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10 Attorneys for State Water Contractors

11 **BEFORE THE**

12 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

13
14 ENFORCEMENT ACTION ENF01949 -
15 DRAFT CEASE AND DESIST ORDER
16 REGARDING UNAUTHORIZED OR
17 THREATENED UNAUTHORIZED
DIVERSIONS OF WATER FROM OLD RIVER
IN SAN JOAQUIN

STATE WATER CONTRACTORS'
MOTION TO QUASH SUBPOENA
DUCES TECUM, OR, IN THE
ALTERNATIVE, MOTION FOR
PROTECTIVE ORDER

REQUEST TO CLOSE DISCOVERY

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

1 State Water Contractors (“SWC”) submit this motion for an order to quash the
2 subpoena duces tecum served by Byron-Bethany Irrigation District (“BBID”) on SWC, or, in
3 the alternative, a protective order prohibiting, or limiting, the production of documents
4 sought by the subpoena. (Government Code § 11450.30; Code of Civil Procedure
5 § 2025.420 (1), (11).)¹ Pending resolution of this motion, SWC respectfully requests that
6 the Water Board stay the challenged subpoena duces tecum. Finally, SWC also seeks an
7 order of the Water Board closing discovery in the above-referenced enforcement
8 proceedings.

9 I. INTRODUCTION

10 Since the submission of rebuttal testimony on February 22, 2016, BBID has
11 engaged in an oppressive and harassing campaign of discovery requests against SWC. In
12 the span of less than two weeks, BBID has noticed the deposition of SWC rebuttal witness
13 Paul Hutton, with accompanying request for production of documents and served
14 subpoenas duces tecum on employees of CH2M Hill, the custodian of records for CH2M
15 Hill and on the SWC. On March 9, 2016, the State Water Resources Control Board (“Water
16 Board”) vacated the notice of deposition of Paul Hutton and the subpoenas duces tecum to
17 Chandra Chilmakuri, Kyle Winslow and CH2M Hill.²

18 As with the now-vacated subpoenas, the burden, expense and intrusiveness of the
19 discovery sought by BBID from SWC far outweighs the likelihood that the information
20 sought will lead to the discovery of admissible evidence, particularly at this late stage of the
21 proceeding when testimony and exhibits have been submitted. The documents sought in
22 large part constitute documents protected by the attorney work product doctrine as well as

23
24 ¹ See the Declaration of Jolie-Anne Ansley (“Ansley Decl.”) attesting to the SWC’s good
25 faith attempt at an informal resolution of issues raised by the subpoenas duces tecum, as
26 required by California Code of Civil Procedure § 2025.420(a). (Ansley Decl. ¶ 3.)

27 ² In its ruling of March 9, 2016, the Water Board granted motions seeking to quash, or in
28 the alternative for protective orders to, the subpoenas duces tecum to Chandra Chilmakuri,
Kyle Winslow and CH2M Hill, including the motion of non-party CH2M Hill which addressed
the amended subpoenas served by BBID on Chandra Chilmakuri and Kyle Winslow on
March 3, 2016. SWC therefore presumes that the Water Board’s ruling “vacated” the
amended subpoenas to Chandra Chilmakuri and Kyle Winslow served on March 2, 2016.

1 documents irrelevant to the current enforcement proceedings. Moreover, any marginally
2 relevant information sought by the discovery is cumulative or duplicative of information
3 already available through more convenient, less burdensome and less expensive hearing
4 procedures including the opportunity to cross-examine rebuttal witness Paul Hutton.

5 For these reasons, SWC requests that the hearing officers issue an order quashing
6 the subpoena, or, in the alternative, protecting the SWC from the unwarranted oppression
7 and undue burden and expense of the subpoena duces tecum propounded by BBID.
8 Moreover, due to the continued discovery propounded by BBID, SWC seeks an order of the
9 Water Board officially closing discovery in the above-referenced proceedings as of March
10 9, 2016.

11 **II. BACKGROUND AND STATEMENT OF FACTS**

12 On July 20, 2015, the State Water Resources Control Board ("Board") issued an
13 Administrative Civil Liability Complaint to BBID relating to its diversions from the intake
14 channel to the Banks Pumping Plant (formerly Italian Slough) after June 12, 2015. In
15 response to the issued ACL, BBID requested a formal hearing on August 6, 2015. On
16 January 19, 2016, written testimony and exhibits composing the cases-in-chief, including of
17 the Prosecution Team and BBID were submitted. On February 22, 2016, written rebuttal
18 testimony and exhibits were submitted by parties including SWC, which submitted the
19 written testimony of Paul Hutton as exhibit SWC0001 in addition to exhibits SWC0002-0007
20 relied on by Dr. Hutton. The hearing in the enforcement proceeding is currently set to
21 commence on March 21, 2016. On March 1, 2016, BBID served a subpoena duces tecum,
22 issued March 1, 2016, on SWC ordering the production of documents by March 11, 2016.
23 (Ansley Decl. ¶ 2, Exhibit 1.)

24 **III. LEGAL AUTHORITY**

25 Administrative hearings and discovery procedures are governed by the Water Code
26 (Water Code §§ 1075 et seq.) and Board regulations (23 C.C.R §§ 648 et seq.), which
27 incorporate portions of the Administrative Procedure Act (Gov't Code §§ 11400 et seq.;
28 11513), the Evidence Code (Evidence Code §§ 801-805) and the Civil Discovery Act

1 (Code of Civil Proc. § 2016.010 et seq.). The Board or any party to a proceeding may take
2 the deposition of witnesses in accordance with the Civil Discovery Act. (Water Code
3 § 1100). In adjudicative proceedings before the Board, subpoena duces tecum are
4 governed by Water Code Sections 1100 and 1105 et seq.; Government Code Sections
5 11450.05 et seq. and 11455.10 et seq., and Code of Civil Procedure Section 2020.210 et.
6 seq. (See 23 C.C.R. § 649.6.) The right to discovery, however, is not unlimited.

7 The information sought to be discovered must be relevant or reasonably calculated
8 to lead to the discovery of admissible evidence. (Code of Civil Proc. § 2017.010). The
9 party seeking the discovery bears the burden of proving that the discovery is relevant.
10 (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 223.) Further,
11 discovery may be limited if it is determined that the burden, expense or intrusiveness of the
12 discovery sought outweighs the likelihood that the information sought will lead to the
13 discovery of admissible evidence. (Code of Civil Proc. § 2017.020(a).) Similarly, discovery
14 can be restricted if it is determined that the discovery sought is unreasonably cumulative or
15 duplicative or is obtainable from some other source that is more convenient, less
16 burdensome, or less expensive. (Code of Civil Proc. § 2019.030(a)(1).) It is a misuse of
17 the discovery process to employ any discovery method in a manner or to an extent that
18 causes unwarranted annoyance, embarrassment, or oppression or undue burden and
19 expense. (Code of Civil Proc. § 2023.010(c).)

20 **IV. ARGUMENT**

21 **A. The Subpoena Duces Tecum Seeks Documents Protected by the** 22 **Attorney Work Product Doctrine**

23 BBID seeks the production of documents that constitute protected attorney work
24 product of the SWC and its member agency Metropolitan Water District of Southern
25 California ("MWD"). (Code of Civil Procedure § 2018.030.) The attorney work product
26 doctrine "protects the mental processes of the attorney, providing a privileged area within
27 which he can analyze and prepare his client's case." (*Fireman's Fund Ins. Co. v. Superior*
28 *Ct.* (2011) 196 Cal.App.4th 1263, 1281.) Protected work product expressly includes

1 writings that reflect an attorney's impressions, conclusions, opinions, or legal research or
2 theories, which are subject to absolute protection, as well as other work product of an
3 attorney, which has conditional protection, including the findings, opinions, and reports of
4 consulting or advisory experts. (Code of Civil Proc. § 2018.030; *National Steel Prods. v.*
5 *Superior Ct.* 164 Cal. App.3d 476, 487.) The latter is not discoverable unless it is
6 determined that the denial of discovery will unfairly prejudice the party seeking discovery in
7 preparing its claim or defense or will result in an injustice. (Code of Civil Proc.
8 § 2018.030(b).)

9 CH2M Hill's work as a technical consultant for SWC and member agency MWD is
10 protected by the attorney-work product doctrine. Working at the direction of in-house
11 counsel for SWC and MWD, CH2M Hill is retained as a technical consultant for the purpose
12 of analyzing conditions in the Delta in response to pending and threatened disputes,
13 including disputes involving BBID. (Declaration of Stefanie D. Morris ("Morris Decl.") ¶ 2)
14 In this proceeding, SWC's rebuttal witness, Dr. Paul Hutton relies on a technical
15 memorandum prepared by CH2M Hill in forming his expert opinion. Using Dr. Hutton's
16 reliance on the produced technical memorandum (SWC0005) as a pretext, however, BBID
17 now seeks to open up broader discovery on CH2M Hill's work for SWC and MWD, which is
18 protected by the attorney work product doctrine.

19 In its opposition to the now-granted motions to quash the subpoenas served on
20 CH2M Hill, Chandra Chilmakuri and Kyle Winslow, BBID incorrectly asserted that the
21 attorney work product doctrine cannot be asserted as to work performed by CH2M Hill for
22 BBID. (See BBID Consolidated Opposition, pp. 5:7-12.) However, as shown by the letter
23 from CH2M Hill to BBID, attached as exhibit A to Mr. Vergara's supporting declaration,
24 CH2M Hill had determined that the work for BBID was based on, i.e., incorporated, work
25 performed for SWC, which should not have been disclosed. As such, the work performed
26 by CH2M Hill for BBID does constitute protected attorney work product of SWC.

27 BBID can show no unfair prejudice in preparing its case or an injustice warranting
28 the extreme decision to remove the protections of the attorney work product doctrine from

1 SWC's documents. BBID has already submitted its case-in-chief and rebuttal testimony.
2 As such, the documents requested are not required to develop its case-in chief or rebuttal
3 testimony. What remains is the cross-examination of Dr. Hutton, which the hearing
4 procedures limit to the scope of his rebuttal testimony. To prepare for cross-examination of
5 Dr. Hutton's, BBID has both Dr. Hutton's written rebuttal testimony and the documents on
6 which relies, including SWC0005, all of which were submitted well in advance of the
7 evidentiary hearing. At this point, BBID has everything it needs for the evidentiary hearing.

8 Instead, BBID is attempting to use the discovery process in this proceeding to obtain
9 documents that disclose the attorney work product of SWC regarding its underlying
10 analyses and strategies regarding Delta disputes beyond the scope of this hearing, as
11 evidenced by the supporting affidavit of Ms. Barfield referencing the coordinated water
12 curtailment cases currently in front of the Santa Clara Superior Court. (See Ansley Decl.,
13 ¶ 2, Exhibit 1.) The subpoena seeks the production of **all** documents, including
14 communications, "concerning or relating to" the Water Board's determination of water
15 unavailability for 2015, the testimony of Paul Hutton, current or historical diversions by
16 BBID, the CH2M Hill Technical Memorandum, CH2M Hill's work on the Technical
17 Memorandum, and CH2M Hill's work for BBID "in any capacity," and all documents relied
18 on by SWC, in addition to Paul Hutton, in the preparation of testimony. (Id.) The document
19 requests instruct that the phrase "relating to" "shall be construed in the broadest possible
20 sense and shall mean, without limitation, pertaining to, regarding, concerning, comprising,
21 constituting, in connection with, reflecting, respecting, referring to, stating, describing,
22 recording, noting embodying, containing, mentioning, studying, analyzing, discussing or
23 evaluating." (Id.) Documents responsive to such expansive requests impermissibly open
24 the door to CH2M Hill's protected work for SWC and MWD. For these reasons, an order
25 quashing the subpoena or prohibiting the production of documents in response to the
26 subpoena duces tecum is warranted to protect the attorney work product of the SWC.

1 **B. The Subpoena Duces Tecum Constitutes an Undue Burden and**
2 **Expense on SWC that Will Not Likely Lead to the Discovery of**
3 **Admissible Evidence**

4 At this point in the proceeding, with all evidence comprising the cases-in-chief and
5 rebuttal testimony submitted, the extensive document requests are an undue burden and
6 expense that far outweigh any likelihood of leading to the discovery of any admissible
7 evidence. ((Code of Civil Proc. §§ 2017.020(a); 2025.420(b).) In particular, BBID's
8 requests for irrelevant information concerning the Water Board's determination of water
9 availability in the Sacramento and San Joaquin River watersheds and the Delta for 2015
10 generally, historical diversions by BBID, or CH2M Hill's work for BBID are not reasonably
11 calculated to lead to the discovery of admissible evidence. (Code of Civil Proc. § 2017.010;
12 Government Code § 11513(c).) Allowing BBID to proceed with the subpoenas to SWC at
13 this late juncture, is an undue burden and expense on SWC, and its member agencies.
14 SWC is already burdened by being forced to make this motion to quash and motion for
15 protective order, mere weeks before the hearing. If required to produce documents
16 pursuant to the subpoena, SWC must expend significant hours of its own counsels' time
17 gathering responsive SWC documents and reviewing such documents for privilege to
18 protect SWC's attorney work product. (Morris Decl. ¶ 3.)

18 **C. The Subpoena Duces Tecum is Duplicative of Information Already**
19 **Available in a More Convenient, Less Burdensome and Less Expensive**
20 **Manner**

21 To the extent the subpoena duces tecum seeks information marginally relevant to
22 these enforcement proceedings, the hearing procedures afford BBID with the ability to gain
23 any needed information regarding Dr. Hutton's rebuttal testimony in a more convenient,
24 less burdensome and less expensive manner than subpoenas commanding extensive
25 document productions weeks shy of the hearing. (Code of Civil Proc. § 2019.030(a)(1).)
26 BBID is in possession of not only Dr. Hutton's complete written rebuttal testimony, but also
27 the documents on which Dr. Hutton relies, including the CH2M Hill Technical Memorandum
28 which was submitted as SWC0005. Further, Dr. Hutton will be made available to all parties
 for cross-examination on his rebuttal testimony, providing parties with the opportunity to

1 question Dr. Hutton concerning the bases for his testimony.

2 **D. The Subpoena Duces Tecum Fails to Provide a Reasonable Time for**
3 **Deposition and the Production of Documents**

4 The subpoena duces tecum to SWC fails to provide a reasonable time for the
5 depositions and/or production of documents. (Government Code § 11450.10.) The Civil
6 Discovery Act provides what constitutes a minimum reasonable amount time to respond. A
7 subpoena commanding only the production of documents shall command production of
8 documents “on a date that is no earlier than 20 days after the issuance, or 15 days after the
9 service, of the deposition subpoena, whichever date is later.” (Code of Civil Proc.
10 §§ 2020.220(a) 2020.410(c).) Under this rule, the earliest reasonable deadline for
11 responding to the subpoena duces tecum to SWC was March 21, 2016, the first day of the
12 evidentiary hearing.

13 **V. SWC RESPECTFULLY REQUESTS THE CLOSE OF DISCOVERY AT A**
14 **REASONABLE TIME PRIOR TO THE EVIDENTIARY HEARING**

15 BBID notice of deposition and six subsequently-issued subpoenas duces tecum
16 were all served less than 30 days before the start of the evidentiary hearing on March 21,
17 2016. To date, there has been no contemplation by the parties or the hearing officers that
18 discovery would be conducted *following* the submission of both the cases-in-chief and
19 rebuttal testimony clear up to the commencement of the evidentiary hearing. Generally,
20 discovery must be completed 30 days prior to the date trial commences. (Code of Civil
21 Proc. § 2024.020.) As such, as once argued by BBID, “discovery in ENF019151 must
22 therefore be completed before February 19, 2016.” (BBID Opposition to Prosecution
23 Team’s Motion for Protective Orders dated October 21, 2015, p. 3:21-25.)

24 The lack of an established discovery cut-off in the above-referenced proceedings
25 has allowed BBID to propound burdensome and harassing discovery requests on SWC
26 right up until the start of the evidentiary hearing, including a deposition scheduled one
27 business day before the evidentiary hearing. For this reason, SWC respectfully requests
28 that the Water Board now establish a reasonable discovery cut-off date for the above-
referenced proceedings and propose a discovery cut-off date of March 9, 2016, which

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would have the effect of quashing or prohibiting the subpoena duces tecum to SWC.

VI. CONCLUSION

For the reasons stated above, good cause exists to grant a motion to quash the subpoena duces tecum served on the SWC, or, in the alternative, a protective order prohibiting the subpoena.

Dated: March 9, 2016

DUANE MORRIS LLP

By: 
Thomas M. Berliner
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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 a party
3 to this lawsuit. My business address is Duane Morris LLP, One Market Plaza, Spear Tower, Suite
2200, San Francisco, California 94015-1127.

4 On March 9, 2016, I served the following document(s):

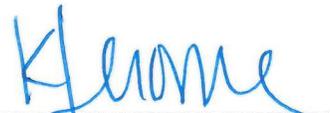
- 5 **1. STATE WATER CONTRACTORS’ MOTION TO QUASH SUBPOENA DUCES**
- 6 **TECUM, OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDER;**
- 7 **REQUEST TO CLOSE DISCOVERY**
- 8 **2. DECLARATION OF STEFANIE D. MORRIS IN SUPPORT OF STATE WATER**
- 9 **CONTRACTORS’ MOTION TO QUASH SUBPOENA DUCES TECUM, OR, IN THE**
- 10 **ALTERNATIVE, MOTION FOR PROTECTIVE ORDER; REQUEST TO CLOSE**
- 11 **DISCOVERY**
- 12 **3. DECLARATION OF JOLIE-ANNE ANSLEY IN SUPPORT OF STATE WATER**
- 13 **CONTRACTORS’ MOTION TO QUASH SUBPOENA DUCES TECUM, OR, IN THE**
- 14 **ALTERNATIVE, MOTION FOR PROTECTIVE ORDER; REQUEST TO CLOSE**
- 15 **DISCOVERY**

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

17 **BY E-MAIL:** On the March 9, 2016, at San Francisco, California, I caused the foregoing
18 document(s) to be served by e-mail transmission to the e-mail address(es) set forth below, as last
19 given by that person on any document which he or she has filed in the cause and served on the party
20 making the service. The document(s) was(were) transmitted by e-mail from a computer in the
21 offices of Duane Morris. The e-mail transmission(s) was(were) reported as delivered to the
22 party(ies) at the indicated e-mail address(es), and no undeliverable message from the recipient’s
23 server was received by the sender of the e-mail. A copy of the e-mail transmission confirmation(s)
24 is(are) attached hereto.

25 **SEE ATTACHED SERVICE LIST**

26 I declare under penalty of perjury under the laws of the State of California that the foregoing is true
27 and correct. Executed on March 9, 2016, at San Francisco, California.

28 

Kristin Jerome

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

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12 **ADMINISTRATIVE CIVIL LIABILITY HEARING**

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