outweighs any benefit to noticing parties merely to prepare for
5 the cross-examination of Mr. Marshall on the limited topics of his rebuttal testimony.

6 Here, the noticing parties seek to exploit the discovery process to not only prepare for the
7 cross-examination of Mr. Marshall regarding his limited rebuttal testimony but also to engage in a
8 fishing expedition for information and documents beyond the scope of Mr. Marshall's rebuttal
9 testimony, all at the undue burden and expense of DWR. For these reasons, good cause exists for
10 the issuance of a protective order prohibiting the deposition and production of documents.

11 **IV. CONCLUSION**

12 The deposition and production of documents are unreasonably duplicative and
13 cumulative, would impose undue burden, and the noticing parties are able to obtain the
14 information from a more convenient, less burdensome, and less expensive source. For these
15 reasons, DWR requests that the Hearing Officers issue a protective order prohibiting the
16 deposition of Mr. Marshall and the accompanying requests for production of documents. If the
17 Hearing Officers are not inclined to prohibit the deposition, DWR respectfully requests that they
18 impose restrictions on the deposition and document requests.

19 Dated: February 29, 2016

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



Robin McGinnis
Office of the Chief Counsel

1 **SERVICE LISTS (VIA E-MAIL)**

2 **PARTIES**
3 **THE WEST SIDE IRRIGATION DISTRICT**
4 **CEASE AND DESIST ORDER HEARING**

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6	<p>PARTIES BYRON-BETHANY IRRIGATION DISTRICT ADMINISTRATIVE CIVIL LIABILITY HEARING</p>	
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