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19 **BEFORE THE**
20 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

21 ENFORCEMENT ACTION ENF01949 -
22 DRAFT CEASE AND DESIST ORDER
23 REGARDING UNAUTHORIZED OR
24 THREATENED UNAUTHORIZED
25 DIVERSIONS OF WATER FROM OLD RIVER
26 IN SAN JOAQUIN

27 In the Matter of ENFORCEMENT ACTION
28 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

**STATE WATER CONTRACTORS'
MOTION TO STRIKE TESTIMONY OF
RICK GILMORE AND MOTION TO
EXCLUDE IRRELEVANT EVIDENCE**

Hearing Date: March 21, 2016

MOTION TO STRIKE TESTIMONY OF RICK GILMORE

I. INTRODUCTION

State Water Contractors ("SWC") object to and hereby move to strike portions of the written testimony of Rick Gilmore (BBID-201) related to water availability (BBID-201, pp. 8:6-9:16) submitted to the State Water Resources Control Board ("Water Board") by Byron-

1 Bethany Irrigation District (“BBID”) in the above referenced enforcement proceeding.¹ SWC
2 objects to the testimony of Mr. Gilmore, the general manager of BBID, on the grounds that
3 Mr. Gilmore is not qualified to provide the testimony submitted on water availability in June
4 2015, and that his testimony constitutes inadmissible hearsay and violates the secondary
5 evidence rule. In particular, Mr. Gilmore provides oral testimony regarding the contents or
6 results of “secret” studies or analyses by a third party, CH2M, which have not been
7 submitted as exhibits in this proceeding. For these reasons, as explained below, Mr.
8 Gilmore’s testimony is not the “sort of evidence on which responsible persons are
9 accustomed to rely in the conduct of serious affairs” and therefore should not be admitted
10 in this proceeding. (Government Code § 11513.) SWC respectfully requests that Water
11 Board grant its motion to strike.

12 **II. STATEMENT OF FACTS**

13 On July 20, 2015, the State Water Resources Control Board issued an
14 Administrative Civil Liability Complaint (“ACL”) to BBID relating to its diversions from the
15 intake channel to the Banks Pumping Plant (formerly Italian Slough) after June 12, 2015.
16 In response to the issued ACL, BBID requested a formal hearing on August 6, 2015.

17 BBID submitted its notice of intent to appear on September 2, 2015 naming Mr.
18 Gilmore as a non-expert witness on the topics of “Water diversions and related issues.” On
19 October 22, 2015, BBID submitted its revised notice of intent to appear continuing to name
20 Mr. Gilmore as a non-expert witness but now on the topic of “Key Issues 1 and 2 Water
21 Availability, BBID operations, diversion and use.”

22 BBID submitted its written testimony (BBID-201), including the testimony of Mr.
23 Gilmore, on January 19, 2016. In his testimony, Mr. Gilmore provides testimony
24 concerning “Water Availability in June 2015” in which he describes and interprets the
25 results of studies and analyses by CH2M that have not been separately submitted as

26 ¹ In light of the requirement that all motions *in limine* be filed as a single document, not to
27 exceed ten-pages in length, State Water Contractors hereby resubmit verbatim their Motion
28 to Strike Testimony of Rick Gilmore consolidated with a Motion to Exclude Irrelevant
Evidence.

1 exhibits to this proceeding. (BBID-201, pp. 8:6-9:16.)

2 **III. ARGUMENT**

3 Under Water Board regulations, all adjudicative proceedings shall be governed by its
4 regulations, select portions of chapter 4.5 of the Administrative Procedure Act
5 (Government Code §§ 11500 et seq.), Evidence Code Sections 801 through 805,
6 pertaining to expert and other opinion testimony, and Government Code Section 11513.
7 (23 C.C.R. § 648.) Government Code Section 11513 provides the provisions and rules of
8 evidence pursuant to which adjudicative hearings before the Water Board are conducted.
9 (23 C.C.R. § 648.5.1.) Section 11513(c) provides that “[a]ny relevant evidence shall be
10 admitted if it is the sort of evidence on which responsible persons are accustomed to rely in
11 the conduct of serious affairs, regardless of the existence of any common law or statutory
12 rule which might make improper the admission of the evidence over objection in civil
13 actions.” However, the “presiding officer has discretion to exclude evidence if its probative
14 value is substantially outweighed by the probability that its admission will necessitate undue
15 consumption of time.” (Government Code § 11513(f).)

16 **A. Mr. Gilmore is not Qualified to Provide Testimony on Water Availability**
17 **in June 2015.**

18 Mr. Gilmore lacks the necessary qualifications to provide testimony on the
19 availability of water in June 2015. Mr. Gilmore is not named as an expert witness. In his
20 testimony, however, Mr. Gilmore provides expert testimony that water was available in
21 June 2015, relying primarily on his interpretation of *undisclosed*, studies and modeling by
22 consultant CH2M. (See BBID-201, pp. 3:15-16, 8:6-9:16.) No studies or reports by CH2M
23 have been submitted as exhibits. Mr. Gilmore testifies as to his interpretation of CH2M
24 alleged technical studies and modeling regarding water availability and quality including an
25 evaluation of the modeling performed in the SWC complaint, and also his own evaluation of
26 the analyses in the SWC complaint. (Id., pp. 8:6-9:16.)

27 Under Evidence Code Section 800(a), lay witness testimony must be rationally
28 based on the perception of the witness, i.e., personal observation of the witness.

1 Generally, lay witnesses may only express opinions on matters within common knowledge
2 or experience. (See Evidence Code §§ 800(a), 801(a); see *Miller v. Los Angeles County*
3 *Flood Control Dist.* (1973) 8 Cal.3d 689, 702.) Expert testimony is required when related to
4 a “subject that is sufficiently beyond the common experience that the opinion of an expert
5 would assist the trier of fact.” (Evidence Code § 801; see also *Miller*, 8 Cal.3d at 702.) A
6 person is qualified to testify as an expert only if he or she has sufficient knowledge, skill,
7 experience, training or education to qualify as an expert on the subject matter of his or her
8 testimony. (Evidence Code § 720.) “The qualifications of an expert must be related to the
9 particular subject upon which he is giving expert testimony.” (*Howard Entertainment Inc. v.*
10 *Kudrow* (2012) 208 Cal.App.4th 1102, 1115 [citation omitted].) “Consequently, the field of
11 expertise must be carefully distinguished and limited, and qualifications on related subject
12 matter are insufficient.” (*Id.* [internal quotations omitted].) As stated in the hearing notice
13 for this proceeding, “[a] party who proposes to offer expert testimony must submit an exhibit
14 containing a statement of the expert witness’s qualifications.”

15 Technical expertise is required to evaluate and interpret water availability and water
16 quality analyses, particularly involving modeling, which is beyond common knowledge and
17 experience. Presumably, for this reason, BBID has also named four witnesses to testify as
18 experts on “Water Availability Key Issues 1 &2” (Nicholas Bonsignore, P.E., Robert
19 Wagner, P.E., Greg Young, P.E., and Susan Paulsen, Ph.D., P.E.). There is no evidence
20 that Mr. Gilmore possesses sufficient expertise qualifying him to direct, interpret or evaluate
21 water quality analyses, including modeling and fingerprint analyses, such as those
22 allegedly performed by CH2M or the technical studies performed by the SWC. Mr.
23 Gilmore’s testimony provides only that he is the general manager of BBID, sits or has sat
24 on many committees and boards, and that prior to his general manager position, he worked
25 in the water operations department of BBID and as a superintendent. (BBID-208, pp. 1:18-
26 2:4.) His testimony does not provide his educational background, technical training, or
27 experience in relevant fields including, but not limited to, hydrology, water quality and
28 modeling techniques. For this reason, Mr. Gilmore’s testimony on water availability in June

1 2015 interpreting undisclosed technical analyses by CH2M, which have not been submitted
2 as an exhibit, as well as his testimony critiquing modeling by the SWC should be stricken
3 on the grounds that Mr. Gilmore is not qualified to provide such testimony.

4 **B. Mr. Gilmore's Testimony As to the Contents of Undisclosed CH2M Hill**
5 **Analyses is Inadmissible Hearsay and Inadmissible Oral Testimony on**
6 **the Contents of a Writing On Which A Reasonable Person Would Not**
7 **Rely**

8 Mr. Gilmore's testimony as to the contents of undisclosed CH2M studies or analyses
9 is not evidence on which a reasonable person would rely. Mr. Gilmore's testimony
10 concerning the CH2M Hill analyses and studies is inadmissible as hearsay and is in
11 violation of the secondary evidence rule concerning evidence to prove the contents of a
12 document. (Evidence Code §§ 1200, 1523.) The studies and analyses by CH2M on which
13 Mr. Gilmore provides conclusory testimony have not been submitted as evidence in this
14 proceeding raising significant and valid concerns regarding the reliability of Mr. Gilmore's
15 testimony, which cannot be sufficiently tested or evaluated in the evidentiary hearing.
16 Under Government Code Section 11513(c), relevant evidence is admitted only if it is the
17 sort of evidence on which responsible persons are accustomed to rely in the conduct of
18 serious affairs. (See e.g., *In the Matter of Administrative Civil Liability For Violations Of*
19 *Licenses 13444 And 13274 Of Lloyd L. Phelps, Jr.; License 13194 Of Joey P. Ratto, Jr.;*
20 *License 13315 Of Ronald D. Conn And Ron Silva, Et Al*, WRO 2004-004, 2004 WL 367585
21 *16 [finding that the testimony, maps and newspaper articles submitted by South Delta
22 Water Agency to show that properties in the Delta were irrigated before 1914 was not the
23 sort of evidence that is persuasive or can be relied upon in the conduct of serious affairs].)

24 SWC objects to Mr. Gilmore's testimony concerning the contents, findings or results
25 of undisclosed studies or analyses by CH2M, as hearsay evidence not subject to an
26 exception. (Evidence Code § 1200.) Under Government Code Section 11513(d), while
27 hearsay evidence may be used in an administrative proceeding for the purpose of
28 supplementing or explaining other evidence, over timely objection, such evidence shall not
be sufficient in itself to support a finding unless it would be admissible over objection in civil

1 actions. Mr. Gilmore's testimony is inadmissible hearsay that cannot by itself support a
2 finding regarding water availability.

3 Moreover, Mr. Gilmore's testimony to the contents of the CH2M analyses or studies
4 is also in violation of the secondary evidence rule (Evidence Code Sections 1500 et seq.),
5 which provides that oral testimony is inadmissible to prove the content of a writing, which
6 itself has not been submitted as evidence. (Evidence Code §§ 1521(b), 1523(a).) The
7 purpose of the secondary evidence rule (like the former best evidence rule) is to "guard
8 against unreliable, misleading, and fraudulent secondary evidence of a writing."
9 (Jefferson's California Evidence Benchbook (4th ed.) § 32.19.)

10 Altogether, Mr. Gilmore has provided testimony concerning water availability in June
11 2015 that he is not qualified to provide (as discussed above in Section A) and in which he
12 relies on the undisclosed analyses and studies of CH2M, rendering his testimony as
13 inadmissible hearsay in violation of the secondary evidence rule. While administrative
14 bodies are not expected to observe meticulously all of the rules of evidence applicable to a
15 court trial, common sense and fair play dictate certain basic requirements for conduct of
16 any hearing at which facts are to be determined. (*Desert Turf Club v. Board of Supervisors*
17 *of Riverside County* (1956) 141 Cal.App.2d 446, 456.)

18 BBID, through Mr. Gilmore's conclusory testimony, is relying on "secret" modeling
19 and analyses of CH2M which have not been produced as exhibits in this proceeding. As
20 such, neither the parties to the proceeding nor the Water Board can evaluate and test,
21 through cross-examination and rebuttal evidence, the analyses performed by CH2M or the
22 interpretation accorded such analyses by Mr. Gilmore.

23 Unsurprisingly, this enforcement proceeding before the Water Board involves highly
24 technical analyses of water availability supported by expert witnesses, all submitted as
25 exhibits, which will be tested through the evidentiary process. No responsible person,
26 however, would rely on conclusory testimony by an unqualified witness purporting to
27 convey and interpret the results of water quality and water availability analyses, particularly
28 involving modeling the complex hydrology of the Delta, which have not been submitted as

1 an exhibit. For these reasons, the testimony of Mr. Gilmore regarding water availability
2 should be excluded under Government Code § 11513(c) as evidence on which no
3 reasonable person would rely in the conduct of serious affairs.

4 **IV. CONCLUSION**

5 For the reasons stated above, State Water Contractors respectfully request that Mr.
6 Gilmore's testimony concerning "Water Availability in June 2015" (BBID-201, pp. 8:6-9:16.)
7 be stricken.

8 **MOTION TO EXCLUDE IRRELEVANT TESTIMONY**

9 SWC hereby move for an *in limine* order, to exclude all evidence of water availability
10 for time periods other than the discrete time periods at issue in the current enforcement
11 proceedings, respectively June 13-June 25, 2015 in the enforcement proceeding against
12 BBID and post-May 1, 2015 in the enforcement proceeding against WSID. (Evidence Code
13 §§ 350, 352; Government Code §§ 11513(c), (f).)

14 **I. INTRODUCTION**

15 The enforcement proceedings against BBID and WSID narrowly focus on allegations
16 of unauthorized diversions during specific time periods in 2015, which follow Water Board
17 determinations of water unavailability. In the proceeding against BBID, the relevant time
18 period is only a 13-day period in June 2015. In the proceeding against WSID, the relevant
19 time period is following the Water Board's notice of water unavailability to WSID dated May
20 1, 2015. Despite the limited time periods at issue, however, parties have submitted, as part
21 of their cases-in-chief, voluminous evidence of water availability outside the relevant time
22 periods, including evidence of historical water availability going back to time periods prior to
23 1917.

24 Such evidence of water availability outside the time periods at issue in the
25 enforcement proceedings are irrelevant to a determination of whether unauthorized
26 diversions of water occurred in 2015. Moreover, even if marginally relevant, the
27 introduction of such evidence at the evidentiary hearing, with resulting cross-examination of
28 witnesses and presentation of rebuttal testimony and evidence, will cause an undue waste

1 of hearing time vastly disproportionate to any purported benefit. For these reasons, SWC
2 respectively submit that all evidence regarding conditions of water availability for time
3 periods other than the discrete time periods at issue should be excluded.

4 **II. STATEMENT OF RELEVANT FACTS**

5 On July 16, 2015, the Water Board issued a draft Cease and Desist Order (“CDO”)
6 to West Side Irrigation District for violations or threatened violations of Water Code Section
7 1052 which prohibits unauthorized diversion or use of water. The draft CDO’s allegations
8 are based, in part, on the Water Board’s determination of the unavailability of water under
9 WSID’s water rights license, for which the Water Board provided notice on May 1, 2015.
10 (draft CDO, ¶ 17.) The draft CDO orders WSID to immediately cease and desist the
11 unauthorized diversions and threatened unauthorized diversions. (draft CDO, p. 6.)

12 On July 20, 2015, the Water Board issued an Administrative Civil Liability Complaint
13 (“ACL”) to BBID relating to its diversions from the Intake Channel to the Banks Pumping
14 Plant (formerly Italian Slough). The ACL alleges unauthorized diversions of water, in
15 violation of Water Code Section 1052, for thirteen days, between June 13, 2015 and June
16 25, 2015, at a time when the Water Board had determined that insufficient water supply
17 was available under BBID’s water right. (ACL, ¶¶ 27-31, 33.)

18 **III. EVIDENCE OF CONDITIONS OF WATER AVAILABILITY OUTSIDE THE**
19 **DISCRETE TIME PERIODS AT ISSUE IN THE CURRENT PROCEEDING ARE**
20 **IRRELEVANT TO DETERMINATIONS OF UNAUTHORIZED DIVERSIONS OF**
21 **WATER IN 2015**

22 The usual purpose of motions *in limine* is to preclude evidence deemed inadmissible
23 by the moving party. (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 669.)
24 “A typical order *in limine* excludes the challenged evidence and directs counsel, parties,
25 and witnesses not to refer to the excluded matters during trial.” (*Id.* at 669-670.) Motions *in*
26 *limine* promote hearing efficiency during the hearing by resolving potentially critical issues
27 at the outset, thereby minimizing disruptions and allowing for the uninterrupted flow of
28 evidence during the hearing. (*See id.*)

Evidence that is not relevant is not admissible. (See Evidence Code §§ 210, 350;

1 *People v. Derello, Inc* (1989) 211 Cal.App.3d 414, 425-26.) Government Code Section
2 11513, which governs adjudicative hearings before the Water Board, similarly restricts the
3 admission of evidence to relevant evidence. (Government Code § 11513(c); 23 C.C.R.
4 § 648.5.1.) “Relevant evidence means evidence ... having any tendency in reason to prove
5 or disprove any disputed fact that is of consequence to the determination of the action.”
6 (Evidence Code § 210.)

7 The central dispute in these enforcement proceedings is the availability of water
8 during specific time periods in the summer of 2015 under BBID’s or WSID’s respective
9 water rights, and whether either district engaged in unauthorized diversions. Both BBID
10 and WSID dispute the Water Board’s determinations of water unavailability. Neither of the
11 two proceedings, however, contain allegations of unauthorized diversions of water prior to
12 May 1, 2015, the date of the notice of water unavailability to WSID, and the earliest date of
13 relevance in the consolidated evidentiary hearing. (draft CDO, ¶ 17.) Accordingly,
14 conditions of water availability prior to May 1, 2015, including historical conditions of water
15 availability, are irrelevant to proving or disproving whether water was or was not available
16 for diversion under the conditions that existed in the late spring or summer of 2015.

17 Despite the discrete time periods at issue in this proceeding, thirteen days in the
18 case of the enforcement proceeding against BBID, parties have submitted, as part of their
19 cases-in-chief, voluminous testimony and evidence regarding water availability for diversion
20 from time periods not only from not only 30 years ago but even 50 plus years ago. (See
21 e.g., WSID-0009 [July 1985 License 1381 Inspection Report]; WSID-00123, pp. 6-7,
22 ¶¶ 6:15-19 [analyzing historical water quality conditions in 1931 and 1939], BBID-294
23 [Deposition of Harvey Banks dated September 23, 1986 regarding water use in 1977];
24 BBID-388, 9:13-12:20 [discussing historical water availability from the pre-1917 time period
25 to the present]; BBID-384, pp. 9-16, 79-87 [discussing historical water availability from the
26 pre-1917 time period to the present and analyzing water availability in 1931].)

27 Including irrelevant evidence in the evidentiary hearing will result in a needless
28 waste of time to offer such evidence, cross-examination regarding the purported value of

1 such evidence, and, if needed, the rebuttal of such evidence, thus impairing hearing
2 efficiency. Even if historical conditions of water availability were marginally probative of
3 water availability conditions that existed after May 1, 2015, such value is substantially
4 outweighed by the probability that its admission will necessitate an undue consumption of
5 time during an evidentiary proceeding concerning conditions in the summer of 2015.
6 (Government Code § 11513(f) [providing the hearing officer with the discretion to exclude
7 evidence if its probative value is substantially outweighed by the probability that its
8 admission will necessitate undue consumption of time].)

9 **IV. CONCLUSION**

10 Because evidence of water availability prior to May 1, 2015 is irrelevant to the
11 narrow issues to be decided in these enforcement proceedings, whether BBID or WSID
12 engaged in unauthorized diversions of water during specific time periods after May 1, 2015,
13 such evidence should be wholly excluded from the evidentiary hearing and parties, counsel
14 and witnesses directed not to refer to such evidence during the hearing.

15 Dated: February 29, 2016

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**SERVICE LIST OF PARTICIPANTS
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