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19 **BEFORE THE**

20 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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

**STATE WATER CONTRACTORS'  
MOTION TO STRIKE TESTIMONY  
OF RICK GILMORE**

Hearing Date: March 21, 2016

**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-Bethany Irrigation District ("BBID") in the above referenced enforcement proceeding. SWC objects to the testimony of Mr. Gilmore, the general manager of BBID, on the grounds that Mr. Gilmore is not qualified to provide the testimony submitted on water availability in June 2015, and that his testimony constitutes inadmissible hearsay and violates the secondary evidence rule. In particular, Mr.

1 Gilmore provides oral testimony regarding the contents or results of “secret” studies or analyses by a  
2 third party, CH2M, which have not been submitted as exhibits in this proceeding. For these reasons,  
3 as explained below, Mr. Gilmore’s testimony is not the “sort of evidence on which responsible  
4 persons are accustomed to rely in the conduct of serious affairs” and therefore should not be  
5 admitted in this proceeding. (Government Code § 11513.) SWC respectfully requests that Water  
6 Board grant its motion to strike.

## 7 **II. STATEMENT OF FACTS**

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

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

17 BBID submitted its written testimony (BBID-201), including the testimony of Mr. Gilmore,  
18 on January 19, 2016. In his testimony, Mr. Gilmore provides testimony concerning “Water  
19 Availability in June 2015” in which he describes and interprets the results of studies and analyses by  
20 CH2M that have not been separately submitted as exhibits to this proceeding. (BBID-201, pp. 8:6-  
21 9:16.)

## 22 **III. ARGUMENT**

23 Under Water Board regulations, all adjudicative proceedings shall be governed by its  
24 regulations, select portions of chapter 4.5 of the Administrative Procedure Act (Government Code  
25 §§ 11500 et seq.), Evidence Code Sections 801 through 805, pertaining to expert and other opinion  
26 testimony, and Government Code Section 11513. (23 C.C.R. § 648.) Government Code Section  
27 11513 provides the provisions and rules of evidence pursuant to which adjudicative hearings before  
28 the Water Board are conducted. (23 C.C.R. § 648.5.1.) Section 11513(c) provides that “[a]ny

1 relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are  
2 accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law  
3 or statutory rule which might make improper the admission of the evidence over objection in civil  
4 actions.” However, the “presiding officer has discretion to exclude evidence if its probative value is  
5 substantially outweighed by the probability that its admission will necessitate undue consumption of  
6 time.” (Government Code § 11513(f).)

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

9 Mr. Gilmore lacks the necessary qualifications to provide testimony on the availability of  
10 water in June 2015. Mr. Gilmore is not named as an expert witness. In his testimony, however, Mr.  
11 Gilmore provides expert testimony that water was available in June 2015, relying primarily on his  
12 interpretation of *undisclosed*, studies and modeling by consultant CH2M. (See BBID-201, pp. 3:15-  
13 16, 8:6-9:16.) No studies or reports by CH2M have been submitted as exhibits. Mr. Gilmore  
14 testifies as to his interpretation of CH2M alleged technical studies and modeling regarding water  
15 availability and quality including an evaluation of the modeling performed in the SWC complaint,  
16 and also his own evaluation of the analyses in the SWC complaint. (Id., pp. 8:6-9:16.)

17 Under Evidence Code Section 800(a), lay witness testimony must be rationally based on the  
18 perception of the witness, i.e., personal observation of the witness. Generally, lay witnesses may  
19 only express opinions on matters within common knowledge or experience. (See Evidence Code  
20 §§ 800(a), 801(a); see *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 702.)  
21 Expert testimony is required when related to a “subject that is sufficiently beyond the common  
22 experience that the opinion of an expert would assist the trier of fact.” (Evidence Code § 801; see  
23 *also Miller*, 8 Cal.3d at 702.) A person is qualified to testify as an expert only if he or she has  
24 sufficient knowledge, skill, experience, training or education to qualify as an expert on the subject  
25 matter of his or her testimony. (Evidence Code § 720.) “The qualifications of an expert must be  
26 related to the particular subject upon which he is giving expert testimony.” (*Howard Entertainment*  
27 *Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1115 [citation omitted].) “Consequently, the field of  
28 expertise must be carefully distinguished and limited, and qualifications on related subject matter are

1 insufficient.” (*Id.* [internal quotations omitted].) As stated in the hearing notice for this proceeding,  
2 “[a] party who proposes to offer expert testimony must submit an exhibit containing a statement of  
3 the expert witness’s qualifications.”

4 Technical expertise is required to evaluate and interpret water availability and water quality  
5 analyses, particularly involving modeling, which is beyond common knowledge and experience.  
6 Presumably, for this reason, BBID has also named four witnesses to testify as experts on “Water  
7 Availability Key Issues 1 &2” (Nicholas Bonsignore, P.E., Robert Wagner, P.E., Greg Young, P.E.,  
8 and Susan Paulsen, Ph.D., P.E.). There is no evidence that Mr. Gilmore possesses sufficient  
9 expertise qualifying him to direct, interpret or evaluate water quality analyses, including modeling  
10 and fingerprint analyses, such as those allegedly performed by CH2M or the technical studies  
11 performed by the SWC. Mr. Gilmore’s testimony provides only that he is the general manager of  
12 BBID, sits or has sat on many committees and boards, and that prior to his general manager position,  
13 he worked in the water operations department of BBID and as a superintendent. (BBID-208, pp.  
14 1:18-2:4.) His testimony does not provide his educational background, technical training, or  
15 experience in relevant fields including, but not limited to, hydrology, water quality and modeling  
16 techniques. For this reason, Mr. Gilmore’s testimony on water availability in June 2015 interpreting  
17 undisclosed technical analyses by CH2M, which have not been submitted as an exhibit, as well as  
18 his testimony critiquing modeling by the SWC should be stricken on the grounds that Mr. Gilmore is  
19 not qualified to provide such testimony.

20 **B. Mr. Gilmore’s Testimony As to the Contents of Undisclosed CH2M Hill**  
21 **Analyses is Inadmissible Hearsay and Inadmissible Oral Testimony on the**  
22 **Contents of a Writing On Which A Reasonable Person Would Not Rely**

23 Mr. Gilmore’s testimony as to the contents of undisclosed CH2M studies or analyses is not  
24 evidence on which a reasonable person would rely. Mr. Gilmore’s testimony concerning the CH2M  
25 Hill analyses and studies is inadmissible as hearsay and is in violation of the secondary evidence rule  
26 concerning evidence to prove the contents of a document. (Evidence Code §§ 1200, 1523.) The  
27 studies and analyses by CH2M on which Mr. Gilmore provides conclusory testimony have not been  
28 submitted as evidence in this proceeding raising significant and valid concerns regarding the  
reliability of Mr. Gilmore’s testimony, which cannot be sufficiently tested or evaluated in the

1 evidentiary hearing. Under Government Code Section 11513(c), relevant evidence is admitted only  
2 if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of  
3 serious affairs. (See e.g., *In the Matter of Administrative Civil Liability For Violations Of Licenses*  
4 *13444 And 13274 Of Lloyd L. Phelps, Jr.; License 13194 Of Joey P. Ratto, Jr.; License 13315 Of*  
5 *Ronald D. Conn And Ron Silva, Et Al*, WRO 2004-004, 2004 WL 367585 \*16 [finding that the  
6 testimony, maps and newspaper articles submitted by South Delta Water Agency to show that  
7 properties in the Delta were irrigated before 1914 was not the sort of evidence that is persuasive or  
8 can be relied upon in the conduct of serious affairs].)

9 SWC objects to Mr. Gilmore's testimony concerning the contents, findings or results of  
10 undisclosed studies or analyses by CH2M, as hearsay evidence not subject to an exception.  
11 (Evidence Code § 1200.) Under Government Code Section 11513(d), while hearsay evidence may  
12 be used in an administrative proceeding for the purpose of supplementing or explaining other  
13 evidence, over timely objection, such evidence shall not be sufficient in itself to support a finding  
14 unless it would be admissible over objection in civil actions. Mr. Gilmore's testimony is  
15 inadmissible hearsay that cannot by itself support a finding regarding water availability.

16 Moreover, Mr. Gilmore's testimony to the contents of the CH2M analyses or studies is also  
17 in violation of the secondary evidence rule (Evidence Code Sections 1500 et seq.), which provides  
18 that oral testimony is inadmissible to prove the content of a writing, which itself has not been  
19 submitted as evidence. (Evidence Code §§ 1521(b), 1523(a).) The purpose of the secondary  
20 evidence rule (like the former best evidence rule) is to "guard against unreliable, misleading, and  
21 fraudulent secondary evidence of a writing." (Jefferson's California Evidence Benchbook (4th ed.)  
22 § 32.19.)

23 Altogether, Mr. Gilmore has provided testimony concerning water availability in June 2015  
24 that he is not qualified to provide (as discussed above in Section A) and in which he relies on the  
25 undisclosed analyses and studies of CH2M, rendering his testimony as inadmissible hearsay in  
26 violation of the secondary evidence rule. While administrative bodies are not expected to observe  
27 meticulously all of the rules of evidence applicable to a court trial, common sense and fair play  
28 dictate certain basic requirements for conduct of any hearing at which facts are to be determined.

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(*Desert Turf Club v. Board of Supervisors of Riverside County* (1956) 141 Cal.App.2d 446, 456.)

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

Unsurprisingly, this enforcement proceeding before the Water Board involves highly technical analyses of water availability supported by expert witnesses, all submitted as exhibits, which will be tested through the evidentiary process. No responsible person, however, would rely on conclusory testimony by an unqualified witness purporting to convey and interpret the results of water quality and water availability analyses, particularly involving modeling the complex hydrology of the Delta, which have not been submitted as an exhibit. For these reasons, the testimony of Mr. Gilmore regarding water availability should be excluded under Government Code § 11513(c) as evidence on which no reasonable person would rely in the conduct of serious affairs.

**IV. CONCLUSION**

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

Dated: February 21, 2016

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