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10 Attorneys for State Water Contractors

11  
12 **BEFORE THE**  
13 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

14 ENFORCEMENT ACTION ENF01949 -  
15 DRAFT CEASE AND DESIST ORDER  
REGARDING UNAUTHORIZED OR  
16 THREATENED UNAUTHORIZED  
17 DIVERSIONS OF WATER FROM OLD RIVER  
IN SAN JOAQUIN

STATE WATER CONTRACTORS'  
RESPONSE TO MOTIONS IN LIMINE  
TO EXCLUDE THE TESTIMONY OF  
PAUL HUTTON

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

23  
24 State Water Contractors ("SWC") hereby respond to the motions in limine to exclude  
25 the testimony of SWC rebuttal expert Paul Hutton filed by Byron-Bethany Irrigation District  
26 and South Delta Water District ("BBID-SDWA Motion"), Central Delta Water Agency and  
27 Banta-Carbona Irrigation District ("CDWA-BCID Motion"), and West Side Irrigation District

1 (“WSID”) and Patterson Irrigation District (“WSID-PID Motion”).<sup>1</sup>

2 **I. INTRODUCTION**

3 SWC interests in this proceeding are limited solely to protecting State Water Project  
4 (“SWP”) stored water supplies. Because these interests were not implicated by the  
5 allegations of the Administrative Liability Complaint or the draft Cease and Desist Order in  
6 the above-referenced proceedings, there was no need for SWC to develop and file a case-  
7 in-chief.<sup>2</sup> Once cases-in-chief were filed on January 19, 2016, however, SWC’s  
8 participation became necessary due to specific claims and defenses raised by the parties in  
9 their cases-in-chiefs along with motions for summary judgment and legal briefs based on  
10 the cases-in-chief that implicate the protection of SWP stored water supplies. SWC timely  
11 submitted limited rebuttal evidence responsive to evidence submitted as part of the cases-  
12 in-chief. (See testimony of Dr. Hutton and related exhibits.) In his testimony, Dr. Hutton  
13 relies largely on a preexisting, publically available study by CH2M Hill, which SWC has also  
14 submitted as an exhibit (SWC0005) and BBID submitted as part of BBID-218.

15 Relying primarily on inapplicable Code of Civil Procedure provisions, the moving  
16 parties now seek to exclude Dr. Hutton’s testimony arguing that his rebuttal testimony is  
17 actually new case-in-chief testimony submitted under the “guise” of rebuttal testimony for  
18 purposes of prejudicial surprise. Contrary to their assertions, however, SWC was not  
19 required by any State Water Resources Control Board (“Water Board”) regulation, hearing  
20 procedure or purportedly applicable Code of Civil Procedure to disclose the identity of its  
21 rebuttal witness in advance of submitting rebuttal testimony, or to present such testimony  
22 as part of a case-in-chief. Further, moving parties cannot maintain their argument that Dr.

23 \_\_\_\_\_  
24 <sup>1</sup> As to the testimony of Paul Hutton, the Motion in Limine filed by West Side Irrigation  
25 District and Patterson Irrigation District merely joins in the Motions in Limine of Byron-  
Bethany Irrigation District and South Delta Water District, and Central Delta Water Agency  
and Banta-Carbona Irrigation District. (See WSID-PID Motion, pp. 11:4-7.)

26 <sup>2</sup> SWC filed NOI’s in this regulatory actions based on the fact that the moving parties had  
27 filed complaints in various Superior Courts that raised claims and defenses that implicate  
28 stored water. Based on that information, it was necessary for SWC to be a party and to  
participate by cross examination and rebuttal.

1 Hutton's reliance on a pre-existing CH2M Hill's technical analysis in his rebuttal testimony  
2 constitutes prejudicial "surprise" evidence. The CH2M Hill technical analysis has been  
3 publically available since June 2015 and in the possession of most of the moving parties or  
4 easily available to them. Moreover, the CH2M Hill technical analysis provides an extensive  
5 discussion of its methodologies, assumptions and modeling parameters, and relies on  
6 models that are in the public domain.

7 For these reasons, SWC respectfully requests that the Water Board deny the  
8 motions in limine to exclude the testimony of Paul Hutton and deny any requests to  
9 continue the hearings to conduct discovery regarding Dr. Hutton's rebuttal testimony.

## 10 **II. LEGAL AUTHORITY**

11 Adjudicative proceedings before the Water Board are governed by Water Board  
12 regulations (23 C.C.R. §§ 648 et seq.), selected provisions of chapter 4.5 of the  
13 Administrative Procedures Act (Gov't Code §§ 11400 et seq.), Government Code Section  
14 11513, and Evidence Code Sections 801-805. (23 C.C.R. § 648(b).) As stated in the  
15 Notices of Public Hearings dated August 19, 2015 and September 1, 2016, the hearing in  
16 the above-referenced proceedings will be conducted in accordance with the hearing  
17 procedures set forth in Sections 648-648.8, 649.6 and 760 of title 23 of the California Code  
18 of Regulations. Section 648.4 provides for the identification of witnesses and the pre-  
19 submission of testimony and exhibits leaving it to the discretion of the Water Board whether  
20 to require, prior to hearing, the identities of intended witnesses, estimates of the time  
21 needed by each witness to present direct testimony and written direct testimony prior to the  
22 hearing. (23 C.C.R. § 648.4(b), (c).) Generally, rebuttal testimony "will not be required to  
23 be submitted in writing, nor will rebuttal testimony and exhibits be required to be submitted  
24 prior to the start of the hearing." (23 C.C.R. § 648.4(f).)

25 In these proceedings, the Water Board has chosen to require the submission of  
26 written rebuttal evidence in advance of the evidentiary hearing. (See Notice of Revised  
27 Schedule for Public Hearings dated January 8, 2016.) As defined in the hearing  
28

1 procedures attached to the original Notices of Public Hearings (p. 6) in these proceedings,  
2 rebuttal evidence is “new evidence used to rebut evidence presented by another party.”  
3 “Rebuttal evidence is limited to evidence that is responsive to evidence presented in  
4 connection with another party’s case-in-chief.” (Id.)

5 **III. ARGUMENT**

6 **A. State Water Contractors’ Participation is Limited Solely to Rebutting**  
7 **Issues Raised with the Potential to Impact Stored Water Supplies**

8 SWC is participating in these enforcement proceedings to protect stored water and  
9 normally would not move to become a party in enforcement proceedings. However, given  
10 early indications through other litigation, it was clear moving parties were raising claims and  
11 defenses that would implicate State Water Project stored water supplies. As stated by  
12 SWC’s general counsel at the pre-hearing conference on October 19, 2015, SWC’s interest  
13 in these proceedings is solely to protect the stored water supplies of the State Water  
14 Project. (October 19, 2016 Prehearing Conference, Transcript p. 27:3-12.) Accordingly,  
15 State Water Contractors submitted notices of intent for these proceedings stating that it  
16 only intended to participate by cross-examination or rebuttal only. (See SWC Notices of  
17 Intent to Appear dated August 28, 2015 and September 24, 2015.) Contrary to BBID-  
18 SDWA’s allegations, there was no reason for SWC to submit a case-in-chief in these  
19 proceedings. (BBID-SDWA Motion, p. 7:7-17.) The allegations of the Administrative  
20 Liability Complaint and the draft Cease and Desist Order in these enforcement proceedings  
21 do not raise issues or claims that implicate the protection of stored water supplies.

22 SWC’s participation and submission of rebuttal testimony and exhibits in these  
23 proceedings was only necessitated by the defenses and claims raised by other parties not  
24 only in the cases-in-chief, submitted on January 19, 2016, but also the legal briefs and  
25 West Side Irrigation District’s (“WSID”) motion for summary judgment supported by the  
26 evidence of the cases-in-chief, submitted on January 25, 2016, with the potential to  
27 implicate the protection of stored water supplies. In response to these defenses and  
28 claims, SWC submitted the testimony of Paul Hutton (SWC0001) and related exhibits

1 (Exhibits SWC0002-0007) as rebuttal evidence for the specific purpose of rebutting the  
2 evidence submitted in support of such defenses and claims raised by the parties.

3 **B. Dr. Hutton's Rebuttal Testimony Properly Responds To Evidence Raised**  
4 **by the Cases-In-Chief**

5 Contrary to allegations, SWC's submission of rebuttal testimony and exhibits was in  
6 compliance with all procedures adopted for these enforcement proceedings. As is  
7 expressly allowed by the hearing procedures, Dr. Hutton's testimony is evidence presented  
8 specifically to respond to and rebut evidence presented in connection with other parties'  
9 cases-in-chief, used to support the claims and defenses raised by the parties to these  
10 proceedings.

11 The nonsensical assertion that SWC rebuttal evidence cannot somehow be "new"  
12 evidence is directly contradicted by the hearing procedures provided in the original Notices  
13 of Public Hearing which state that rebuttal evidence is, in fact, "new evidence used to rebut  
14 evidence presented by another party." (See BBID-SDWA Motion, pp. 5:17-6:27; CDWA-  
15 BCID Motion, p. 11:21-24.) By definition, rebuttal evidence is always "new" evidence,  
16 which generally is not disclosed until during the evidentiary hearing. (23 C.C.R. § 648.4(f).)  
17 It is equally nonsensical, as these parties appear to be arguing, to assert that expert  
18 testimony that relies on studies or analyses is limited to the cases-in-chief when expert  
19 testimony before the Water Board often involves technical analyses, which must in turn be  
20 rebutted by expert testimony that involves additional analyses. (BBID-SDWA Motion, pp.  
21 1:5; 5:4-7; CDWA-BCID Motion, p. 11:21-24.) SWC has a right to present rebuttal  
22 evidence, including other analyses, countering or contradicting the analyses of expert  
23 witnesses Susan Paulsen and Thomas Burke.

24 Further, nothing in the Water Board regulations or hearing procedures requires the  
25 identification of rebuttal witnesses, including those witnesses that qualify as experts, prior  
26 to the submission of written rebuttal testimony, as is alleged in the BBID-SDWA Motion (pp.  
27 4:25-26, 5:4-7; 6:21-27.) Again, in Water Board adjudicative proceedings, the identity and  
28 testimony of rebuttal witnesses are generally not even disclosed prior to the start of the

1 evidentiary hearing. (23 C.C.R. § 648.4(f).) Though clearly the Water Board has wide  
2 discretion as to hearing procedures, by their express wording, Code of Regulations Section  
3 648.4(b) and (c) of title 23 apply primarily to direct testimony as part of the cases-in chief.  
4 (See BBID-SDWA Motion, p. 5:4-8.)

5 Code of Civil Procedure Sections concerning procedures for simultaneous  
6 exchanges of expert witnesses in civil actions (Code of Civil Proc. § 2034.210) and  
7 conditions under which experts not designated on a party's trial list may testify in civil  
8 actions (Code of Civil Procedure § 2013.310) are not applicable to these proceedings.  
9 (See BBID-SDWA Motion, pp. 5: 4-8, 6:18-27; CDWA-BCID Motion, pp. 3:7-10, 11:21-24.)  
10 There is no limitation on the testimony of expert rebuttal witnesses to impeachment  
11 testimony as to a foundational fact. Further, absolutely nothing in the cited, but  
12 inapplicable, Code of Civil Procedure Section 2023.210 provides that a rebuttal expert  
13 cannot contradict another expert's opinion but can only testify to the falsity or nonexistence  
14 of a fact. (See BBID-SDWA Motion, p. 6:25-27.)

15 In its motion, BBID-SDWA attempts to equate their arguments to exclude Dr.  
16 Hutton's limited rebuttal testimony to the Hearing Officer's exclusion of the testimony of  
17 WSID direct witness Karna Harrigfeld claiming similar prejudice. (BBID-SDWA Motion, pp.  
18 7:28-8:17.) The situations, however, are completely dissimilar. Ms. Harrigfeld's testimony  
19 was submitted as part of WSID's case-in-chief on January 19, 2015 even though Ms.  
20 Harrigfeld had not been previously listed as a witness offering direct testimony *pursuant to*  
21 *applicable hearing procedures*, which WSID ignored without sufficient reason. (See  
22 Procedural Ruling dated February 1, 2016.) The Prosecution Team argued that the late  
23 addition prejudiced its ability to conduct discovery and to prepare its case-in-chief. (Id.) In  
24 contrast, SWC followed all applicable hearing procedures; there was no requirement that  
25 rebuttal experts be identified in advance of submission of rebuttal testimony. Moreover,  
26 because rebuttal evidence is limited under the hearing procedures to evidence responsive  
27 to evidence presented in connection with another party's case-in-chief, the level of  
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1 purported prejudice alleged by BBID-SDWA is in no way comparable or commensurate to  
2 the failure of the party, against whom the enforcement proceeding is brought, to identify a  
3 witness providing testimony in the case-in-chief. SWC cannot be penalized for following  
4 the hearing procedures simply because moving parties now want to argue that those  
5 adopted hearing procedures result in some sort of prejudice to them.

6 Moreover, Dr. Hutton's narrow rebuttal testimony presents proper rebuttal evidence  
7 to refute evidence supporting issues and claims raised by parties in their cases-in-chief.  
8 (See SWC0001.) Dr. Hutton's testimony primarily rebuts the conclusions and analyses of  
9 expert witnesses Susan Paulsen (BBID-388) and Thomas Burke (WSID-123) who provide  
10 testimony, based on their own analyses, regarding the availability of water for diversion, in  
11 terms of both water quantity and water quality (salinity), at BBID's and WSID's points of  
12 diversion in the Delta, past which State Water Project stored water releases also flow. Dr.  
13 Paulsen's and Mr. Burke's conclusions concerning historical and current water availability  
14 for diversion, and the methods by which they conducted their analyses (e.g., the ways they  
15 account for the presence of stored water), directly implicate the protection of stored water  
16 releases in the Delta from unauthorized diversions. BBID-SDWA only offer conclusory  
17 allegations that specific paragraphs in Dr. Hutton's testimony (¶¶ 17-21, 26-33) are not  
18 responsive rebuttal testimony. (See BBID-SDWA, pp. 5:19-28.)

19 Dr. Paulsen and Mr. Burke provide testimony concerning historical salinity conditions  
20 in the Delta and WSID has introduced evidence of DWR bulletins discussing such  
21 conditions. (See e.g, WSID0008; WSID0123, ¶¶ 6-19; BBID-388, ¶¶ 21(b)-(e).) In direct  
22 response, in paragraphs 26-30, Dr. Hutton provides rebuttal testimony regarding historical  
23 salinity conditions in the Delta, relying on the same publication offered by WSID as  
24 WSID0008, and additional DWR bulletins. Paragraph 32 of Dr. Hutton's testimony is  
25 merely his conclusion based on the same DWR bulletin offered by WSID, WSID0008.

26 Paragraphs 17, 20, 21, 31 and 33 of Dr. Hutton's testimony rebut Dr. Paulsen's  
27 opinion that water was available for diversion at BBID's and WSID's point of diversions  
28

1 historically, even in dry and critically dry years, and in 2015, which imply that water is  
2 always available for diversion at these points, as well as Dr. Paulsen's modeling  
3 assumptions utilized to reach her opinion. (See BBID-388, ¶ 21.) Paragraph 17 of Dr.  
4 Hutton's testimony describes the results of an existing, publically-available study on which  
5 he relies to form direct rebuttal opinions about salinity conditions, absent Project  
6 operations, in many dry and critically dry years. Paragraphs 20 and 21 are Dr. Hutton's  
7 analysis and comparison of 2015 and 1931 scenarios to directly rebut Dr. Paulsen's  
8 conclusion that conditions in 1931 are an adequate proxy for 2015 conditions without  
9 project operations. (BBID-388, ¶ 20.) Paragraphs 31 and 33 are merely the conclusions  
10 reached from these analyses. Finally, paragraphs 18 and 19, are evidence to rebut  
11 allegations concerning the Water Board's motivation in issuing the water unavailability  
12 notices (allegedly to shift the burdens of WQCP compliance to Delta parties) and the  
13 alleged lack of harm caused by BBID's diversions, raised by WSID in the legal brief  
14 submitted on January 25, 2015, and for which it can be presumed WSID will offer evidence  
15 at the hearing. (See CDWA and SDWA Legal Issues Brief; Joinder of West Side Irrigation  
16 District, pp. 4-5; 12-14.) All of the challenged paragraphs in Dr. Hutton's rebuttal testimony,  
17 SWC0001, are proper rebuttal testimony.<sup>3</sup>

18 **C. Dr. Hutton's Reliance on a Pre-Existing, Publically-Available Analysis Is**  
19 **Not Prejudicial to Opposing Parties**

20 In their motions, BBID-SDWA and CDWA-BCID assert that Dr. Hutton's rebuttal  
21 testimony, and in particular his reliance on the analysis by CH2M Hill, violates Water Board  
22 regulations holding that it is the policy of the Water Board to discourage the introduction of  
23 surprise testimony and exhibits. (BBID-SDWA Motion, pp. 4:23-5:13, 7:7-17; CDWA-BCID  
24 Motion, pp. 11:20-12:20. ) The moving parties assert that they will be prejudiced by their  
25 inability to fully explore the bases for Dr. Hutton's testimony within the time periods afforded  
26 for cross-examination, and, without discovery, will be unable to effectively prepare for

27 <sup>3</sup> Instead of wholesale exclusion of an expert's testimony, the proper remedy for  
28 challenging specific portions of testimony is a motion to strike improper selected testimony.

1 cross-examination. (Id.)

2 The analyses by CH2M Hill on which Dr. Hutton relies in his testimony and which  
3 has been submitted as SWC0005 is in no way a “surprise” to the moving parties. The  
4 moving parties have been aware of, and many in the possession of, the CH2M Hill study  
5 since June of 2015. The CH2M Hill study is attached to the water rights complaint filed by  
6 the SWC with the Water Board on June 16, 2015, which is publically available at the Water  
7 Board. Further, on June 16, 2015, lawyers for BBID (Daniel Kelly), South Delta Water  
8 Agency (John Herrick), and CDWA (Jennifer Spaletta) were each personally sent a copy of  
9 the SWC Water Rights Complaint by SWC General Counsel Stefanie Morris. (See  
10 Declaration of Stefanie D. Morris, ¶¶ 2,3, Exhibits A and B.) Not only is BBID aware of the  
11 SWC water rights complaint which attaches the CH2M Hill study at issue, it actually  
12 submitted the SWC water rights complaint as an exhibit to these proceedings, Exhibit  
13 BBID-218. The moving parties have been aware of the CH2M Hill analysis for more than  
14 six months, which responds to issues they themselves raise in this proceeding, water  
15 availability in the Delta. They cannot now complain that they had insufficient notice of its  
16 contents or are surprised that SWC would submit such evidence in rebuttal.

17 The moving parties also now claim that they need extensive discovery concerning  
18 the modeling analyses in the CH2M Hill report on which Dr. Hutton relies in forming his  
19 opinions, claiming that they need to know the assumptions that underlie the analysis and  
20 how the models were modified to run the scenarios described. (See BBID-SDWA Motion  
21 7:18-27; CDWA-BCID Motion, p. 11:26-12:20.) However, SWC0005 contains a detailed  
22 explanation of the approach taken, including the modifications to the models, and the  
23 assumptions made in performing the analysis. Given that the model used is DSM2 which is  
24 in the public domain, and given the detail contained in SWC0005, moving parties could  
25 recreate the model runs themselves. Moreover, all parties are afforded the opportunity to  
26 cross-examine Dr. Hutton on the bases for his conclusions, including the assumptions and  
27 methods used in the modeling analyses. For these reasons, extensive discovery was not  
28

1 required to develop an understanding of the CH2M Hill analysis or Dr. Hutton's testimony  
2 either to help develop the parties' cases-in-chief or rebuttal testimony, and is not now  
3 required to prepare for cross-examination.

4 **IV. CONCLUSION**

5 For the reasons stated above, SWC respectfully requests that the motions in limine  
6 to exclude the testimony of Paul Hutton, filed by Byron-Bethany Irrigation District and South  
7 Delta Water District, West Side Irrigation District and Patterson Irrigation District, and  
8 Central Delta Irrigation District, be denied.

9  
10 Dated: March 4, 2016

**DUANE MORRIS LLP**

11  
12 By: 

13 Thomas M. Berliner  
14 Jolie-Anne S. Ansley  
15 Attorneys for State Water Contractors

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1 **PROOF OF SERVICE**

2 I am a resident of the state of California, I am over the age of 18 years, and I am not  
3 a party to this lawsuit. My business address is Duane Morris LLP, One Market Plaza,  
4 Spear Tower, Suite 2200, San Francisco, California 94015-1127.

5 On March 4, 2016, I served the following document(s):

- 6 1. State Water Contractors' Response to Motions in Limine to Exclude the  
7 Testimony of Paul Hutton
- 8 2. Declaration of Stefanie F. Morris in Support of State Water Contractors'  
9 Response to Motions in Limine to Exclude the Testimony of Paul Hutton

10 on the interested party(ies) in this action in the following manner:

11 **BY E-MAIL:** On the March 4, 2016, at San Francisco, California, I caused the foregoing  
12 document(s) to be served by e-mail transmission to the e-mail address(es) set forth below,  
13 as last given by that person on any document which he or she has filed in the cause and  
14 served on the party making the service. The document(s) was(were) transmitted by e-mail  
15 from a computer in the offices of Duane Morris. The e-mail transmission(s) was(were)  
16 reported as delivered to the party(ies) at the indicated e-mail address(es), and no  
17 undeliverable message from the recipient's server was received by the sender of the e-  
18 mail. A copy of the e-mail transmission confirmation(s) is(are) attached hereto.

19 **SEE ATTACHED SERVICE LIST**

20 I declare under penalty of perjury under the laws of the State of California that the foregoing  
21 is true and correct. Executed on March 4, 2016, at San Francisco, California.

22   
23 \_\_\_\_\_  
24 Kristin Jerome

**SERVICE LIST OF PARTICIPANTS  
THE WEST SIDE IRRIGATION DISTRICT  
CEASE AND DESIST ORDER HEARING**

**PARTIES**

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**SERVICE LIST OF PARTICIPANTS  
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ADMINISTRATIVE CIVIL LIABILITY HEARING**

**PARTIES**

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