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12 CH2M Hill Engineers, Inc., Chandra Chilmakuri and
13 Kyle Winslow

14 BEFORE THE
15 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

16 ENFORCEMENT ACTION ENF01949 –
17 DRAFT CEASE AND DESIST ORDER
18 REGARDING UNAUTHORIZED OR
19 THREATENED UNAUTHORIZED
20 DIVERSIONS OF WATER FROM OLD RIVER
21 IN SAN JOAQUIN

22 In the Matter of ENFORCEMENT ACTION
23 ENF01951 - ADMINISTRATIVE CIVIL
24 LIABILITY COMPLAINT REGARDING
25 UNAUTHORIZED DIVERSION OF WATER
26 FROM THE INTAKE CHANNEL TO THE
27 BANKS PUMPING PLANT (FORMERLY
28 ITALIAN SLOUGH) IN CONTRA COSTA
COUNTY

SWRCB Enforcement Action ENF01951
and ENF01949

NON-PARTIES CH2M HILL
ENGINEERS, INC., CHANDRA
CHILMAKURI AND KYLE
WINSLOW'S FURTHER RESPONSE TO
BBID'S OPPOSITION TO STATE
WATER CONTRACTORS' MOTION TO
QUASH SUBPOENA DUCES TECUM
OR, ALTERNATIVELY, MOTION FOR
A PROTECTIVE ORDER

23 Non-parties CH2M Hill Engineers, Inc. ("CHE"), Chandra Chilmakuri and Kyle Winslow
24 (collectively, "CHE Parties") hereby submit this further response to Byron-Bethany Irrigation
25 District's ("BBID") opposition to State Water Contractors' ("SWC") motion to quash the
26 subpoena served by BBID upon SWC ("SWC Subpoena") or, alternatively, motion for protective
27 order ("March 11 Filing"). The March 11 Filing, submitted by BBID after receiving responses to

28 4827-2015-9023.1

CH2M HILL ENGINEERS, INC., CHANDRA CHILMAKURI AND KYLE WINSLOW'S FURTHER
RESPONSE TO BBID'S OPPOSITION TO STATE WATER CONTRACTORS' MOTION TO QUASH
SUBPOENA DUCES TECUM OR, ALTERNATIVELY, MOTION FOR A PROTECTIVE ORDER

1 the prior version of the opposition, unsuccessfully attempts to correct the deficiencies in the
2 pleading submitted by BBID on March 10, 2016.

3 **I. INTRODUCTION**

4 Although the March 11 Filing is framed as pertaining to a subpoena served on SWC in
5 which the production of documents from SWC is sought, in reality it appears that BBID is
6 seeking a reconsideration of the State Water Resources Control Board's ("Board") March 9, 2016
7 ruling ("March 9 Ruling"). BBID claims that the March 9 Ruling is silent with respect to a
8 subpoena issued to the Custodian of Records of CH2M Hill ("CH2M Subpoena") despite
9 acknowledging in other pleadings that CH2M Engineers, Inc. had moved to quash said subpoena.
10 BBID also contends it is entitled to documents regarding work performed by Mr. Winslow for
11 BBID. For the reasons set forth below, and in CHE Parties' Motion to Quash Subpoenas filed on
12 March 4, 2016 ("CHE Parties Motion"), BBID's contentions are patently incorrect. Accordingly,
13 CHE Parties submit that SWC's motion to quash the SWC Subpoena should be granted.
14 Alternatively, CHE Parties request a determination that any ruling regarding SWC's Subpoena is
15 limited to that subpoena, and CH2M Parties are not required to produce any documents or
16 otherwise.

17 **II. RELEVANT FACTUAL BACKGROUND**

18 In or about June 2015, SWC and the Metropolitan Water District of Southern California
19 ("MWD") retained CHE as a technical consultant for the purpose of analyzing conditions in the
20 California Delta in response to pending and threatened disputes, including disputes involving
21 BBID. (See ¶ 2 of the Declaration of Burns Logan ("Logan Decl.") annexed to the CHE Parties
22 Motion.) In connection therewith, on or about June 5, 2015, CHE prepared a draft technical
23 memorandum for SWC based in part on confidential and proprietary information provided by
24 SWC and MWD (the "Memorandum"). (Logan Decl. ¶ 3.) CHE later agreed to provide
25 consulting services to BBID and inadvertently disclosed SWC's and MWD's information (the
26 "Report"). When CHE realized what had happened, CHE immediately ceased providing services
27 to BBID. (Logan Decl. ¶ 4.)

1 Upon information and belief, on July 20, 2015, the Board filed an Administrative Civil
2 Liability Complaint (the “Complaint”) relating to BBID’s alleged diversions from the intake
3 channel to the Banks Pumping Plant (formerly Italian Slough) after June 12, 2015 (the
4 “Proceeding”). In response to the Complaint, BBID requested a formal hearing. (See SWC’s
5 Motion to Quash Subpoenas Duces Tecum submitted on March 2, 2016 (“SWC Motion”), p. 2,
6 lines 7-10.)

7 Upon information and belief, on January 19, 2016, written testimony and exhibits were
8 submitted to the Board in connection with both the prosecution’s and BBID’s cases-in-chief. On
9 January 25, 2016, the parties, including SWC, submitted rebuttal testimony. In connection with
10 its rebuttal, SWC submitted the written testimony of Paul Hutton. (See Exhibit SWC0001 to
11 SWC’s rebuttal.) The hearing in the enforcement proceeding is scheduled for March 21, 2016.
12 (SWC Motion, p. 2, lines 11-16.)

13 In the course of the Proceeding, BBID issued deposition notices and subpoenas duces
14 tecum to Chandra Chilmakuri and Kyle Winslow, as agents for CH2M Hill. (See Exhibits 1 and 2
15 to the Declaration of Yasmin Coffey in support of CHE Parties’ Motion.) BBID also issued a
16 subpoena duces tecum to the Custodian of Records for CH2M Hill. (CHE Parties Motion, Exhibit
17 3.) (The aforesaid subpoenas to Chilmakuri, Winslow and CH2M Hill are hereinafter collectively
18 referred to as the “Subpoenas.”) Upon information and belief, on or about March 1, 2016, BBID
19 issued the SWC Subpoena in which BBID seeks, *inter alia*, documents relating to (a) the
20 Memorandum and CH2M Hill’s work on the Memorandum, and (b) CH2M Hill’s work for
21 BBID. (See SWC Subpoena; Exhibit C to the Barfield Declaration submitted in support of
22 BBID’s March 11 Filing.)

23 On March 2, 2016, SWC interposed the SWC Motion seeking to quash the subpoenas
24 issued to Messrs. Chilmakuri and Winslow. (See SWC Motion, pp. 1:1-8 and 2:21-23.) On March
25 4, 2016, the CHE Parties moved to quash *all* of the Subpoenas on the grounds that they are
26 overbroad and unduly burdensome and seek information that is irrelevant and not reasonably
27 calculated to lead to the discovery of admissible evidence; the information sought is protected by

1 the attorney work product doctrine; and the subpoenas contain a number of procedural defects.
2 (*See* CHE Parties Motion, 2:3-18.) On March 8, 2016, BBID served a “consolidated” opposition
3 to both SWC’s and the CHE Parties’ Motions (“BBID Opposition”). (BBID Opposition, 8:4-9.)
4 The BBID Opposition and the supporting attorney declaration acknowledge that BBID was aware
5 that the CHE Parties were moving to quash the CH2M Subpoena (BBID Opposition, 4:1-2).
6 Thereafter, the Board issued its March 9 Ruling, vacating the Subpoenas in their entirety. (*See*
7 March 9 Ruling, p. 2.)

8 **III. ARGUMENT**

9 **A. THE MARCH 9 RULING VACATED THE CH2M HILL SUBPOENA**

10 In the March 11 Filing, BBID alleges “SWRCB did not comment on the March 3, 2016
11 subpoena served [on] the CH2M Hill Custodian of Records.” (March 11 Filing, 4:22-23.) In
12 doing so, BBID apparently misconstrues the March 9 Ruling as solely vacating the subpoenas
13 issued to Mr. Chilmakuri and Mr. Winslow. The CHE Parties Motion, which was granted by the
14 Board, is explicitly directed at *all* of the Subpoenas. (CHE Motion, 2:3-18.) Contrary to the
15 assertions made in BBID’s March 11 Filing, the Board vacated the Subpoenas issued to Messrs.
16 Chilmakuri and Winslow *and CH2M Hill*. In this regard, the March 9 Ruling provides, in relevant
17 part:

18 “On March 3, 2016, BBID served amended subpoenas duces
19 tecum on Mr. Winslow, Mr. Chilmakuri, and the custodian of
20 records for CH2M Hill.”

21 * * *

22 “[W]e hereby **vacate**...the subpoenas served on Mr. Winslow, Mr.
23 Chilmakuri, and CH2M Hill dated February 24, 2016.”¹¹

24 (March 9 Ruling, pp. 1-2.)

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26 ¹¹ While the Board indicates in this sentence that the Subpoenas were issued on February 24,
27 2016, a reading of the March 9 Ruling as a whole clearly reveals that the Board intended to vacate
the CH2M Hill Subpoena issued on March 3, 2016.

1 Based on the foregoing, BBID’s contention that the March 9 Ruling did not operate to
2 vacate the CH2M Hill Subpoena is incorrect and should be discounted.

3 **B. BBID IS NOT ENTITLED TO DISCOVERY OF**
4 **DOCUMENTS PREPARED BY MR. WINSLOW**

5 BBID also alleges that the attorney work product privilege does not preclude BBID from
6 discovery of Mr. Winslow’s work for BBID. (March 11 Filing, 6:6-8.) It is axiomatic that the
7 work product of an attorney is not discoverable. (Code Civ. Proc. § 2018.030.) The attorney work
8 product doctrine “protects the mental processes of the attorney, providing a privileged area within
9 which he can analyze and prepare his client’s case.” (Fireman’s Fund Ins. Co. v. Superior Ct.
10 (2011) 196 Cal.App.4th 1263.) Work product subject to absolute protection includes writings that
11 reflect an attorney’s impressions, conclusions, opinions, legal research or theories. (Code of Civil
12 Proc. § 2018.030.) Other attorney work product, including the findings, opinions, and reports of
13 consulting or advisory experts, is not discoverable unless the denial of discovery will unfairly
14 prejudice the discovering party in preparing its claim or defense or will result in an injustice. (Id.;
15 National Steel Prods. v. Superior Ct. 164 Cal. App.3d 476, 487.)

16 CHE was retained by in-house counsel for SWC and MWD as a technical consultant for
17 the purpose of analyzing conditions in the California Delta in response to pending and threatened
18 disputes, including disputes involving BBID. (Logan Decl. ¶ 2.) CHE’s work for SWC and MWD
19 is protected by the attorney work product doctrine, which BBID is attempting to circumvent by its
20 service of the SWC Subpoena. Indeed, the SWC Subpoena seeks documents related to the
21 Memorandum that would encompass findings and opinions of CHE. In its March 11 Filing, BBID
22 frames its request as a request for work performed by Mr. Winslow for BBID. In performing
23 work for BBID, however, CHE inadvertently disclosed SWC’s and MWD’s confidential and
24 proprietary information. When CHE realized what had happened, CHE immediately ceased
25 providing services to BBID. (Logan Decl. ¶ 4.) Thus, the documents BBID now seeks by virtue of
26 the SWC Subpoena constitute protected work product. These documents are not discoverable.

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1 As set forth in the March 9 Ruling, BBID will not be unfairly prejudiced in preparing its
2 claim in this Proceeding by the denial of the requested discovery. All cases-in-chief and rebuttal
3 testimony have already been submitted. (March 9 Ruling, p. 2.) What remains is Dr. Hutton's
4 cross-examination, which is limited to the scope of his rebuttal testimony. BBID already has in its
5 possession Dr. Hutton's written rebuttal testimony and the documents upon which his testimony
6 is based, all of which was submitted well in advance of the upcoming evidentiary hearing. (*Id.*)

7 In addition to the foregoing, the Subpoenas seek documents that contain trade secret and
8 propriety information and are owned by SWR and MWD. Thus, BBID must demonstrate that the
9 information sought is necessary to prove its case. However, as set forth above, BBID has all of
10 the information it needs to prepare its cross-examination of Dr. Hutton, and there is no reason
11 why BBID should be permitted to obtain confidential and proprietary information.

12 **IV. CONCLUSION**

13 For the foregoing reasons, CHE Parties submit that SWC's motion to quash the SWC
14 Subpoena should be granted.

15
16 Dated: March 13, 2016

KUTAK ROCK LLP

17
18 By: 

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