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20 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

21 ENFORCEMENT ACTION ENF01949
22 DRAFT CEASE AND DESIST ORDER
23 REGARDING UNAUTHORIZED
24 DIVERSIONS OR THREATENED
25 UNAUTHORIZED DIVERSIONS OF
26 WATER FROM OLD RIVER IN SAN
27 JOAQUIN COUNTY

28 ENFORCEMENT ACTION ENF01951
DRAFT ADMINISTRATIVE LIABILITY
COMPLAINT REGARDING
UNAUTHORIZED DIVERSIONS BY
BYRON-BETHANY IRRIGATION
DISTRICT

**CDWA, SDWA, WSID Opposition to SWC
Motion for Protective Order re Deposition
of Paul Hutton; Supporting Declaration of
Jennifer L. Spaletta**

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I. Introduction

Central Delta Water Agency (“CDWA”), South Delta Water Agency and The West Side Irrigation District (“Delta parties”) oppose the State Water Contractor’s (“SWC”) request for a protective order for the Deposition of Paul Hutton because:

- Hutton is a late disclosed expert offered to provide independent and contradictory opinions that should have been disclosed in the SWC case-in-chief. If Hutton is allowed to testify as an expert, the Delta parties must be allowed to depose him to avoid unfair surprise and prejudice.
- Depositions of party witnesses are expressly allowed by the Water Code.
- CDWA has not requested documents that have already been produced and carefully limited the notice to matters that are directly relevant to these proceedings and the opinions expressed by Mr. Hutton in his testimony.

II. Statement of Facts

On Monday, February 22, 2016 – 28 days before the start of these enforcement proceedings – the State Water Contractors (SWC) served the expert rebuttal testimony of Paul Hutton. Although SWC submitted its Notice of Intent to Appear on August 28, 2015, it waited six months, until the last possible day to submit rebuttal testimony, to notify other parties about new expert testimony regarding water quality in the Delta and alleged impacts on SWC supplies. This is particularly notable because, throughout the month of November 2015, WSID, BBID and the Delta agencies conducted depositions at which Delta hydrodynamics were discussed in detail. SWC was present for these depositions, and was fully aware that Delta hydrodynamics would be an issue in the enforcement proceedings. (Spaletta Dec. ¶ 2.) Despite this awareness, it chose not to add an expert witness on this issue to its case in chief.

Now, after submitting significant new technical expert opinion testimony less than a month before the hearing, SWC objects to the Delta parties’ requests to depose that expert.

1 **III. Argument**

2 **A. The Water Code Expressly Entitles CDWA to Depose Mr. Hutton if his Testimony**
3 **is not Stricken as Untimely**

4 CDWA and BBID’s motions in limine explain why the Hutton rebuttal expert
5 testimony should be stricken as untimely and prejudicial. (C.C.P. §§ 2034.300, 2034.310.)
6 If it is not stricken, as a party to this proceeding, CDWA is entitled to depose Mr. Hutton
7 (or any witness) in the manner set forth in Part 4 of the Code of Civil Procedure. (Water
8 Code § 1100.)

9 A deposition is particularly appropriate in this situation due the expert nature and
10 breadth of the proffered Hutton testimony. Because Hutton did not limit his testimony to
11 addressing “the falsity or non-existence of a fact” relied on by another expert, and instead
12 provided improper contradictory testimony, the testimony and expert disclosure is untimely
13 and should be excluded. (C.C.P. §2034.310.) If Hutton is allowed to testify, he may only
14 do so after the Hearing Officers have eliminated any prejudice to the Delta parties,
15 including by making the new expert immediately available for deposition. (C.C.P.
16 §2034.300(d); §2034.720(d).)

17 **B. The Deposition is Necessary to Avoid Undue Prejudice Due to SWC’s Violation**
18 **of the Rules of Civil Procedure**

19 SWC argues that the Hearing Officer did not contemplate depositions of rebuttal
20 witnesses. The Hearing Officer also did not contemplate that SWC would violate the rules
21 of Civil Procedure and produce an untimely and previously undisclosed expert opinion as
22 Rebuttal Testimony. If SWC had properly limited Mr. Hutton’s rebuttal testimony per the
23 code, we would not be having this discussion.

24 CDWA, SDWA, WSID and BBID will be unfairly prejudiced if the Hutton testimony
25 is admitted and the Hearing Officers have prohibited depositions. (See, e.g., *People v.*
26 *Alexander* (2010) 49 Cal.4th 846, 934, as modified on denial of reh’g (Sept. 29, 2010) [“To
27 effectuate the constitutional rights to counsel and to due process of law, an accused must
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1 . . . have a reasonable opportunity to prepare a defense and respond to the charges.”];
2 *Sallas v. Municipal Court* (1978) 86 Cal.App.3d 737, 742 [“due process of law requires
3 that an accused . . . have a reasonable opportunity to prepare and present his defense. .
4 . . .”].)

5 Hutton’s expert testimony relies on complex technical models that require large
6 data sets to reach conclusions and opinions that SWC asserts are useful to the Hearing
7 Officers to decide these proceedings. In order for the Delta parties’ attorneys to prepare
8 questions for cross-examination, its experts will need the opportunity to review and
9 understand these data sets, model assumptions, and Mr. Hutton’s further explanation as
10 to how he reached his opinions. Unlike DWR and SWC, the Delta parties do not have
11 modelers or hydrologists on staff. Thus, working with technical expert testimony requires
12 the retention of outside experts and time to understand and be able to prepare to address
13 during a hearing. (Spaletta Dec. ¶ 3.)

14 **C. SWC Cannot Meet Its Burden for a Protective Order**

15 The party seeking a protective order on “the basis that the information is from a
16 source that is not reasonably accessible because of undue burden or expense *shall bear*
17 *the burden* of demonstrating that the information is from a source that is not reasonably
18 accessible because of undue burden or expense.” (C.C.P. § 2025.420(c).) Further, a court
19 may order the production of electronically stored information, even if it is not reasonably
20 accessible, unless one of four conditions exist: (1) it is possible to obtain the information
21 from a more convenient, less burdensome, or less expensive source; (2) the discovery is
22 unreasonably cumulative or duplicative; (3) the party had ample opportunity to obtain the
23 information sought; or (4) the likely burden of the proposed discovery outweighs the likely
24 benefit, taking into account the importance of the issues in the litigation, and the
25 importance of the requested discovery in resolving the issues. (C.C.P. § 2025.420(e), (f).)

26 SWC cannot meet this burden.
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1 **1. The Information Sought is not Unreasonably Cumulative or Duplicative and**
2 **is not Otherwise Available to the Delta Parties**

3 The CDWA Notice specifically limits requested documents to those not previously
4 produced during the course of the proceedings. (Notice of Deposition, pg. 3.) It is
5 disingenuous for SWC to assert that the protective order should be granted, in part, due
6 to the duplicative nature of the request. CDWA has no inclination to spend more time or
7 effort with Mr. Hutton in a deposition than is necessary to prepare to deal with his untimely
8 expert opinions at the hearing.

9 Further, the fact that the Delta parties have received Mr. Hutton’s testimony and
10 exhibits is irrelevant. The testimony contains numerous factual conclusions, summaries
11 and statements of opinion that are not supported by the information in the testimony itself
12 or in the exhibits produced, or in the documents previously produced by SWC. The Delta
13 parties are entitled to conduct discovery to determine: (1) if Hutton relied on other
14 documents or data sets to support his opinions and conclusory statements, and (2) if so,
15 what those documents or data sets include.

16 Paul Hutton’s testimony spans 33 paragraphs and includes several attachments,
17 including a technical memo from CH2M Hill from June 2015 regarding with and without
18 project salinity conditions based on DSM2 model runs. (Exh. SWC0005.) The bulk of Mr.
19 Hutton’s testimony describes the CH2M Hill model runs and argues that hypothetical
20 salinity conditions in the Delta in 2015, absent the projects, could not have supported
21 irrigated agriculture. Mr. Hutton then uses the results of this CH2M Hill modeling effort to
22 cast stones at Susan Paulson’s expert testimony regarding Delta hydrodynamics and to
23 provide a contradictory and independent opinion regarding water availability in the Delta.

24 Notably, the CH2M Hill modeling effort that forms the backbone of Mr. Hutton’s
25 testimony is not in the public domain and includes modeling parameter modifications that
26 are unavailable for WSID, BBID and the Delta Agencies, and their experts to review,
27 understand or verify. (Spaletta Dec. ¶ 4.) Yet, this modeling work was purportedly done
28 in June 2015 - more than six months before case in chief testimony was due.

1 If SWC is allowed to put forth an expert's opinion in these proceedings that the
2 salinity conditions in the Delta in 2015 would not have supported irrigated agriculture,
3 absent project releases - then Delta interests are absolutely entitled to understand the
4 basis for that opinion. If this discovery is prevented, the opinion should be stricken.

5 **2. There is no Undue Burden or Expense on SWC to Produce Mr. Hutton for**
6 **Deposition or to Produce the Documents Requested in the Deposition**
7 **Notices**

8 Every deposition and document request imposes some burden on a party. Not
9 every burden is an "undue" burden. A party cannot expect to be able to produce an expert
10 witness to provide opinion testimony and then protect that witness from deposition or
11 production of the information that purportedly supports the opinions expressed. This
12 would be severely unfair and is expressly prohibited by the Code of Civil Procedure. It is
13 not an "undue" burden on SWC to require its expert witness to comply with the minimum
14 requirements of the code in order to testify.

15 Here, CDWA's notice is carefully limited. Document requests 1-6 request only
16 those previously unproduced documents that support specific statements, opinions or
17 factual claims made in the proffered Hutton testimony. Requests 7-9 are expressly limited
18 to previously unproduced correspondence between (7) Hutton and the State Board, (8)
19 Metropolitan Water District ("MWD") and the State Board, and (9) SWC and the State
20 Board regarding the water availability determinations that are the express subject of Phase
21 1 of these hearings. These requests are limited to just what is necessary to understand
22 the basis for Mr. Hutton's expert opinions, determine if his opinions are supported based
23 on this underlying information, and whether or not Mr. Hutton has bias. No more, no less.
24 If the requested categories of documents were already provided, as SWC asserts, then
25 the burden is actually minimal and the deposition will be extremely helpful to allow Mr.
26 Hutton to explain to the other parties how these already produced documents support his
27 opinion.

1 Further, Mr. Hutton is a MWD employee who works with SWC on behalf of MWD
2 (Hutton, ¶ 12), and is being offered by SWC as its representative expert witness in this
3 proceeding. The fact that the deposition notices may seek documents that go beyond
4 what is in Mr. Hutton's immediate possession and may be in the possession of other
5 employees or representatives of SWC, MWD, or DWR is not objectionable. As an expert
6 witness, Mr. Hutton will be and should be examined regarding potential bias or influence
7 and the source of all information supporting his opinions. To the extent there are
8 documents within MWD, SWC, or DWR that evidence bias or otherwise refute or cast
9 doubt on the credibility of Mr. Hutton's testimony (or alternatively provide support for the
10 testimony) they should be produced.

11 If SWC does not believe it has sufficient time to produce the documents, it should
12 request a continuance of the hearing or withdraw Mr. Hutton as a witness. However, the
13 concept of allowing substantial new technical expert testimony, without related discovery,
14 is not a legally defensible or equitable option.

15 **3. The Information Sought Cannot be Obtained in Cross-Examination**

16 The Hearing Officers have placed strict limits on the time for cross examination at
17 the hearing. There is insufficient time to probe the witness to describe all of the underlying
18 factual and analytical bases for the modeling work that forms the basis for his opinions
19 during cross examination - nor is this even humanly possible. The modeling and data
20 analysis conclusions contained in Mr. Hutton's opinions are supported (we assume) by
21 datasets that are not going to be committed to Mr. Hutton's memory and cannot be
22 realistically disclosed or explained during cross-examination.

23 Further, allowing Hutton to testify without a prior deposition and requiring the Delta
24 parties to ask all questions of Hutton during cross to both understand and potentially
25 discredit his opinion would unduly prejudice the Delta parties. These parties will need the
26 assistance of their own experts to understand Hutton's explanations and underlying data
27 sets and analysis, which has not yet been produced.

1 Finally, requiring parties to deal with experts in the first instance on cross-
2 examination is a huge waste of time for the Hearing Team and other parties. The purpose
3 of the deposition is to gain a better understanding of an expert's opinion so that the
4 examination during the hearing can be limited to just the key issues necessary to identify
5 bias or analytical error. Often, the problems with an expert opinion elicited during
6 deposition will even convince a party to withdraw an expert prior to the hearing, which
7 helps shorten the hearing.

8 **4. The Burden of the Discovery Does Not Outweigh the Importance of the**
9 **Discovery to Resolving an Issue in the Hearing**

10 Mr. Hutton's 33 paragraph expert testimony and related exhibits are not "limited" as
11 SWC claims and certainly do not stay within the bounds of C.C.P. § 2034.310 for late
12 disclosed experts. Rather, the Hutton testimony provides independent opinions about the
13 effects of salinity levels in the Delta on irrigated agriculture during the summer of 2015 that
14 should have been produced in SWC's case-in-chief and are highly technical. If the
15 Hearing Officers do not think the issues raised by Hutton are important to the hearing and
16 agree the testimony is untimely, it should be stricken. If, alternatively, the Hearing Officers
17 want to hear this new opinion testimony and deem it to address an "important issue," then
18 SWC cannot meet its burden for a protective order and the deposition and document
19 production must go forward. (C.C.P. § 2025.420(f)(4).)

20 Similarly the document requests in the CDWA Hutton notice are not overbroad.
21 The Delta parties are entitled to understand what Hutton reviewed to form his opinions
22 and conclusions. If Hutton does not have documents that support his opinions, then that
23 too would be useful to know. If the supporting documents are voluminous and cannot be
24 produced in the remaining days (Hutton's deposition is set for March 8th) then that is
25 grounds for a continuance. However, under no circumstance that comports with basic due
26 process could the Hearing Officers conclude that the supporting documents are too
27 voluminous to allow discovery, but Hutton should be allowed to summarize opinions based
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1 upon them in these proceedings, which the Hearing Officers could then rely on as
2 evidence. This would be the epitome of prejudice.

3 **IV. Conclusion**

4 The Rules of Civil Procedure are clear that late disclosed expert testimony many
5 only be admitted using a method that ensure no undue prejudice to other parties - including
6 making the expert immediately available for deposition. (C.C.P. §2034.720(d).) SWC
7 cannot have it both ways. Either the Hutton testimony is allowed and Hutton must produce
8 the underlying information and sit for deposition, or the testimony is out.

9 If the Hearing Officers decide the testimony will not be stricken and allow the deposition,
10 then we respectfully request that the Hearing Officers also consider pushing the hearing
11 dates back to allow time for the depositions and for the parties to properly and efficiently
12 organize the presentation of evidence at the hearings.

13 Respectfully submitted,

14
15 Dated: March 2, 2016

SPALETTA LAW PC

16
17 By:


18 JENNIFER L. SPALETTA
Attorney for Central Delta Water Agency

19 Dated: March 2, 2016

HARRIS, PERISHO & RUIZ


21 S. DEAN RUIZ
22 Attorney for South Delta Water Agency

23 Dated: March 2, 2016

HERUM\CRABTREE\SUNTAG


25 JEANNE M. ZOLEZZI
26 Attorney for the West Side Irrigation

1 **Supporting Declaration of Jennifer L. Spaletta**

2 1. I, Jennifer L. Spaletta am an attorney duly licensed to practice law in the
3 State of California and co-counsel of record for Central Delta Water Agency in these two
4 enforcement proceedings. The matters stated herein are based upon my personal
5 knowledge, which I would and could testify to if called upon to do so.

6 2. On Monday, February 22, 2016 – 28 days before the start of these
7 enforcement proceedings – the State Water Contractors (SWC) served the expert
8 rebuttal testimony of Paul Hutton. Although SWC submitted its Notice of Intent to
9 Appear on August 28, 2015, it waited six months, until the last possible day to submit
10 rebuttal testimony, to notify other parties about new expert testimony regarding water
11 quality in the Delta and alleged impacts on SWC supplies. Yet, throughout the month of
12 November 2015, WSID, BBID and the Delta agencies conducted depositions at which
13 Delta hydrodynamics were discussed in detail. SWC’s counsel was present for these
14 depositions, and was thus fully aware that Delta hydrodynamics would be an issue in the
15 enforcement proceedings.

16 3. Hutton’s expert testimony relies on complex technical models that require
17 large data sets to reach conclusions and opinions that SWC asserts are useful to the
18 Hearing Officers to decide these proceedings. In order for the Delta parties’ attorneys to
19 prepare questions for cross-examination, its experts will need the opportunity to review
20 and understand these data sets, model assumptions, and Mr. Hutton’s further
21 explanation as to how he reached his opinions. Unlike DWR and SWC, the Delta parties
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23 testimony requires the retention of outside experts and time to understand and be able
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25 4. The CH2M Hill modeling effort that forms the backbone of Mr. Hutton’s
26 testimony is not in the public domain and includes modeling parameter modifications that
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are unavailable for WSID, BBID and the Delta Agencies, and their experts to review, understand or verify.

I declare under penalty of perjury pursuant to the laws of the state of California that the foregoing is true and correct.

Executed this 2nd day of March, 2016 in Lodi, California.



JENNIFER L. SPALETTA