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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

HEARING REGARDING PETITION FILED BY THE DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION REQUESTING CHANGES IN WATER RIGHTS FOR THE CALIFORNIA WATERFIX PROJECT	MOTION OF PROTESTANTS PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS AND INSTITUTE FOR FISHERIES RESOURCES TO DISQUALIFY PETITIONERS’ WITNESSES AND EXCLUDE THEIR TESTIMONY AND EXHIBITS Hearing Date: July 26, 2016 Time: 9:00 a.m.
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1 **I. INTRODUCTION**

2 The Change Petition submitted by the Department of Water Resources and the U.S.
3 Bureau of Reclamation (“petitioners”) is easily the most important matter pending on this Board’s
4 current docket. It may well be the most significant water rights proceeding this Board will decide
5 for decades to come. According to every state and federal agency that manages its fish and
6 wildlife, the Bay-Delta ecosystem is collapsing. The National Marine Fisheries Service
7 (“NMFS”) and the Fish and Wildlife Service (“FWS”) concluded in 2008 and 2009, respectively,
8 that continued operation of the Central Valley Project (“CVP”) and the State Water Project
9 (“SWP”) would jeopardize the existence of Delta smelt, winter-run Chinook salmon, green
10 sturgeon, and other imperiled fish species. *San Luis & Delta Mendota Water Authority v. Jewell*,
11 747 F.3d 581, 592 (9th Cir. 2014) (quoting FWS’ Biological Opinion); *San Luis & Delta*
12 *Mendota Water Authority v. Locke*, 776 F.3d 971, 981 (9th Cir. 2014) (quoting NMFS’ Biological
13 Opinion). The Environmental Protection Agency (“EPA”) agrees. As stated in its comments on
14 the Recirculated Draft EIR/Supplemental Draft EIS (“RDEIR/SDEIS”) for the California
15 WaterFix dated October 30, 2015, “[t]hese species have experienced sharp population declines in
16 the last decade and showed record low abundance over the last five years.” *Id.* at 3.

17 Far from protecting those species, the WaterFix will *hasten their demise*. EPA warned
18 that “[i]nformation presented in the [RDEIR/]SDEIS shows that the WaterFix project could
19 reduce habitat conditions for Delta smelt, winter-run Chinook salmon, green and white sturgeon,
20 striped bass, and American shad, and result in a decline of long fin smelt abundance.” *Id.* EPA
21 cautioned further that the WaterFix will cause a wholesale increase in salinity throughout the
22 Bay-Delta, posing potentially catastrophic impacts on both fish and wildlife and municipal uses.
23 *Id.*

24 It gets worse. Not only is the Bay-Delta ecosystem in free fall, all three safety nets that
25 state law requires for protection of this dying estuary have been ruled inadequate. EPA has given
26 the RDEIR/SDEIS a failing grade of “‘3’ (Inadequate).” *Id.* at 4. The Sacramento Superior Court
27 has set aside the Delta Stewardship Council’s Delta Plan – the very plan that the Legislature
28 mandated to reverse the Delta’s “crisis” – because it fails to prescribe measureable and

1 enforceable targets for restoring the Delta’s natural flows, reducing environmental harms and
2 curtailing diversions of its flows.¹ And, most important of all, it is indisputable that the Bay-Delta
3 Water Quality Control Plan adopted by this Board in 1995 (Decision-1641) is obsolete. It has
4 failed to protect the Delta’s fish and wildlife and must therefore be updated as required by the
5 Clean Water Act and the California Water Code.

6 The upshot? Unless and until all three of these fundamental gaps in the Delta’s required
7 protection are rectified, there is no regulatory regime in place to provide an evidentiary basis for
8 the Change Petition. Because there are no valid water quality standards in place, the petitioners’
9 assurances that the WaterFix’s claimed compliance with environmental standards will prevent
10 harm to other legal users of water rings hollow. For this reason, as detailed below, the evidence
11 proposed by petitioners is neither relevant nor reliable as required by settled principles of
12 administrative and evidentiary law. Accordingly, this Board must reject petitioners’ proffered
13 evidence and with it, their Change Petition.

14 **II. THE LEGAL PREDICATES FOR PETITIONERS’ TESTIMONY ARE ABSENT.**

15 Petitioners’ testimony and exhibits are neither relevant nor reliable because they rest on
16 the false premise that compliance with existing environmental standards will prevent harm to
17 other legal users of the Delta’s water. 23 Cal. Code Regs. (“CCR”) §648.5.1 directs that this
18 Board’s adjudicative proceedings must “be conducted in accordance with the provisions and rules
19 of evidence set forth in Government Code section 11513.” Although that section instructs that
20 this Board’s “hearing need not be conducted according to technical rules relating to evidence and
21 witnesses,” it is settled law that “even in such [administrative] proceedings, with the relaxed
22 standards of admissibility, the evidence must be relevant and reliable.” *Aengst v. Board of*
23 *Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283. Indeed, the standard for
24 determining the admissibility of scientific evidence in this adjudicatory hearing is the same as it

25
26 ¹ Ruling on Submitted Matter: Petitions for Writ of Mandate, Bifurcated Proceeding on Statutory
27 Challenges filed May 18, 2016 (“Ruling”), in Delta Stewardship Council Cases (Judicial Council
28 Coordination Proceeding No. 4758) at 26, setting aside the Delta Plan adopted by the Delta
Stewardship Council in May, 2013 because it violates the Delta Reform Act, Water Code sections
85001 et seq. A true copy of this Ruling is annexed as Exhibit 1 to this Motion.

1 would be in a judicial proceeding. *Seering v. Department of Social Services* (1987) 194
2 Cal.App.3d 298, 310. In 1976 the California Supreme Court approved the venerable rule of
3 admissibility for new scientific methodologies adopted by the District of Columbia Circuit Court
4 of Appeals in 1923. *People v. Kelly* (1976) 17 Cal.3d 24, 30 (approving and applying *Frye v.*
5 *United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). “Under the *Kelly-Frye* Rule, evidence based
6 on a new scientific method of proof is admissible only upon a showing that the procedure has
7 been generally accepted as reliable in the scientific community in which it was developed.” *In re*
8 *Amber B.* (1987) 191 Cal.App.3d 682, 686. Petitioners’ proffered evidence fails to meet this
9 fundamental standard of general acceptance by the relevant scientific community because it is
10 erroneously premised on the false assumption that compliance with existing environmental
11 standards will assure the WaterFix will harm no legal users of water. To the contrary, since the
12 primary environmental standards governing management of the Delta have been deemed
13 inadequate, petitioners’ premise is a logical fallacy, as discussed below.

14 **A. THE 1995 BAY-DELTA PLAN HAS NOT BEEN UPDATED.**

15 The Water Quality Control Plan for the San Francisco Bay/San Joaquin-Sacramento Delta
16 Estuary (WQCP) (Water Rights Decision 1641, D-1641) was adopted in 1995, and amended
17 without substantive changes in 2006. “The State Water Board is in the process of a periodic
18 update of the WQCP, which is occurring in phases.” (Reference DWR-51, Jennifer Pierre
19 testimony at 4 n.4). Indeed, as this Board recognized in its February 11, 2016, Ruling: “The
20 appropriate Delta flow criteria will be more stringent than petitioners’ current obligations and
21 may well be more stringent than petitioners’ preferred project.” (*Id.* at 4.) This Board further
22 acknowledged “that the WaterFix, if approved, would be a significant component of Delta
23 operations, and it would be preferable to have Phase 2 [of the Plan update] completed prior to
24 acting on the change petition.” (*Id.* at 4-5).

25 Moreover, the Delta Reform Act mandates that any order by this Board approving a
26 diversion point change “shall include appropriate Delta flow criteria and shall be informed by the
27 analysis conducted pursuant to this section.” Water Code § 85086(c)(2). But contrary to this
28 express mandate of the Delta Reform Act, this Board has failed to adopt appropriate Delta flow

1 criteria before considering the Change Petition. This cart-before-the-horse error is prejudicial and
2 must be corrected before the Change Petition may be considered.

3 Because existing standards are known to be inadequate, testimony that the Waterfix will
4 comply with existing standards is not relevant. Comprehensive and adequate Bay-Delta water
5 quality planning needs to take place before, not after, this Board may proceed with a hearing on
6 the Change Petition.

7 **B. THERE HAS BEEN NO COMPLIANCE WITH THE DELTA REFORM**
8 **ACT.**

9 There is currently no valid Delta Plan in effect. On May 18, 2016, the Sacramento
10 Superior Court issued its 73 page ruling in the seven coordinated Delta Stewardship Council
11 Cases (Judicial Council Coordinated Proceeding No. 4758). In pertinent part, the Ruling ordered
12 that:

13 A peremptory writ shall issue from this Court to Respondent [the
14 DSC], ordering Respondent to revise the Delta Plan and any applicable
regulations to:

15 Include quantified or otherwise measurable targets associated with
16 achieving reduced Delta reliance, reduced environmental harm from
17 invasive species, restoring more natural flows, and increased water
supply reliability, in accordance with the Delta Reform Act.

18
19 (*Id.* at 26, 38.) This Board may and should take official notice of this Ruling under 23 C.C.R.
20 section 648.2 because judicial notice would be proper under Evidence Code sections 451(a),
21 452(a) and 453. The Delta Plan is designated as “the comprehensive, long-term management plan
22 for the Delta as adopted by the [Delta Stewardship Council] in accordance with this division.”
23 (Water Code § 85059.) As the Ruling explains, Water Code section 85308(b) “provides that the
24 Delta Plan shall, ‘include quantified or otherwise measurable targets associated with achieving the
25 objectives of the Delta Plan.’” (Ruling at 8.) The Ruling further explains that quantified or
26 measurable targets would include a numeric designation or an amount that can be identified. (*Id.*
27 at 8-9). The Court also noted on page 9 of its Ruling that there is “legislative direction that the
28 Delta Plan be ‘legally enforceable.’ (§ 85001.)” In addressing the DSC's arguments, the Court

1 found that “WR R1 is not an enforceable policy and does not describe how progress will be
2 measured.” (Ruling at 12.) The Court found “the Delta Plan fails to ‘include quantified or
3 otherwise measurable targets associated with achieving’ reduced Delta reliance as required by the
4 Delta Reform Act.” (*Id.* at 12.)

5 Accordingly, the Ruling directed that:

6 A peremptory writ of mandate shall issue from this court to
7 Respondent, ordering Respondent to revise the Delta Plan and any
8 applicable regulations to:

- 9 1) Provide a flow policy that includes 'quantified or otherwise
10 measurable targets;

11 *Id.* at 38.)

12 The Court ruled that “the Delta Plan fails to 'include quantified or otherwise measurable
13 targets associated with' restoring more natural flows as required by the Delta Reform Act.” (*Id.* at
14 36.) The Court explained that section 85302(e)(4) “provides [that] [t]he following sub goals and
15 strategies for restoring a healthy ecosystem shall be included in the Delta Plan... (4) Restore
16 Delta flows and channels to support a healthy estuary and other ecosystems.” (*Id.* at p. 34.) The
17 Court pointed out that a goal of “progress”:

18 does not provide a quantified or otherwise measurable target upon
19 which Delta users can gauge compliance. While Respondent may
20 intend to refine its performance measures, the Delta Reform Act
21 requires measurable targets to be included in the Delta Plan. As
22 Respondent has certified that it has completed such a Delta Plan, any
23 future modifications are not relevant to a determination of whether the
24 Delta Plan currently complies with the Delta Reform Act.

25 (*Id.* at 36.)

26 For these additional reasons, the Ruling directed further that:

27 A peremptory writ of mandate shall issue from this Court to
28 Respondent, ordering Respondent to revise the Delta plan and any
applicable regulations to:

Promote options for war conveyance and storage systems.

1 (Ruling at 38, 72.) The Court reasoned that “simply recommending the BDCP's completion does
2 not promote any options.” (*Id.* at 37.) “[T]he Delta Reform Act. . . does require Respondent to
3 promote options for water conveyance.” (*Id.* at 59). The Court therefore held that the failure to
4 promote options for water conveyance is a violation of the Delta Reform Act. (*Id.* at 37-38, 59.)

5
6 On June 24, 2016, the Court issued a further Order in response to motions for clarification,
7 adhering to and expanding upon its earlier Ruling, and explaining that “Specifically, with regard
8 to reduced Delta reliance, the Court found the Plan failed to include targets that would ensure
9 reduced reliance, as required by the Delta Reform Act.” See Exhibit 2 hereto.² The Court
10 repeated its previous ruling that the Delta Plan must be revised “to include quantified or otherwise
11 measurable targets associated with achieving reduced Delta reliance, . . . restoring more natural
12 flows, and increased water supply reliability,” and emphasized that “[t]o be clear, the Delta Plan
13 is invalid and must be set aside until proper revisions are completed.” *Id.*

14
15 More stringent Delta flow criteria are clearly necessary. The Delta Reform Act requires
16 measures to “[r]estore Delta flows and channels to support a healthy estuary and other
17 ecosystems.” Water Code § 85302(e)(4). The Act establishes State policy “to reduce reliance on
18 the Delta in meeting California's future water supply needs through a statewide strategy of
19 investing in improved regional supplies, conservation, and water use efficiency.” Water Code §
20 85021. State policy is also to “[r]estore the Delta ecosystem, including its fisheries and wildlife,
21 as the heart of a healthy estuary and wetland ecosystem.” Water Code § 85020(c).

22
23 The status quo does not satisfy the Delta Reform Act. Instead, reliance on the Delta by
24 consumptive users must be reduced, and more natural Delta flows must be restored.

25
26
27 ² As with the Court’s May 18, 2016 Ruling, this Board should take official notice under 23 C.C.R.
28 section 648.2 because judicial notice would be proper under Evidence Code sections 451(a),
452(c) and 453.

1 Consequently, testimony that the Waterfix will comply with existing standards is not relevant, and
2 testimony about a lack of negative effects to legal users of water is neither relevant nor reliable.

3 Like the Delta Stewardship Council, this Board will be sent back to the starting line for
4 violating the law if it continues to consider the Change Petition without adopting the adequate
5 flow criteria required by the Delta Reform Act, Water Code section 85086.
6

7 **C. THE WATERFIX/BDCP EIR/EIS IS PRELIMINARY AND INADEQUATE.**

8 Petitioners have not prepared or approved a Final EIR/EIS for the WaterFix. The
9 WaterFix’s RDEIR/SDEIS, including the Draft EIR/EIS that it modifies and incorporates, is
10 merely a preliminary document. It does not identify a Project, nor does it address public concerns
11 regarding the deficiencies in its analysis. Because it is still an incomplete draft, its analysis and
12 conclusions are subject to change. It has not been certified as complete or accurate by *any*
13 decisionmaking body.

14 The RDEIR/SDEIS is further inadequate because it does not present a reasonable range of
15 alternatives, as required by CEQA. *North Coast Rivers Alliance v. Kawamura* (2015) 243
16 Cal.App.4th 647, 666-673. Its range of alternatives is improperly and artificially curtailed by the
17 petitioners’ project objectives, in violation of CEQA. *Id.* The RDEIR/SDEIS fails to study any
18 alternative that would hinder the ability of the SWP and CVP to deliver full contract amounts,
19 despite multiple comments requesting such an analysis. The Environmental Water Caucus
20 prepared one such alternative, which was attached to the January 21, 2016, letter to this Board
21 submitted by Friends of the River, *et al.*

22 Pursuant to 23 C.C.R. section 648.2 and Evidence Code section 452(c), protestants hereby
23 request official notice of the contents of EPA’s October 30, 2015 letter reviewing the
24 RDEIR/SDEIS pursuant to Evidence Code section 452(c).³ In that letter, the EPA gave the
25 RDEIR/SDEIS a rating of “‘3’ (*Inadequate*).” *Id.* at p. 4. The EPA findings about missing
26

27 ³ The October 30, 2015 EPA letter was attached to the November 24, 2015, letter to this Board
28 submitted by protestants California Sportfishing Protection Alliance, Environmental Water
Caucus, Friends of the River, and Restore the Delta.

1 information are consistent with this Board’s October 30, 2015, comment letter on the
2 RDEIR/SDEIS, which stated on page 2 that “there is a large degree of uncertainty regarding the
3 exact effects of the project due to a number of factors.” Because the RDEIR/SDEIS is a
4 preliminary, incomplete draft, this Board cannot rely upon it for its decision in this proceeding.

5 The starting point for determining whether there will be negative effects to legal users of
6 water should be an adequate Final EIR/EIS with a robust analysis of alternatives, including an
7 alternative of reducing water exports. Instead, petitioners present testimony and exhibits that
8 have never been examined in any final and adequate analysis of environmental impacts under
9 California law. Rather than comply with CEQA, petitioners insist that this Board unlawfully
10 proceed on the basis of petitioners’ own self-serving testimony and exhibits. Their attempted
11 evasion of CEQA’s requirements must not be rewarded by allowing their premature Change
12 Petition to proceed to hearing. Accordingly, their testimony and exhibits must, along with their
13 Change Petition, be rejected.

14
15 **III. THIS BOARD SHOULD DISQUALIFY PETITIONERS’ WITNESSES AND
16 EXCLUDE THEIR TESTIMONY AND EXHIBITS.**

17 As noted, the legal predicates for petitioners’ testimony and exhibits are absent, since the
18 1995 Bay-Delta Plan is obsolete, the 2013 Delta Plan has been invalidated by the court, and there
19 is no CEQA-required final EIR/EIS for the WaterFix Project. Absent valid, updated and adequate
20 environmental standards against which to measure the impacts of the WaterFix, there is no basis
21 for petitioners’ witnesses’ claims that the WaterFix will not harm legal users of water because it
22 will conform to applicable environmental standards. Furthermore, this Board should disqualify
23 petitioners’ witnesses and exclude their testimony and exhibits because petitioners have failed to
24 provide evidence that identifies the specific impacts of the WaterFix on legal users of water. As
25 shown below, despite this Board’s clear instruction that petitioners must provide this specific
26 information, they have failed to do so. Accordingly, their witnesses, testimony and exhibits
27 should be excluded, and their petition must be denied.
28

1 “identification in quantitative terms of any projected change in water quantity, water quality,
2 timing of diversion or use, consumptive use of the water, reduction in return flows, or reduction in
3 the availability of water within the streams affected by the proposed change(s).” 23 C.C.R. §
4 794(a)(6), (8), (9).

5 Petitioners now admit that they cannot provide the information required by the Board with
6 particularity. “Since the BiOp has not been issued,” petitioners explain, “and DWR and
7 Reclamation do not know the initial operational criteria, the analytical framework presented for
8 Part 1 is a boundary analysis.” DWR 51 at 10:8-10. While this “boundary analysis” attempts to
9 “provide a broad range of operational criteria,” the conclusions stated in the written testimony
10 offered by petitioners are not supported by the necessary data or analysis and do not contain the
11 specificity necessary to satisfy the informational requirements of the Board's October 30 Notice,
12 February 11 Ruling, or regulations. DWR 51 at 10:10.

13 All testimony by petitioners’ witnesses on project modeling must be excluded because it is
14 not based on principles or procedures that have gained general acceptance in their field. *People v.*
15 *Kelly, supra*, 17 Cal.3d at 32 (adopting the rule in *Frye v. United States, supra*, 293 F. at 1014);
16 *People v. Leahy* (1994) 8 Cal.4th 587, 594. The *Kelly* rule, known as the “general acceptance
17 test,” allows for the admission of expert opinion grounded in a scientific theory or technique if the
18 theory or technique is generally accepted as reliable in the relevant scientific community. Under
19 this rule, evidence based on a new scientific method must satisfy three requirements to be
20 admissible: (1) the technique has gained general acceptance in its field; (2) the witness furnishing
21 the testimony is qualified to give evidence on the acceptance of the technique; and (3) correct
22 scientific procedures were used. *People v. Diaz* (1992) 3 Cal.4th 495, 526. Petitioners’ witnesses
23 have not satisfied these criteria.

24 The modeling results relied upon by petitioners’ witnesses do not meet the *Kelly* rule
25 because they have failed to provide a proper foundation in actual data and understandable analysis
26 to “provide a reasonable basis for the particular opinion offered.” *Lockheed Litigation Cases*
27 (2004) 115 Cal.App.4th 558, 564. Under Evidence Code section 803, this Board “shall . . .
28

1 exclude” opinion testimony in the form of an opinion that is based in whole or in significant part
2 on matter that is not a proper basis for such an opinion.”

3 This Board is well aware of the importance of providing adequate documentation of model
4 assumptions, validation through testing, and adjustment by calibration. In 2012 this Board
5 convened its own scientific panel to provide specific recommendations as to the requirements for
6 assuring that hydrologic models are accurate and reliable. Neither of the models on which
7 petitioners rely – CalSim II and DSM2 – have ever been validated for use by any external and
8 disinterested experts. The absence of this required validation requires exclusion of petitioners’
9 testimony based upon these models. *Seering, supra*, 194 Cal.App.3d at 311. Petitioners fail to
10 address this fatal deficiency.

11 But this defect strikes at the heart of the entire basis for petitioners’ claim that the
12 WaterFix will not harm legal users of water. Numerous independent experts familiar with these
13 models have questioned their validity. According to one review, “Better quality control is needed
14 both for the model and its current version and the input data. Procedures for model calibration
15 and verification are also needed. Currently many users are not sure of the accuracy of the results.
16 A sensitivity and uncertainty prediction capability and analysis is needed.” California Bay Delta
17 Science Program, *A Strategic Review of CalSim II and its Use for Water Planning, Management,*
18 *and Operations in Central California*, p. 8 (Dec. 4, 2003) (“2003 Peer Review”). The lack of
19 acceptance of CalSim II has been persistent, as a subsequent peer review found that “CalSim II
20 work fails to adequately report technical results that would give knowledgeable readers some
21 sense of the quality, accuracy, sensitivity, or uncertainty present in the results. This issue was
22 prominent in the previous CalSim review panel report.” CALFED Science Program, *San Joaquin*
23 *River Valley CalSim II Model Review*, p. 10 (Jan. 12, 2006) (“2006 Peer Review”). The U.S. Fish
24 and Wildlife Service (“FWS”) also criticized petitioners’ modeling and had to develop its own
25 alternative because it felt that CalSim II was unusable.

26 The inaccuracies in CALSIM lead us to use actual data to develop an empirical baseline
27 We calculated monthly or multiple month averages or medians based on these daily
28 hydrology data sets. The historical time series are intended to show where changes in
water project operations have caused or contributed to changed Delta hydrology and to

1 serve as an empirical baseline of SWP and CVP operations for comparison to proposed
2 futures modeled using CALSIM II.

3 2008 Fish and Wildlife Service Formal Endangered Species Act Consultation on the Proposed
4 Coordinated Operations of the Central Valley Project (CVP) and State Water Project (SWP)
5 (Exhibit SWRCB-87, p. 205). FWS also thereby demonstrated that use of actual data for an
6 empirical baseline was not only desirable, but also possible, further implicating petitioners'
7 failure to use the best available science.

8 CalSim II has never been calibrated, in direct contradiction to recommendations by
9 qualified and disinterested experts who served on the 2003 and 2006 peer review panels, quoted
10 above. Moreover, this lack of calibration is in direct contradiction to petitioners' own responses
11 to those peer reviews. *Peer Review Response: A Report by DWR/Reclamation in Reply to the*
12 *Peer Review of the CalSim-II Model Sponsored by the CALFED Science Program in December*
13 *2003*, p. 19 (Aug. 2004).

14 The 2006 Peer Review panel also recommended documentation of model assumptions and
15 error analyses. Under "Uncertainty in Model Results," the reviewers noted that "[c]urrently no
16 general guidance is available to indicate whether differences of 1 taf, 50 taf, 100 taf, or 500 taf are
17 significant enough to rise above the level of error and noise inherent in the model." 2006 Peer
18 Review, p. 6. As a result, the reviewers recommended, "[a]t a minimum, error analyses should be
19 conducted, combining a sensitivity analysis of critical model results to some of the largest and
20 least well supported model assumptions with an assessment of the likely range of error in these
21 major model parameters and assumptions." *Id.* While the 2007 Peer Review Response (Exhibit
22 DWR-507) attempts to do the mandated error analyses for the San Joaquin River component, the
23 analyses were never externally reviewed. Other components of the model lack any detailed or
24 meaningful error analysis. Without adequate error analysis, general acceptance by the scientific
25 community is not possible, and petitioners' modeling is not admissible evidence in an
26 adjudicative hearing before the Board.

1 Petitioners have also failed to demonstrate that their models are based on “best available
2 science.” A model is only as good as the data it utilizes, and petitioners have failed to
3 demonstrate the accuracy and validity of the data on which their models rely. Supporting
4 evidence should have been submitted with the Petition, so protestants would be able to review it
5 in a timely manner. If modeling is not in evidence, protestants are deprived of their due process
6 right to question petitioners’ witnesses about that modeling. “[I]n civil proceedings a party has a
7 due process right under the Fifth and Fourteenth Amendments to the Federal Constitution to
8 cross-examine and confront witnesses.” *Seering, supra*, 194 Cal.App.3d at 304, quoting *In re*
9 *Mary S.* (1986) 186 Cal.App.3d 414, 419. “[In] a civil proceeding the constitutional right
10 involves general notions of procedural due process.” *Id.* Because petitioners’ testimony based
11 on their modeling fails to identify the underlying data as necessary to permit petitioners’ informed
12 cross-examination, both the model and the testimony based thereon are objectionable on due
13 process grounds. *Id.* Moreover, since the underlying data is not in evidence, such testimony is
14 objectionable for the additional reason that it assumes facts not in evidence. *Dee v. PCS Property*
15 *Management, Inc.* (2009) 174 Cal.App.4th 390, 404 (an opinion based on assumed facts, without
16 adequate foundation for concluding that those facts exist, is unreliable and therefore should be
17 excluded).

18 Finally, petitioners’ failure to disclose the basis of their exclusion of environmentally
19 more protective alternatives (such as alternatives that would restore natural flows as required by
20 the Delta Reform Act) is objectionable. For example, Appendix 3I of the Draft Bay Delta
21 Conservation Plan (Exhibit SWRCB-4) states that certain alternatives for flow criteria were
22 eliminated from consideration by petitioners during preliminary modeling, with the Board’s
23 agreement. This premature elimination of alternatives from consideration by the public – let
24 alone the parties to this proceeding – impermissibly sidesteps the hearing process and protestants’
25 due process right to cross-examine petitioners’ witnesses as to the basis for their testimony.

26 In summary, petitioners’ witnesses have failed to demonstrate that the modeling on which
27 they rely is “the sort of evidence on which responsible persons are accustomed to rely in the
28 conduct of serious affairs.” Government Code section 11513(c). Petitioners have failed to

1 provide a sufficient foundation for their modeling to demonstrate its reliability and accuracy.
2 And, most importantly, petitioners have failed to demonstrate that the methodology employed in
3 their modeling is generally accepted by the relevant scientific community as required under the
4 *Kelly* standard. Accordingly, all of petitioners' testimony and exhibits that are based on the
5 CalSim II and DSM2 models must be excluded.

6 **B. THIS BOARD MUST DISQUALIFY WITNESSES WHOSE TESTIMONY**
7 **WAS NEVER DISCLOSED.**

8 Twelve of petitioners' witnesses must be excluded because their testimony was not
9 provided to the hearing participants by the May 31 deadline prescribed by this Board. On April
10 25, 2016, this Board ruled that noon on May 31, 2016 was the:

11 Deadline for receipt and service of petitioners' case in chief, including witnesses'
12 proposed testimony, witness qualifications, exhibits, list of exhibits, and a
13 statement of service for Part 1A of the hearing.

14 (Ruling, April 25, 2016 at 4) (emphasis added).

15 This Ruling is clear, and petitioners never sought a further extension of time to submit
16 their testimony. They elected to file proposed testimony for only 7 witnesses. As to 12 other
17 witnesses, petitioners provided only one sentence stating that the witness helped review, or
18 contributed information to, another witness' testimony. Each of these 12 witnesses' one sentence
19 of proposed "testimony" is set forth below. Each of these witnesses' testimonies should either be
20 limited to the single sentence provided, or excluded entirely.

21 **1. Steve Centerwall, DWR-52**

22 "I testify that I helped review the written testimony of Jennifer Pierre."

23 **2. Michael Anderson, DWR-64**

24 "I testify that I contributed information about the extreme conditions of recent years to the
25 testimony of John Leahigh."

26 **3. Eric Reyes, DWR-67**

27 "I reviewed and contributed to the written testimony of Mr. Munevar. In particular, I was
28 relied upon by Mr. Munevar for my particular expertise in modeling."

1 **4. Michael D. Bryan, DWR-73**

2 “I testify that I helped review the written testimony of Parviz Nader-Tehrani. Specifically,
3 I was relied upon by Parviz Nader-Tehrani for my particular expertise in water quality.”

4 **5. Jamie Anderson, DWR-69**

5 “I testify that I reviewed and contributed to the written testimony of Parviz Nader-Tehrani.
6 In particular, I was relied upon by Parviz Nader-Tehrani for my particular expertise in Delta
7 Modeling.”

8 **6. Tara Smith, DWR-70**

9 “I testify that I reviewed and contributed to the written testimony of Parviz Nader-Tehrani.
10 In particular, I was relied upon by Parviz Nader-Tehrani for my particular expertise in Delta
11 Modeling.”

12 **7. Kristin White, DOI-6**

13 “I have participated in the modeling testimony for this hearing by reviewing drafts and
14 making comments on CVP-related matters.”

15 **8. Gwendolyn Buchholz, DWR-72**

16 “I testify that I am closely involved in the creation of the BDCP/California WaterFix
17 EIR/EIS.”

18 **9. Mark A. Holderman, DWR-62**

19 “I testify that I can speak knowledgeably about the Department of Water Resources’
20 Temporary Barriers Project.”

21 **10. Shanmugam (Praba) Pirarooban, DWR-54**

22 “I testify that I contributed significantly to the engineering testimony of John Bednarski.
23 In particular, I was relied upon by John Bednarski for my experience in the project’s conceptual
24 design.”

25 **11. Sergio Valles, DWR-58**

26 “I testify that I contributed significantly to the engineering testimony of John Bednarski.
27 In particular, I was relied upon by John Bednarski for my experience in the project’s conceptual
28 design.”

1 **12. Robert Cooke, DWR-60**

2 “I testify that I can provide historical perspective on water contracts and Delta water
3 transfer facility activities, SWP water rights, long-term water supply contracts, and SWP
4 settlement agreements.”

5 Any request by petitioners to expand the testimony of any of these witnesses should be
6 denied. Protestants were entitled to receive proposed testimony, if any, from each of the above
7 witnesses by May 31, 2016. “It is the policy of the State and Regional Boards to discourage the
8 introduction of surprise testimony and exhibits.” 23 Cal. Code Regs § 648.4(a).

9 Allowing their testimony would not only violate this Board’s April 25, 2016 Ruling, but
10 also deprive protestants of due process by denying them their right to review the proposed
11 testimony, *including the witnesses’ opinions and the basis/reasons for their opinions*, well in
12 advance of the commencement of the Hearing. Admission of any additional testimony from these
13 witnesses would prejudice protestants and therefore, under 23 Cal. Code Regs section 648.4(e),
14 must be excluded.

15
16 **C. THIS BOARD MUST DISQUALIFY WITNESSES AND EXCLUDE
17 TESTIMONY AND EXHIBITS THAT ARE NEITHER RELEVANT
18 NOR RELIABLE.**

18 As explained above, petitioners have a duty to provide this Board with evidence that is
19 both relevant and reliable. *Aengst, supra*, 110 Cal.App.3d at 283. They have failed to do so.
20 Accordingly, the following testimony and exhibits must be excluded, as discussed below.

21 **1. Jennifer Pierre, DWR-51**

22 **General objections for which Ms. Pierre’s testimony should be struck in its entirety.**

23 Ms. Pierre’s testimony must be excluded to the extent it relies on modeling because it is
24 not based on principles or procedures that have gained general acceptance in their field and are
25 not based on “best available science,” as detailed above.

26 **Specific objections.**

27 Ms. Pierre’s testimony purporting to characterize the legal effect of various agreements
28 cannot be used to prove the contents of those agreements where those agreements are also

1 submitted as exhibits. Specifically, Ms. Pierre’s testimony concerning a “Summary of CWR
2 Specific Background” contains many such references, and as a paraphrase of these documents this
3 section should be struck in its entirety. DWR-51, p. 6-8. Further, the rest of Ms. Pierre’s
4 testimony contains numerous additional attempts to characterize the legal effect of submitted
5 agreements, and each such reference should be stricken. To the extent that such testimony
6 constitutes an opinion on a question of law it must be considered incompetent because it usurps
7 the role of the decisionmaker. *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 867, 884
8 (“*Sheldon*”) (not proper for attorneys to be called as experts on questions of law).

9 Ms. Pierre’s testimony is often vague, irrelevant, or unreliable, and where this is so must
10 be excluded. For instance, Ms. Pierre’s statement that “[e]ach intake has a maximum capacity to
11 divert 3000 cfs (a total of 9000 cfs from the NDD), although actual operations will be governed
12 by the operational criteria and based on hydrologic conditions and fish presence” is not relevant
13 and is not reliable in reciting operations and impacts. DWR-51, p. 9:6-8. It is vague and
14 meaningless to assert that actual operations will be changed based on “conditions” and whether or
15 not there are fish without any further explanation. *Sargon Enterprises, Inc. v. University of*
16 *Southern California* (2012) 55 Cal.4th 747, 771-772 (estimates of lost profits based on
17 unachieved market share were too speculative).

18 Ms. Pierre’s statement at DWR-51, page 3:9 that operations will “include new or
19 additional criteria” is likewise vague and unsupported. No specific reference is given to these
20 new criteria, so this testimony is speculative and based on assumptions not supported by the
21 record. *Id.* Ms. Pierre’s statement at DWR-51, page 5:16-19 that North Delta diversion structures
22 will improve conditions in the Delta is also speculative and based on assumptions not supported
23 in the record. *Id.* Furthermore, it should be excluded because it is an attempt to improperly opine
24 as to the environmental conditions that the law requires. *Summers v. A. L. Gilbert Co.*
25 (“*Summers*”) (1999) 69 Cal.App.4th 1155, 1183 (witness not allowed to give opinions on law).
26 Further, this testimony must be excluded because it is unsupported by the material on which the
27 expert relies. *Sargon*, 55 Cal.4th 771-772.

1 Ms. Pierre’s conclusions that alternatives have been considered, including that “[t]he
2 inclusion of alternative operating scenarios responds to the State Water Board’s request that the
3 EIR/EIS evaluate a sufficiently broad range of alternatives in order for the State Water Board to
4 consider changes to water rights,” must be excluded. DWR-51, p. 10-12, 12:3-5. This testimony
5 is an attempt to improperly usurp the fact-finding function of the trier of fact. *Summers*, 69
6 Cal.App.4th at 1183. Moreover, it is not relevant or reliable and is contrary to the evidence. The
7 Draft EIR/EIS, and RDEIR/SDEIS do not, in fact, include a reasonable range of alternatives.
8 Among the obvious alternatives that must be included pursuant to CEQA but have not been
9 included are alternatives increasing through-Delta flows by reducing exports and alternatives that
10 do not establish new conveyance upstream from the Delta for exporters.

11 Exhibit DWR-115 contains no identifying information and should be struck accordingly.
12 Without any indication of where this map came from or who made it or for what purpose, it has
13 no indicia of reliability. Likewise, the tables at DWR-114 and 116 contain no identifying
14 information and should be struck.

15 **2. John Leahigh, DWR-61**

16 **General objections.**

17 Mr. Leahigh’s testimony must be excluded to the extent it relies on modeling because it is
18 not based on principles or procedures that have gained general acceptance in their field and is not
19 based on “best available science,” as detailed above.

20 Mr. Leahigh’s testimony purporting to characterize the legal effect of various agreements,
21 reports, or decisions cannot be used to prove the contents of such documents, especially where
22 those documents are also submitted as exhibits. Evidence Code § 1521.

23 Mr. Leahigh’s proposed testimony must be excluded where it is unsupported by the
24 material on which he relies and constitutes an opinion on a question of law that usurps the role of
25 the decisionmaker. *Sheldon*, 47 Cal.3d at 884; *see also Cooper Companies v. Transcontinental*
26 *Ins. Co.* (1995) 31 Cal.App.4th 1094 (expert contract interpretation in appropriate); *Asplund v.*
27 *Selected Investments* (2000) 86 Cal.App.4th 26, 50 (expert may not give opinion on legal
28 question).

1 **Specific objections.**

2 Mr. Leahigh’s qualifications do not extend to the subject matter at issue in his testimony.
3 As a civil engineer, Mr. Leahigh is not qualified to give testimony on salinity, water quality, and
4 fisheries objectives. DWR-61, p. 17:5-11. Because such testimony is outside the scope of his
5 experience and he is not qualified to testify as to whether the WaterFix will meet such objectives,
6 this testimony should be struck.

7 Protestants hereby timely object to Mr. Leahigh’s hearsay evidence to the extent that it is
8 used to support his findings. DWR-61, p. 7:13-22 (reliance on other experts), 10:4-8; Gov. Code
9 § 11513. Mr. Leahigh’s statements purporting to summarize the testimony of other witnesses to
10 justify his own testimony that water quality objectives can be met must be stricken as
11 inadmissible hearsay. These witnesses can and should speak for themselves.

12 Mr. Leahigh’s opinion as to future regulatory compliance is not relevant and not reliable.
13 Mr. Leahigh states that his “opinion is that regulatory compliance with the CWF will be at least as
14 good, if not better, as today given that CWF will add infrastructure flexibility to system
15 operations.” DWR-61, p. 7:25-27; repeated at DWR-61, p. 17, 20. Regulatory reliance must be
16 with a lawfully updated Bay-Delta Plan, and Delta Plan – as explained above – updated flow
17 criteria will be more stringent than current obligations. Likewise, Mr. Leahigh’s testimony that
18 existing Delta water quality and fisheries objectives will be met is not relevant because there will
19 be new fisheries objectives established by a new Biological Opinion. DWR-61, p. 17.
20 Accordingly, this testimony must be excluded.

21 Exhibit DWR-401 contains no identifying information and should be struck accordingly.
22 Without any indication of where this table came from or who made it or for what purpose, it has
23 no indicia of reliability. Likewise, Exhibits DWR-402, 404-412 contain no identifying
24 information and should be struck accordingly. The “California Data Exchange Center,” cited
25 without further explanation in connection to some exhibits, does not provide sufficient
26 authentication to admit the exhibits into evidence. Finally, Mr. Leahigh’s references to webpages
27 that are not submitted as evidence should be struck as they have not been authenticated. *See, e.g.,*
28 DWR-61, p. 13 n. 13, 14 n. 14 & 16.

1 **3. Parviz Nader-Tehrani, DWR-66**

2 **General Objections**

3 As discussed above, the hydrologic or water operations modeling relied on by the
4 petitioners, CalSim II and DSM2, is inadmissible because it is not: (1) based on principles or
5 procedures that have gained general acceptance in their field; and (2) based on the best available
6 science. Mr. Nader-Tehrani’s testimony attempts to authenticate this modeling, especially as
7 regards DSM2, but cannot in the face of the general acceptance and best available science
8 objections already detailed. DSM2 as it is used by petitioners has not been validated for use by
9 any external and disinterested experts. *Seering v. Department of Social Services, supra*, 194
10 Cal.App.3d at 311.

11 This Board convened a panel of leading scientists and technical experts to review existing
12 models, including DSM2. Board, *Analytical Tools for Evaluating Water Supply, Hydrodynamic*
13 *and Hydropower Effects* (2012). Appendix 2 to that report includes a June 9, 2009 letter from 24
14 hydrodynamics modelers who compiled a list of “Improved Modeling Capabilities Needed for the
15 Bay-Delta Planning Effort” that states that the models show a need for comparison of 2D and 3D
16 model outputs, and states that “[g]iven the controversial nature of policy-making in the Bay-
17 Delta, these needs must be met with a high level of scientific transparency, proper verification and
18 validation, adequate documentation, and rigorous peer review.” *Id.* at Appendix 2. Without these
19 vital elements, Mr. Nader-Tehrani, and petitioners generally, cannot maintain that the DSM2
20 model has been accepted as reliable by experts in the field, and Mr. Nader-Tehrani’s opinion “that
21 the modeling results are accurate” and that “DSM2 represents the best available planning model”
22 must be struck because it is neither relevant nor reliable. DWR-66, p. 2:15-16 (first quote), 3:22-
23 23 (second quote).

24 Mr. Nader-Tehrani’s testimony purporting to characterize the legal effect of various
25 agreements, reports, or decisions cannot be used to prove the contents of such documents,
26 especially where those documents are also submitted as exhibits. Evidence Code § 1521.

27 Mr. Nader-Tehrani’s proposed testimony must be excluded where it is unsupported by the
28 material on which he relies and constitutes an opinion on a question of law that usurps the role of

1 the decisionmaker. *Sheldon, supra*, 47 Cal.3d at 884; *see also Cooper Companies v.*
2 *Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094 (expert contract interpretation in
3 appropriate); *Asplund v. Selected Investments* (2000) 86 Cal.App.4th 26, 50 (expert may not give
4 opinion on legal question).

5 Protestants hereby timely object to Mr. Nader-Tehrani's hearsay evidence to the extent
6 that it is used to support his findings. Gov. Code § 11513.

7 Specific objections.

8 Mr. Nader-Tehrani's testimony states several times that there will be no negative effects to
9 legal users of water due to water level changes, even though operational decisions cannot be
10 accurately modeled. DWR-66, p. 3, 10, 11. These statements are inadmissible because they are
11 based on speculation that assumes facts that are not in evidence, and are therefore neither relevant
12 nor reliable.

13 Mr. Nader-Tehrani's testimony is based on monthly averages for the no action alternative
14 and all operational scenarios. DWR-66, p. 3:1-6. This fails to show impacts in particular water-
15 year types, such as successive dry years. Likewise, Mr. Nader-Tehrani's statement that
16 "water quality is shown to meet the water quality objectives" lacks foundation because most of
17 the objectives are dependent on water year type. DWR-66, p. 3:2-4, 8-11. Thus, this testimony
18 should be precluded as it lacks the proper foundation, and Exhibit DWR-513 cannot be relied on.

19 Mr. Nader-Tehrani's testimony that the project will not have "negative effects [on] legal
20 users of water" is without sufficient foundation. DWR-66, p. 10:14-15. Mr. Nader-Tehrani's
21 analysis was performed for water levels, but does not address reliability or delivery. Furthermore,
22 "negative effects" is not defined by Mr. Nader-Tehrani, and such effects are a legal question
23 that Mr. Nader-Tehrani is precluded from offering.

24 Exhibit DWR-513 contains no identifying information and should be struck accordingly.
25 Without any indication of where this table came from or who made it or for what purpose, it has
26 no indicia of reliability.

1 **4. Armin Munévar, DWR-71**

2 **General objections.**

3 As discussed above, the hydrologic or water operations modeling relied on by the
4 petitioners, CalSim II and DSM2, is inadmissible because it is not: (1) based on principles or
5 procedures that have gained general acceptance in their field; and (2) based on the best available
6 science. Mr. Munévar’s testimony attempts to authenticate this modeling, especially as regards
7 CalSim II, but cannot in the face of the general acceptance and best available science objections
8 already detailed. CalSim II has never been validated for use by any external and disinterested
9 experts. *Seering v. Department of Social Services, supra*, 194 Cal.App.3d at 311.

10 Mr. Munévar does not account for the fact that output from the CalSim model has not
11 been accepted as reliable by experts in the field, in large part because of the failure by petitioners
12 to document adequate model testing and calibration. According to one review, “Better quality
13 control is needed both for the model and its current version and the input data. Procedures for
14 model calibration and verification are also needed. Currently many users are not sure of the
15 accuracy of the results. A sensitivity and uncertainty prediction capability and analysis is needed.”
16 California Bay Delta Science Program, *A Strategic Review of CalSim II and its Use for Water*
17 *Planning, Management, and Operations in Central California*, p. 8 (Dec. 4, 2003) (“2003 Peer
18 Review”). The lack of acceptance of CalSim II has been persistent, as a subsequent peer review
19 found that “CalSim II work fails to adequately report technical results that would give
20 knowledgeable readers some sense of the quality, accuracy, sensitivity, or uncertainty present in
21 the results. This issue was prominent in the previous CalSim review panel report.” CALFED
22 Science Program, *San Joaquin River Valley CalSim II Model Review*, p. 10 (Jan. 12, 2006).

23 Mr. Munévar’s resume states that he has been the Integration Lead for the modeling
24 analysis for the petitioners and oversaw the development and application of the CalSim II model
25 versions used as inputs for all of the BDCP and WaterFix modeling. As such, Mr. Munévar’s
26 testimony is necessary to certify the CalSim modeling for its proposed use in the hearing. Yet
27 Mr. Munévar himself stated in his testimony that the CalSim model “cannot be calibrated.”
28 DWR-71, p. 13:1. “Because it is a simulation, based on a combination of historical hydrology,

1 the current regulatory environment and projected changes to the hydrology due to climate change,
2 CalSim II cannot be calibrated and therefore, should not be used in a predictive manner.” *Id.* at
3 12-13. This statement is in direct contradiction to recommendations by qualified and
4 disinterested experts who served on the 2003 and 2006 peer review panels, quoted above.
5 Moreover, this statement is in direct contradiction of petitioners’ own responses to those peer
6 reviews. *Peer Review Response: A Report by DWR/Reclamation in Reply to the Peer Review of*
7 *the CalSim-II Model Sponsored by the CALFED Science Program in December 2003*, p. 19 (Aug.
8 2004).

9 Mr. Munévar’s testimony purporting to characterize the legal effect of various agreements,
10 reports, or decisions cannot be used to prove the contents of such documents, especially where
11 those documents are also submitted as exhibits. For instance, Mr. Munévar’s testimony
12 concerning the RDEIR/REDIS and EIR/EIS is irrelevant. DWR-71, p. 2.

13 Mr. Munévar’s proposed testimony must be excluded where it is unsupported by the
14 material on which he relies and constitutes an opinion on a question of law that usurps the role of
15 the decisionmaker. *Sheldon, supra*, 47 Cal.3d at 884; *see also Cooper Companies v.*
16 *Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094 (expert contract interpretation in
17 appropriate); *Asplund v. Selected Investments* (2000) 86 Cal.App.4th 26, 50 (expert may not give
18 opinion on legal question).

19 Protestants hereby timely object to Mr. Munévar’s hearsay evidence to the extent that it is
20 used to support his findings. Gov. Code § 11513.

21 **Specific objections.**

22 Mr. Munévar’s testimony that “CalSim II is the state of the art model for the purposes of
23 comparing various CWF scenarios” is unsupported and should be stricken because it is not the
24 “sort of evidence on which responsible persons are accustomed to rely in the conduct of serious
25 affairs.” Gov. Code. § 11513. In order to be admissible, petitioners would have needed to satisfy
26 its “burden of making the necessary showing of compliance with Frye, i.e., of demonstrating by
27 means of qualified and disinterested experts that the new technique is generally accepted as
28 reliable in the relevant scientific community.” *Seering, supra*, 194 Cal.App.3d at 311, *quoting*

1 *People v. Shirley* (1982) 31 Cal.3d 18, 54. The 2003 Peer Review, quoted above, showed that the
2 CalSim II modeling approach lacked essential steps such as model verification, testing,
3 calibration, and validation. While such steps were recommended by the peer reviewers, they were
4 never completed. 2003 Peer Review, p. 6.

5 Mr. Munévar testifies that the CalSim II model can be used in relative mode, stating that

6 CalSim II results are intended to be used in a comparative manner, which allows
7 for assessing the changes in the SWP/CVP system operations and resulting
8 incremental effects between two scenarios. The model should be used with caution
9 where absolute results are needed in instances such as determining effects based on
a threshold, prescribing seasonal operations, or predicting flows or water deliveries
for any real-time operations.

10 In summary, the CalSim II and DSM2 results should only be used comparatively.

11 DWR-71, p. 13:2-9. However, the 2003 Peer Review panel was “somewhat skeptical” of
12 petitioners’ proposed use of the model, and stated that the feature would need to be “documented
13 rather than merely assumed.” 2003 Peer Review, p. 9. Petitioners’ proposed use relies on the
14 assumption that model errors do not affect the forecast of change in outcome, an assumption that
15 would need to be, and has not yet been, documented. 2003 Peer Review, p. 6. Without such
16 documentation, Mr. Munévar’s statement that CalSim II can be used in relative mode is without
17 basis and must be dismissed.

18 Mr. Munévar makes reference to documents that are not admitted into evidence, and
19 testimony relating to such documents must be disregarded as without basis. DWR-71, p. 8-9
20 (reference to a “CALSIM Generalized Model for Reservoir System Analysis, Journal of Water
21 Resources Planning and Management” not authenticated).

22 Finally, Mr. Munévar’s references to webpages that are not submitted as evidence should be
23 struck as they have not been authenticated. *See, e.g.*, DWR-71, p. 7:28, 8:5, 8:9, .

24 **5. Marueen Sergent, DWR 53**

25 **General objections for which Ms. Sergent’s testimony should be struck in its entirety.**

26 Ms. Sergent’s testimony must be excluded to the extent it relies on modeling because it is
27 not based on principles or procedures that have gained general acceptance in their field, and is not
28 based on “best available science,” as detailed above.

1 Ms. Sergent’s testimony purporting to characterize the legal effect of various agreements
2 cannot be used to prove the contents of those agreements where those agreements are also
3 submitted as exhibits. For instance, Ms. Sergent’s testimony concerning D-1641, the Delta Smelt
4 Biological Opinion, the anadromous fish species Biological Opinion, and the Incidental Take
5 Permit for long-fin smelt should be stricken. DWR-53, p. 4:9-16. As the entirety of Ms.
6 Sergent’s testimony consists of numerous additional attempts to characterize the legal effect of
7 submitted agreements, and each such reference must be stricken, Ms. Sergent’s testimony should
8 be stricken in its entirety.

9 Ms. Sergent’s proposed testimony as to water rights must be excluded because it is
10 unsupported by the material on which she relies and constitutes an opinion on a question of law
11 that usurps the role of the decisionmaker. *Sheldon, supra*, 47 Cal.3d at 884; *see also Cooper*
12 *Companies v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094 (expert contract
13 interpretation in appropriate); *Asplund v. Selected Investments* (2000) 86 Cal.App.4th 26, 50
14 (expert may not give opinion on legal question). As Ms. Sergent’s entire testimony appears to
15 solely consist of her legal opinion (e.g., “[i]t is my understanding that Water Code Section 1701
16 allows a permittee or licensee to . . . ,” DWR-53, p. 9:15) and legal interpretation of water rights,

17 Ms. Sergent’s testimony should be stricken in its entirety.

18 **Specific objections.**

19 Protestants hereby timely object to Ms. Sergent’s hearsay evidence to the extent that it is
20 used to support her findings. Gov. Code § 11513. Specifically, Ms. Sergent’s opinion that “the
21 CWF can be constructed and operated without injuring other legal users of water” is based on the
22 testimony of other witnesses and cannot be used to support her findings. DWR-53, p. 3:23-25.
23 Ms. Sergent’s statements purporting to summarize the testimony of other witnesses – including
24 Armin Munevar, John Leahigh, and Parviz Nader-Terhani – to justify her own testimony that the
25 CWF can be operated without injuring other legal users of water must be stricken as inadmissible
26 hearsay. DWR-53, p. 3-4, 5 (n. 6 & 7), 8:25, 10, 11-13, 24. These witnesses can and should
27 speak for themselves; Ms. Sergent’s long quotations of their testimony are unnecessary and
28 irrelevant. *See, e.g.*, DWR-53, p. 12-13 (7 lines quoted from Dr. Nader-Tehrani).

1 Ms. Sergent's reliance on the Board's Order WR 2009-0061 is misplaced. DWR-53, p. 9-
2 10. That order concerned a permit for storage, while the present project proposes three new
3 points of diversion, a fundamental difference. 23 C.C.R. §791(a). WR 2009-0061 also does not
4 define a new water right, as Ms. Sergent asserts. DWR-53, p. 9-10. The proffered expert
5 testimony must be excluded because it is unsupported by the material on which the expert relies.

6 Exhibit DWR-330 contains no identifying information and should be struck accordingly.
7 Without any indication of where this table came from or who made it or for what purpose, it has
8 no indicia of reliability. Finally, Ms. Sergent's references to webpages that are not submitted as
9 evidence should be struck as they have not been authenticated. *See, e.g.*, DWR-53, p. 6:17, 6 n. 9,
10 7:3-4, 7:17, 9:18-20,17:8-9, 20:2.

11 **7. Ron Milligan, DOI-7**

12 To the extent Mr. Milligan's testimony is based on modeling for which insufficient
13 documentation and authentication has been provided, this testimony is inadmissible hearsay and
14 should not be considered by the Board. DOI-7. For instance, Mr. Milligan's statement that "it is
15 anticipated that the new diversion points can be operated in a manner that will not impede
16 Reclamation's ability to meet its requirements and may add flexibility to the coordinated
17 operations of the projects" is based solely on "the modeling of Project operations to support the
18 petition before the Board." DOI-7, p. 4. Because Mr. Milligan has little experience with direct
19 modeling, authentication of modeling, or documentation of modeling, this testimony should not
20 be considered by the Board. Mr. Milligan's testimony is irrelevant and misleading in so far as it
21 is being used to support the accuracy of Reclamation's or DWR's modeling.

22 **8. Ray Sahlberg, DOI-4**

23 To the extent Mr. Sahlberg's testimony is "based on project and real time hydrologic and
24 hydrodynamic information more fully explained in testimony on the operations of the CVP by
25 Mr. Ron Milligan," this testimony is inadmissible hearsay and should not be considered by the
26 Board. DOI-4, p. 2. Likewise for Mr. Sahlberg's testimony that the proposed change will not
27 injure other legal users of water, purportedly supported by "modeling testimony," is inadmissible
28 hearsay. DOI-4, p. 6 ("the modeling testimony supports that operation of the CWF will still result

1 in full compliance with the terms of D-1641, and the CVP will continue to meet D-1641 Delta
2 water quality objectives.” There is insufficient documentation and authentication of this
3 modeling, protestants have not been given access, and Mr. Sahlberg himself cannot explain the
4 basis for his own opinions.

5 This expert testimony proffered by Mr. Sahlberg must be excluded because the witness’s
6 qualifications do not extend to the subject matter at issue, i.e., the proffered testimony is beyond
7 the scope of the witness’s expertise. Evid. Code § 720; *People v. Ramos* (1997) 15 Cal.4th 1133,
8 1174-1175.

9 In light of petitioners’ refusal to consider alternatives that do not allow for full exports,
10 such as alternatives that would meet the 2010 Flow Criteria, Mr. Sahlberg’s statement that
11 “Reclamation operates its facilities to meet all statutory and regulatory requirements prior to
12 satisfying contractual obligations” is clearly in error. DOI-4, p. 2.

13 **8. John Bednarski, DOI-57**

14 **General objections.**

15 Mr. Bednarski’s testimony must be excluded to the extent it relies on modeling because it
16 is not based on principles or procedures that have gained general acceptance in their field, and is
17 not based on “best available science,” as detailed above.

18 Mr. Bednarski’s testimony purporting to characterize the legal effect of various
19 agreements, reports, or decisions cannot be used to prove the contents of such documents,
20 especially where those documents are also submitted as exhibits. For instance, Mr. Bednarski’s
21 testimony concerning the EIR/EIS and Stormwater General Permit should be stricken. DWR-57,
22 p. 2. As the entirety of Mr. Bednarski’s testimony consists of numerous additional attempts to
23 characterize the legal effect of submitted agreements, reports, and decisions, and each such
24 reference must be stricken, Mr. Bednarski’s testimony should be stricken in its entirety.

25 Mr. Bednarski’s proposed testimony must be excluded where it is unsupported by the
26 material on which he relies and constitutes an opinion on a question of law that usurps the role of
27 the decisionmaker. *Sheldon, supra*, 47 Cal.3d at 884; *see also Cooper Companies v.*
28 *Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094 (expert contract interpretation in

1 appropriate); *Asplund v. Selected Investments* (2000) 86 Cal.App.4th 26, 50 (expert may not give
2 opinion on legal question).

3 Protestants hereby timely object to Mr. Bednarski's hearsay evidence to the extent that it
4 is used to support his findings. Gov. Code § 11513.

5 **Specific objection**

6 Exhibit DWR-220 contains no identifying information and should be struck accordingly.
7 Without any indication of where this table came from or who made it or for what purpose, it has
8 no indicia of reliability. Likewise, Exhibit DWR-221 contains no identifying information and
9 should be struck accordingly.

10 **9. DWR-505, 507, 513, 514, 515 Objections**

11 These five exhibits are the results of CalSim II and DSM2 modeling. The modeling done in
12 CalSim II and DSM2 does not meet the proper standards to be relied upon as an exhibit, as
13 detailed previously. The models both lack proper verification, validation, accreditation, and peer
14 review. The verification, validation, external peer review, and accreditation steps are an essential
15 part of scientific and engineering practice, and the completion of these steps in developing a
16 simulation is part of the "best available science."

17 The 2003 and 2006 Peer Reviews were insufficient and required additional action that was
18 never taken. In 2003 a general Peer Review was conducted that nonetheless found problems with
19 the modeling and recommended solutions. The 2006 Peer Review declined to endorse the use of
20 the model for any purpose, while also recommending the provision of error estimates, which
21 recommendation has not yet been complied with.

22 For the foregoing reasons, these exhibits should be excluded.

23 **10. DWR-5 Objections**

24 Modeling PowerPoint slides should be excluded because relying on CalSim II and DSM2
25 to support the WaterFix Project would be relying on models that fail to conform to basic systems
26 engineering standards, as documented above, which would invalidate any conclusions from the
27 modeling. These models have never been validated, and without documentation of model
28 assumptions and error analyses petitioners' modeling should not be admitted. Because the

1 PowerPoint slides rely on CalSim II and DSM2 modeling as a foundation, they must also be
2 excluded.

3 **11. DWR-3 Objections**

4 Water Rights PowerPoint slides must be excluded in part or whole because they are based
5 on testimony that is not relevant and not reliable, and are based on the faulty reasoning in Ms.
6 Sergent's testimony. Water Right Order 2009-0061 does not give the definition of a new water
7 right for the current proceeding, but rather provides an incomplete definition that is not reliable.
8 The PowerPoint's slides stating that the WaterFix will not injure other legal users of water must
9 be excluded as speculation and contrary to fact and law.

10 **12. DWR-404, SWRCB-21, SWRCB-27, SWRCB-30 Objections**

11 Water Right Decision 1641 (D-1641) standards should be excluded because D-1641
12 cannot form a valid basis for determining water rights. D-1641 has not been updated in 21 years,
13 during which the Delta has seen ever worsening conditions. D-1641 does not set acceptable
14 standards to be presented as an exhibit pursuant to *Aengst v. Board of Medical Quality Assurance*,
15 *supra*, 110 Cal.App.3d at 283. The increased exports, combined with climate change's resulting
16 reduced mountain runoff and increased sea level rise, have all exacerbated the salinity problem in
17 the Delta. None of these changes are reflected in D-1641. Therefore, D-1641 is not reliable and
18 should be excluded.

19 **13. DWR-401, 402, 413 Objections**

20 These Bay-Delta Compliance Metrics exclude years when water periods were waived.
21 Furthermore, the periods of compliance covered by the metrics are only pro forma, rather than
22 substantive, introducing yet more uncertainty into the use of these metrics. These incomplete
23 metrics are unreliable and should be excluded on that basis.

24 **14. DWR-511 Objections**

25 The memorandum to C. Crothers dated August 22, 2013 was not authenticated or
26 finalized. The memo is a draft. Since it is not a final version, it should not be relied upon. The
27 purpose of the memo is also unclear and there is no explanation as to its relevance. With no such
28

1 explanation, the draft memo should be excluded because it is incomplete and has no purpose or
2 relevance.

3 **15. SWRCB-3, SWRCB-4, SWRCB-5, SWRCB-102 Objections**

4 The 2015 California WaterFix RDEIR/SDEIS, and the 2013 BDCP Draft EIR/EIS that it
5 modifies and incorporates, must both be excluded because they are legally and factually
6 inadequate. Neither presents a reasonable range of alternatives, including an alternative that
7 reduces water exports. EPA's October 30, 2015 letter reviewing the RDEIR/SDEIS gives it a
8 rating of "'3' (*Inadequate*)." EPA Letter, October 30, 2015, p. 4. Since the RDEIR/SDEIS is
9 inadequate, is not a Final ER/EIS, fails to include a reasonable range of alternatives and fails to
10 include the comments on the 2013 Draft and 2015 RDEIR/SDEIS, these documents must be
11 excluded as they are not relevant and are not reliable.

12 **IV. CONCLUSION**

13 For the foregoing reasons, petitioners' proffered witnesses, testimony and exhibits are
14 objectionable. Accordingly, they should be excluded for the reasons set forth above.

15 Dated: July 12, 2016

LAW OFFICES OF STEPHAN C. VOLKER


STEPHAN C. VOLKER

Attorney for Protestants

PACIFIC COAST FEDERATION OF FISHERMEN'S
ASSOCIATIONS and INSTITUTE FOR FISHERIES
RESOURCES

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1 **STATEMENT OF SERVICE**

2 CALIFORNIA WATERFIX PETITION HEARING
3 Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)

4 I hereby certify that I have this day submitted to the State Water Resources Control Board and
5 caused a true and correct copy of the following document(s):

6 **MOTION OF PROTESTANTS PACIFIC COAST FEDERATION OF FISHERMEN'S**
7 **ASSOCIATIONS AND INSTITUTE FOR FISHERIES RESOURCES TO DISQUALIFY**
8 **PETITIONERS' WITNESSES AND EXCLUDE THEIR TESTIMONY AND EXHIBITS 1**
9 **AND 2**

10 to be served by Electronic Mail (email) upon the parties listed in Table 1 of the Current Service
11 List for the California WaterFix Petition Hearing, dated June 9, 2016, posted by the State Water
12 Resources Control Board at

13 [http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/
14 service_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

15 I certify that the foregoing is true and correct and that this document was executed on July 12,
16 2016.



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