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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' BRIEF IN
OPPOSITION TO MOTIONS IN LIMINE

18 California Department of Water Resources ("DWR") files this brief in opposition to the
19 motions in limine filed by Byron-Bethany Irrigation District ("BBID"), Central Delta and South
20 Delta Water Agencies, The West Side Irrigation District ("WSID"), and Banta-Carbona and
21 Patterson Irrigation Districts (collectively, "Opposing Parties"). The motions misstate the statutes
22 and regulations that apply to these enforcement actions and mischaracterize the rebuttal testimony
submitted by DWR. They should, therefore, be denied.

23 **I. INTRODUCTION**

24 DWR sought to be designated as a party in these enforcement actions to provide
25 information to the State Water Resources Control Board ("Board") and clarify issues related to
26 the operation of the State Water Project ("SWP"). Despite the seemingly limited scope of the
27 enforcement actions and the Board's clear authority to enforce water rights, DWR was concerned
28 that the parties to these enforcement actions would submit evidence outside the scope of the

1 hearing notices and mischaracterize conditions in the Delta and agreements between DWR and
2 BBID. This is, in fact, what has happened. DWR did not submit direct testimony but instead
3 limited its testimony to address misstatements and mischaracterizations advanced by parties
4 opposing the Board’s enforcement actions. Now that DWR has submitted evidence to rebut the
5 testimony submitted by BBID and WSID, the Opposing Parties seek to have it excluded.

6 **II. STATEMENT OF FACTS**

7 On July 16, 2015, the Board issued a draft Cease and Desist Order to WSID pursuant to
8 Water Code Sections 1052 and 1831. In response, WSID requested a formal hearing on August
9 7, 2015. On July 20, 2015, the Board issued an Administrative Civil Liability (“ACL”)
10 Complaint to BBID pursuant to Water Code Sections 1052 and 1055. In response, BBID
11 requested a formal hearing on August 6, 2015.

12 The initial hearing notices issued in these actions did not contemplate submission of written
13 rebuttal evidence prior to the evidentiary hearing. (See Notices of Public Hearing dated August
14 19, 2015 (BBID) and September 1, 2015 and November 10, 2015 (WSID), (collectively,
15 “Hearing Notices”).) On October 2, 2015, via e-mail, the hearing officer in the BBID matter
16 continued the hearing date to March 21, 2016 and set a deadline for submission of written
17 testimony and exhibits for cases-in-chief of January 18, 2016 and a deadline for submission of
18 written rebuttal testimony and exhibits of February 22, 2016.

19 Also in the October 2, 2015 ruling, Hearing Officer Doduc invited the parties to identify
20 and submit concise statements of legal issues that they would like to address in prehearing briefs.
21 DWR submitted a letter explaining its view that the issues the Board should consider at the BBID
22 hearing should be limited to those listed in the ACL Complaint and should not be enlarged, the
23 nature of the alleged violation defines the scope of the hearing, and enlarging the scope of the
24 hearing to include water quality, priority of rights, and Delta hydrodynamics was unnecessary.
25 (See McGinnis Decl., at ¶ 4.)

26 On September 2, 2015, DWR submitted a Notice of Intent to Appear in ENF01951
27 indicating that Paul Marshall would be an expert witness and testify regarding “Effects of Delta
28 Diversions.” (See McGinnis Decl., at ¶ 5.) On October 2, 2015, DWR submitted a Notice of

1 Intent to Appear in ENF01949 indicating that Mr. Marshall would be an expert witness and
2 testify regarding “Effects of Delta Diversions.” (See McGinnis Decl., at ¶ 6.) The Opposing
3 Parties did not contest DWR’s participation in these proceedings.

4 BBID, CDWA, and WSID noticed the deposition of Mr. Marshall for November 24, 2015,
5 which was later cancelled. (See McGinnis Decl., at ¶ 7.) On December 7, 2015, DWR produced
6 documents in response to requests for production of documents included in the notices of
7 deposition. (See McGinnis Decl., at ¶ 8.)

8 On January 19, 2016, DWR submitted an Amended Notice of Intent to Appear indicating
9 that it would participate in the hearing on cross-examination and rebuttal only. (See McGinnis
10 Decl., at ¶ 9.) The Opposing Parties did not contest DWR’s Amended Notice of Intent to Appear.

11 The hearing notices clearly describe the key issues to be addressed at the hearings. Despite
12 these clear descriptions, BBID’s and WSID’s case-in-chief testimony includes expert opinion on
13 such topics as Delta hydrology and hydrodynamics, fingerprinting of water molecules, water
14 quality and supply conditions in 1931, interpretation of agreements between DWR and BBID,
15 litigation in the 1970s, BBID’s attempts to obtain additional water in 2015, water use in the
16 Mountain House community, and salinity conditions in 1931 and 1939. (See Exhibits BBID 201
17 (Gilmore), BBID 388 (Paulsen), and WSID0123 (Burke).) In order to protect its interests and
18 prevent further misinterpretations, DWR submitted its rebuttal testimony and exhibits on
19 February 22, 2016. (See McGinnis Decl., at ¶ 10.)

20 **III. ARGUMENT**

21 The Hearing Notices indicate the hearings will be conducted in accordance with the
22 procedures in California Code of Regulations, title 23, sections 648 to 648.8, 649.6 and 760.
23 (Hearing Notices, Information Concerning Appearance at Water Right Hearings, at p. 1.)
24 According to these regulations, Board hearings shall be governed by the regulations, chapter 4.5
25 of the Administrative Procedure Act (commencing with section 11400 of the Government Code),
26 sections 801 to 805 of the Evidence Code, and section 11513 of the Government Code. (Cal.
27 Code Regs., tit. 23, § 648.) Water Code section 1100 also applies. It allows the Board or any
28 party to take depositions. (Wat. Code, § 1100.) Water Code section 1100 says depositions may

1 be taken in the manner prescribed by law in the Civil Discovery Act. (Code Civ. Proc., §
2 2016.010 et seq.; Wat. Code, § 1100.)

3 **A. DWR’s rebuttal testimony meets the Board’s standards for admissibility.**

4 Applicable statutes and regulations allow DWR to submit its testimony on rebuttal rather
5 than as part of a case-in-chief. Parties to enforcement actions have the right to call and examine
6 witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter, impeach
7 any witness, and *to rebut the evidence against him or her*. (Gov. Code, § 11513, subs. (b).)

8 DWR did not submit a case-in-chief based on the limited scope of the issues described in the
9 Hearing Notices. DWR changed its participation to cross and rebuttal only so that, if necessary, it
10 would be able to explain hydrodynamics in the Delta and operations of the SWP, focusing on
11 conditions in 2015 due to severe drought. DWR is uniquely positioned to inform the Hearing
12 Officers of matters directly related to the operations in the Delta, drought conditions, and the
13 timing of water quality measures monitored and improved with reservoir releases.

14 The Board incorporates the relevancy and admissibility standards from Government Code
15 section 11513. (Cal. Code Regs., tit. 23, § 648.) Any relevant evidence shall be admitted if it is
16 the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious
17 affairs, regardless of the existence of any common law or statutory rule which might make
18 improper the admission of the evidence over objection in civil actions. (Gov. Code, § 11513,
19 subs. (c).) DWR developed its rebuttal testimony in response to evidence submitted by BBID and
20 WSID. DWR submitted its expert opinion on Delta hydrology and hydrodynamics, water quality
21 and supply conditions in 1931, interpretation of agreements between DWR and BBID, and
22 BBID’s attempts to obtain additional water in 2015, because DWR is a reliable source of
23 information on which the Board can rely. As long as rebuttal testimony is largely responsive,
24 when the arguments and technical details included in parties’ cases-in-chief is complex, rebuttal
25 testimony does not have to have a direct correlation to the documents and experts of the other
26 parties, and a document-by-document explanation of the rebuttal submittal is not required.

1 (Board Chair Tam M. Doduc, Final Ruling on Outstanding Motions in the Board’s A-1824 –
2 Rialto Perchlorate Contamination matter, Aug. 11, 2007, at p. 10.¹)

3 The Board incorporates sections 801 to 805 of the Evidence Code to govern expert
4 testimony in the Board’s hearings. (Cal. Code Regs., tit. 23, § 648.) Evidence Code section 801
5 provides:

6 If a witness is testifying as an expert, his testimony in the form of an opinion is
7 limited to such an opinion as is:

8 (a) *Related to a subject that is sufficiently beyond common experience* that the
9 opinion of an expert would assist the trier of fact; and

10 (b) *Based on matter (including his special knowledge, skill, experience, training,
11 and education)* perceived by or personally known to the witness or made known
12 to him at or before the hearing, whether or not admissible, that is of a type that
13 reasonably may be relied upon by an expert in forming an opinion upon the
14 subject to which his testimony relates, unless an expert is precluded by law from
15 using such matter as a basis for his opinion.

16 (Evid. Code, § 801, emphasis added.) DWR’s witnesses are both registered engineers who have
17 each worked for DWR for over twenty years. Mr. Marshall has worked in water management for
18 27 years, including expertise in water supply, flood management, water quality monitoring and
19 analysis, and aquatic habitat uses. He has been the chief of DWR’s Bay-Delta Officer for over 15
20 years. Maureen Sergent has worked for DWR for 24 years in water rights related activities
21 including work with the DWR’s Drought Water Banks, Dry Year Purchase Programs, and Water
22 Transfers. Ms. Sergent has overseen the management of DWR’s agreements with BBID for
23 close to two decades and was directly involved in discussions for the development and drafting of
24 the 2003 settlement agreement with BBID, which BBID included as Exhibit 208. DWR’s
25 rebuttal testimony falls within Section 801’s definition of expert testimony, because Delta
26 hydrology and hydrodynamics, water quality and supply conditions in 1931, interpretation of
27 agreements between DWR and BBID, and BBID’s attempts to obtain additional water in 2015 are
28 topics sufficiently beyond common experience. Also, both of DWR’s witnesses qualify as

29 ¹ Available at:
30 http://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/a1824rialto/a1824_final_ruling_motions_081107.pdf

1 experts based on their special knowledge, skill, experience, training, and education. These
2 enforcement actions would benefit from inclusion of these experts' testimony.

3 **B. The motions in limine include citations to inapplicable law.**

4 The motions in limine include citations to sections of the Code of Civil Procedure and
5 Evidence Code that do not apply to hearings before the Board.² The Board's regulations and the
6 Water Code govern the Board's hearing and discovery procedures. (Hearing Notices,
7 Information Concerning Appearance at Water Right Hearings, at p. 1; see Wat. Code, § 1100;
8 Cal. Code Regs., tit. 23, §§ 648, 648.4.) Since the Opposing Parties joined each other's motions
9 and mixed their arguments based on applicable statutes with arguments based on inapplicable
10 statutes and cases interpreting them, it is not possible to decipher what arguments, if any, are
11 valid. Thus, the motions in limine in their entirety should be disregarded.

12 Neither the Water Code, nor the Board's regulations incorporate all of the Civil Discovery
13 Act. Indeed, "[t]he Board's regulations do not incorporate any provisions of the Civil Discovery
14 Act." (Staff Counsel David Rose, Prosecution Team's Response to MCWD and Hill/Gomes
15 Request For Interrogatories, Admissions and Inspection Demands pursuant to Civil Discovery
16 Act regarding Draft Cease and Desist Order, at p. 1.³) Water Code section 1100 authorizes
17 parties to Board hearings to take despotisions pursuant to the Civil Discovery Act, but it does not
18 incorporate any other sections of the Civil Discovery Act. (Code Civ. Proc., § 2016.010 et seq.;
19 Wat. Code, § 1100; see Hearing Officer Arthur G. Baggett, Jr., Hearing Officer's Ruling on
20 Request for Exemption of Procedural Requirements to Allow for Pre-Hearing Discovery Pursuant
21 to Civil Discorvery Act Filed by MCWD and Hill/Gomes, at p. 2.⁴)

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24 ² Throughout their motions in limine, the Opposing Parties cite these inapplicable statutes and cases
25 interpreting them: Code of Civil Procedure section 2034.230, et seq.; Evidence Code sections 210, 350, 352, 400,
26 401, 702, 720, 800, 1200, 1201; and Government Code section 11511.

27 ³ Available at:

28 http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/millview/docs/prosecution_interrogs120209.pdf.

⁴ Available at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/millview/docs/hearofficerruling120309.pdf

1 The Board's regulations incorporate Government Code section 11513 for the standards of
2 relevance and admissibility that apply in its hearings. (Cal. Code Regs., tit. 23, § 648.) The
3 motions in limine incorrectly cite sections 350 and 352 of the Evidence Code for the standards of
4 relevance and admissibility. In the Board's administrative hearings, "the Evidence Code section
5 352 balancing test is inapplicable." (Board Chair Tam M. Doduc, Aug. 11, 2007 Final Ruling,
6 *supra*, at p. 12.) The Opposing Parties' arguments based on sections of the Evidence Code that
7 do not apply to Board hearings are flawed and should be disregarded.

8 Sections 801 to 805 of the Evidence Code govern expert testimony in the Board's hearings.
9 (Cal. Code Regs., tit. 23, § 648.) The motions in limine cite sections 702 and 720 of the Evidence
10 Code for the standards that apply to layperson and expert testimony, but they are inapplicable
11 here. The motions in limine also include citations to the sections of the Civil Discovery Act that
12 apply to expert testimony, but the Board did not make these sections applicable to its proceedings.
13 The Board only incorporated those sections of the Civil Discovery Act that apply to depositions.
14 (Wat. Code, § 1100.) The arguments in the motions in limine that cite to the wrong statutes
15 should be disregarded.

16 **IV. CONCLUSION**

17 DWR opposes the motions in limine because they misstate the statutes and regulations that
18 apply to these enforcement actions and mischaracterize the rebuttal testimony submitted by
19 DWR. DWR submitted proper expert testimony to rebut BBID's and WSID's cases-in-chief, and
20 it should be considered. DWR therefore requests that the Board deny the motions in limine.

21 Dated: March 4, 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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