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## State Water Resources Control Board

July 11, 2022

### **Administrative Hearing Office’s Public Hearing on Court Reference to State Water Board in *City of Marina v. RMC Lonestar*, Monterey County Superior Court No. 20CV001387: Hearing Officer’s Ruling on City of Marina and Marina Coast Water District’s Joint Motion in Limine**

#### Introduction

This document contains my ruling on the joint motion in limine filed by the City of Marina and Marina Coast Water District (collectively “Marina”) regarding the written proposed testimony of Dave Owen that has been filed by the California-American Water Company (“Cal-Am”) in this proceeding. For the reasons stated in this ruling, I grant this motion.

#### Background

On May 6, 2022, the Administrative Hearings Office (“AHO”) issued its Notice of Public Hearing and Pre-Hearing Conference in this proceeding. The purpose of this proceeding, background, hearing issues and related information are discussed in that notice and are not repeated here.

Following the May 25, 2022 pre-hearing conference, the AHO issued its Pre-Hearing Conference Order and Notice of Second Pre-Hearing Conference on June 1, 2022. Among other things, that order and notice directed Cal-Am to file a statement regarding whether or not it intended to call Dave Owen as a witness in this proceeding, and, if so, listing the specific topics on which Cal-Am proposed to ask Mr. Owen to testify.

Cal-Am filed this statement on June 8, 2022. Cal-Am stated that Cal-Am intended to call Mr. Owen as an expert witness in this proceeding to “opine as to mixed questions of law and fact related to Hearing Issues 8(a) and 8(b).” (2022-06-08 Cal-Am Stmt. Re Dave Owen, p. 2.) Cal-Am stated that such questions may include questions regarding: “how to determine the legal character of the water to be extracted by Cal-Am’s proposed wells for its desalination project,” “[h]ow the foregoing determinations affect the water rights at issue and the salvaged and developed water doctrines,” “how [ ] the ‘reasonable and beneficial use’ requirement of the [California] Constitution and the usufructuary nature of all California water rights affect the attachment of water rights to water of the quality to be extracted by Cal-Am’s wells,” and “[h]ow to determine the boundaries of . . . the Salinas Valley Groundwater Basin.” (*Ibid.*)

The Marina parties filed their joint motion in limine to exclude Mr. Owen's testimony on June 22, 2022. The principal argument in Marina's motion in limine is that "expert testimony on questions of law is patently inadmissible." (2022-06-22 City of Marina and Marina Coast WD's joint motion in limine, p. 9.) To support this argument, the Marina parties cite several reported court decisions that held that expert testimony on questions of law is not admissible and affirming trial court decisions granting motions in limine that excluded such testimony. (*Id.*, pp. 9-10.)

Cal-Am filed its opposition to this motion on July 6, 2022. In its opposition, Cal-Am argues that, while expert testimony on questions of law is, "[a]s a general principle," inadmissible in court proceedings, the rationale for this principle does not apply to administrative proceedings. (2022-07-06 Cal-Am Opp. to Marina Mtn. In Limine, p. 6.) Cal-Am argues that, in an administrative proceeding like this one, there is no risk that expert-witness testimony on legal issues will undermine "the integrity of the process," because the AHO "is fully capable of assessing any expert testimony based solely on its merits." (*Id.*, p. 7.) Cal-Am states that "the AHO is fully capable of ignoring Owen's testimony to the extent it disagrees with his opinions. As such, there is nothing to be gained by preemptively excluding his testimony." (*Id.*, p. 8.)

Cal-Am also filed its written proposed direct testimony, associated exhibits and exhibit identification index on July 6, 2022. Exhibit Cal-Am 64 is the written proposed testimony of Mr. Owen. Exhibit Cal-Am 66 is a statement of Mr. Owen's curriculum vitae. Mr. Owen's written proposed testimony is essentially a legal brief, with several legal arguments and numerous citations to legal authorities. (Exh. Cal-Am 64.)

### Discussion

As stated in the AHO's hearing notice, "Government Code section 11513 shall apply to all evidence offered during this hearing." (2022-05-06 AHO Hearing Notice (City of Marina), p. 21, ¶ 11.) Subdivision (c) of section 11513, provides:

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. *Any relevant evidence* shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Italics added.) Thus, although the standards for admissibility of evidence stated in this subdivision (c) are broad, evidence must be relevant to be admissible.

Evidence Code section 210 provides:

"Relevant evidence" means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

Mr. Owen's written proposed testimony is not "relevant evidence" under this definition. His written proposed testimony contains arguments regarding some of the legal issues involved in this proceeding. It does not contain any information based on Mr. Owen's personal knowledge that would tend in reason to prove or disprove any disputed fact that is of consequence to the determination of any factual issues in this proceeding.

Accordingly, while Mr. Owen may work with Cal-Am's attorneys as they prepare their briefs on legal issues in this proceeding, he may not testify.

### CONCLUSION

The joint motion in limine filed on June 22, 2022 by the City of Marina and Marina Coast Water District is granted. I will not allow Mr. Owen to testify in this proceeding and I will not accept exhibit Cal-Am 64 or exhibit Cal-Am 66 into evidence.

July 11, 2022

/s/ ALAN B. LILLY

Alan B. Lilly

Presiding Hearing Officer

Administrative Hearings Office

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