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8
9 BEFORE THE
10 STATE WATER RESOURCES CONTROL BOARD
11

12 **In the Matter of Water Right**
13 **Application No. 30166 of James J.**
14 **Hill, III**

APPLICANT JAMES J. HILL, III'S
OPPOSITION TO THE DEPARTMENT
OF FISH AND GAME'S MOTION TO
QUASH AND PROTECTIVE ORDER
AND NON-OPPOSITION TO EX PARTE
APPLICATION FOR AN ORDER
SHORTENING TIME

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18 **I. INTRODUCTION AND FACTS**

19 The Department of Fish and Game ("DFG") seeks to quash three deposition
20 notices of former and current staff scientists who possess technical information related to the
21 Water Right Application ("Application") of Applicant James J. Hill, III. Additionally, DFG filed
22 an ex parte application for the matter to be heard on shortened time. The Applicant does not
23 oppose the request to have the issue determined on an expedited basis. However, the Applicant
24 files this opposition to DFG's attempt to further avoid their duty to produce witnesses and
25 documents central to their protest against the Application. The deposition notices and
26 accompanying document requests were made to ensure a fair hearing and effective review of
27 studies and analyses challenging DFG's reports by the Board members. The Applicant should be
28 afforded the opportunity to examine the scientific methodologies of the DFG scientists noticed for

1 deposition and receive all documents utilized by them in preparation of their written testimonies
2 or opinions prior to the hearing. Importantly, pre-hearing depositions will ensure focused and
3 efficient cross-examination, eliminating the potential for “fishing expeditions” during the hearing.

4 Under Water Code section 1100, a party to a proceeding before the Board may
5 take the depositions of witnesses related to a matter before the Board in accordance with the Code
6 of Civil Procedure (“C.C.P.”). The C.C.P. sets forth procedure for taking witness depositions,
7 including expert witness depositions. Section 2034.210 specifically governs the exchange of
8 expert witness reports and writings. It allows any party to demand the production of writings by
9 the expert, including any writings made in the course of preparing the expert’s opinion. The
10 exchange of written testimonies by the experts in this matter is analogous to an exchange under
11 section 2034.210, and is thus the basis for requesting all documents utilized by the expert in
12 making their written testimony, including draft reports.

13 While discovery in an administrative matter is permitted under the Code of Civil
14 Procedure, it is governed by the Agency’s discretion. It has been this Board’s practice to disallow
15 any depositions in contested matters prior to the exchange of written testimony for precisely the
16 reason given by DFG in seeking a protective order: the discovery would be duplicative,
17 cumulative and obtained from another source. However, it has also been this Board’s practice to
18 permit depositions in contested matters after the exchange of written testimonies and exhibits,
19 should the party noticing the deposition conclude the depositions were necessary. Under the short
20 timelines in this matter, it would be almost impossible to notice depositions after the exchange of
21 testimony.

22 On March 1, 2011, this Board served the operative Revised Service List (“Service
23 List”) on all parties. The Service List designated May 19, 2011, as the date for the interested
24 parties to exchange written testimonies and exhibits. The Service List also contained the
25 notification that the hearing on the Application would commence on June 16, 2011. Under a
26 strict interpretation of the Code of Civil Procedure, scheduling the hearing date 28 days after the
27 exchange of written testimonies effectively deprives the Applicant of the opportunity to conduct
28 percipient witness depositions, an act that is undoubtedly prejudicial; an act that can be cured by

1 the Board in the exercise of it's discretion to permit the percipient witness deposition.

2 Given the short time period between the exchange of written testimony and the
3 cutoff for expert depositions – only 8 business days, and the inevitable vacation schedules of the
4 experts, the Applicant noticed the depositions so they could be taken within the 8 day timeframe,
5 if necessary. If the Applicant had waited until after the written testimony was exchanged to
6 notice the depositions, the window for taking the depositions would have shrunk to two business
7 days due to the 10 day notice requirement under C.C.P. 2025.270. In other words, the Applicant
8 would have two days to read the written testimonies of the experts and notice their depositions.
9 The deposition notices were served on May 11 and 14, well within the 10 day notice requirement
10 under C.C.P. § 2025.270. (See the Declaration of Danielle Teeters, counsel for the Applicant,
11 filed in support herewith, ¶¶ 7&8, Exhibits F and G.) An amended proof of service and service
12 list was filed with the Board and served on all interested parties on May 14, 2011. (Ibid.)

13 Further, while the Applicant has made Public Records Act (“PRA”) requests to
14 the Department of Fish and Game for documents related to their protest, the Department has been
15 less than forthcoming with responsive documents. By way of example, a request made in
16 December 2010 sought documents related to DFG’s “wetted perimeter analysis.” (Id., at ¶ 2,
17 Exhibit A.) While some documents were provided, DFG has knowingly withheld critical
18 documents related to data collection sites that were used in the study/analysis. At this late date,
19 on Saturday, May 14, 2011, DFG’s counsel send an email with what were reportedly the GPS
20 coordinates for data collection sites related to the study notwithstanding the fact that the
21 collection sites have been known to DFG since 1994 when the data was collected by deponent
22 Robert Titus. However, not all the files in the email were accessible. (Id., ¶ 6, Exhibit E.) DFG
23 correctly states that many requests for the data collection sites have been made; but, DFG does
24 not state why so many requests (at least 4) for the same information had to be made – DFG’s
25 continued refusal to provide the 17 year old information. (Id., at ¶ 5, Exhibits D.) Because DFG
26 was less than forthcoming with documents responsive to the Public Records Act requests, the
27 Applicant was also left no choice but to seek all documents related to the scientists’ reports and
28 opinions via a request included with the deposition notices to ensure a clean record and also

1 ensure DFG isn't relying on documents they failed to produce under the PRA request. To ensure
2 a fair hearing, the requests, as well as the depositions should go forward and DFG's motion for a
3 protective order and to quash the discovery should be denied.

4 II. LAW AND ARGUMENT

5 California Water Code reads:

6 The board or any party to a proceeding before it may, in any
7 investigation or hearing, cause the deposition of witnesses residing
8 within or without the state to be taken in the manner prescribed by
9 law for depositions in civil actions in the superior courts of this
state under Title 4 (commencing with Section 2016.010) of Part 4
of the Code of Civil Procedure.

10 California Code of Civil Procedure section 2025.010 permits any party to an action to
11 obtain discovery by taking the deposition of any person, including another party. C.C.P. §
12 2025.270 requires 10 days notice for the deposition. Under C.C.P. § 2034.030 a party may
13 conduct the deposition of a designated expert as late as 15 days before the date of trial.

14 On May 11, and May 14, the Applicant noticed the depositions of three current and former
15 DFG scientists. Two of the scientists were designated as experts by DFG in their Notice of Intent
16 to Appear. One scientist, Debra Hillyard, was not so designated, however, by the Department's
17 own admission, attended settlement negotiations and provided opinions as a staff scientist in this
18 matter. (See Department of Fish and Game's Ex Parte Application for Order Shortening Time for
19 Notice and Service of Motion to Quash Notices of Depositions of Kit Custis, Deborah Hillyard,
20 and Rob Titus and for Protective Order to Limit Discovery, p. 6:12-14.) Obviously, attending
21 settlement negotiations is not the same as providing sworn testimony; and further, DFG's failure
22 to list Ms Hillyard as a witness for its case in chief does not preclude her from being called as a
23 rebuttal witness.

24 Although the Code of Civil Procedure sets forth the process for noticing depositions,
25 agency discretion as to pre-hearing discovery is the rule rather than the exception. "The extent of
26 discovery that a party engaged in an administrative hearing is entitled to is primarily determined
27 by the particular agency.... [Citation]. Nevertheless, because the due process clause ensures that
28 an administrative proceeding will be conducted fairly, 'discovery must be granted if in the

1 particular situation a refusal to do so would so prejudice a party as to deny him due process.’ ”
2 [Citation]. (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 302; see *Petrus v. State Dept. of*
3 *Motor Vehicles* 2011 WL 1348356, 2 (2011).) In the recent *Petrus* case, the Fourth District of the
4 California Court of Appeal found that due process requires that a party be given a meaningful
5 opportunity to present his case. It was required that an examination of the blood test results be
6 made because that was an element the agency had to prove at the hearing. (*Petrus, supra*, p. 2)

7 Here, DFG has an unsettled protest against the Applicant’s Water Right Application. In
8 supporting that protest, many studies and reports were completed by DFG scientists. In order to
9 prevail on their protest, DFG must prove that the analysis from those reports should be adopted
10 by the Board thereby limiting diversions in accordance with the DFG findings. For example,
11 DFG seeks to limit the amount of pumping the Applicant does from the underground aquifer.
12 DFG has produced no studies or reports thus far that shows that pumping from the underground
13 aquifer has any effect whatsoever on the surface flow of the Big Sur River. However, DFG has
14 notified the Applicant that it will utilize a “wetted perimeter” study/analysis at the hearing as
15 support for minimum in-stream flows. As previously mentioned, some data from the study is
16 only now being produced by DFG, notwithstanding the fact that it has had the data since 1994
17 and numerous requests for the data were made over the course of the last five months. From the
18 case law cited, as the “wetted perimeter analysis/study” is part of DFG’s support for its protest,
19 due process requires that the Applicant be given a meaningful opportunity to fully examine the
20 scientists who conducted the study and analysis pertaining to it prior to the hearing and defend
21 against it and any other reports/studies DFG proffers in support of their protest.

22 This Board has the discretion to permit depositions and discovery prior to the hearing, and
23 in fact has exercised that discretion to allow depositions in several matters. Board practice
24 dictates that depositions are not permitted by this Board until after the exchange of written
25 testimony. For example, in the water rights matter Cuchuma Project Hearing – Applications
26 11331 and 11332 the Cachuma Conservation Release Board (“CCRB”) and the Santa Ynez River
27 Water Conservation District, Improvement District No. 1 (“SYRWCD”) noticed the depositions
28 of CalTrout’s expert witnesses prior to the exchange of written testimony and exhibits. The

1 Board granted a protective order filed by CalTrout to prevent the depositions from moving
2 forward. CCRB and SYRWCD sought to depose CalTrout's witnesses on the subject of their
3 direct testimony, and to obtain documents that related to the subject of their testimony. The
4 Board found that because the depositions were noticed before the exchange of written testimony
5 and exhibits, CCRB and SYRWCD's requests for deposition were premature as the information
6 that could be obtained in deposition was obtainable from a more convenient, less burdensome,
7 and less expensive source, and further that conducting the depositions before the exchange date
8 was unreasonably cumulative or duplicative. The Board granted the protective order but also
9 stated in the order that if CCRB and SYRWCD concluded that the depositions were still
10 necessary after reviewing CalTrout's written testimony and exhibits, they could reschedule the
11 depositions.

12 In the matter concerning a cease and desist order against Millview County Water District,
13 a similar outcome was reached. In that matter, the District's counsel sought pre-hearing
14 discovery under the Civil Discovery Act. The Board confirmed that the Water Board's prior
15 approval was not required for discovery pursuant to Water Code section 1100, but went on to
16 caution that any protective order regarding premature discovery would probably be granted as any
17 discovery requested prior to the exchange of written testimony and exhibits was burdensome, and
18 could be obtained via a less expensive source.

19 We are not aware of any instance in which a request to take depositions has been denied
20 and DFG offers no example.

21 Finally, one of the issues raised by DFG is that their protective order should be granted
22 because the agency has limited financial and personnel resources. However, DFG bears the
23 burden of establishing good cause for relief from depositions under the Code of Civil Procedure
24 on the basis of financial hardship. Respondents bear the burden of establishing good cause for
25 such relief:

26 Generally, a deponent seeking a protective order will be required to
27 show that the burden, expense, or intrusiveness involved in . . . [the
28 discovery procedure] *clearly outweighs* the likelihood that the
information sought will lead to the discovery of admissible
evidence.


1 (*Emerson Elec. Co. v. Superior Court (Grayson)* (1997) 16 Cal.4th 1101, 1110, italics added.)

2 DFG has made no showing of burden, expense or intrusiveness. In fact, the depositions
3 are currently noticed for the offices of the law firm Kronick Moskovitz, Tiedemann & Girard
4 located less than eight blocks from DFG headquarters. DFG provides no showing that the
5 deponents would be required to travel a great distance. Further, the party taking the deposition is
6 expected to pay the expert's "reasonable and customary" fees for any time spent at the deposition.
7 (C.C.P. 2034.430(b).) DFG has provided no support for limiting the discovery on this basis.

8 In sum, it is clear that the Applicant has a right to defend his application, and that
9 necessarily includes taking pre-hearing depositions of noticed experts and percipient witnesses
10 with technical information regarding protests against the application. Given the law and
11 argument made above, this Board should deny DFG's motion for protective order and motion to
12 quash and permit the depositions to move forward.

13
14 Dated: May 18, 2011

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

16
17 By: 
18 Janet K. Goldsmith
19 Danielle R. Teeters
20 Attorneys for James J. Hill

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1 **PROOF OF SERVICE**

2 I, Sherry Ramirez, declare:

3 I am a citizen of the United States and employed in Sacramento County, California. I am
4 over the age of eighteen years and not a party to the within-entitled action. My business address
5 is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On May 18, 2011, I served a
6 copy of the within document(s):

7 **APPLICANT JAMES J. HILL, III'S OPPOSITION TO THE DEPARTMENT OF
8 FISH AND GAME'S MOTION TO QUASH AND PROTECTIVE ORDER AND NON-
9 OPPOSITION TO EX PARTE APPLICATION FOR AN ORDER SHORTENING
10 TIME**

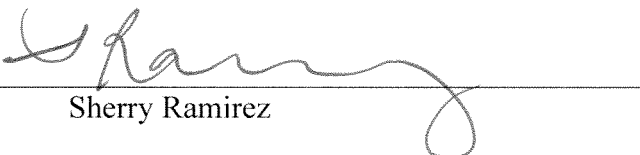
- 11 by transmitting via facsimile the document(s) listed above to the fax number(s) set
12 forth below on this date before 5:00 p.m.
- 13 by placing the document(s) listed above in a sealed envelope with postage thereon
14 fully prepaid, the United States mail at Sacramento, California addressed as set
15 forth below.
- 16 by placing the document(s) listed above in a sealed Delivery Service envelope and
17 affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery
18 Service agent for delivery.
- 19 by transmitting via e-mail or electronic transmission the document(s) listed above
20 to the person(s) at the e-mail address(es) set forth below.

21 *SEE ATTACHED*

22 I am readily familiar with the firm's practice of collection and processing correspondence
23 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
24 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
25 motion of the party served, service is presumed invalid if postal cancellation date or postage
26 meter date is more than one day after date of deposit for mailing in affidavit.

27 I declare under penalty of perjury under the laws of the State of California that the above
28 is true and correct.

Executed on May 18, 2011, at Sacramento, California.


Sherry Ramirez

SERVICE LIST

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