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7 Principal, California Water Research

8  
9 **BEFORE THE**  
10 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**  
11

12 HEARING REGARDING PETITION  
13 FILED BY THE DEPARTMENT OF  
14 WATER RESOURCES AND U.S. BUREAU  
15 OF RECLAMATION REQUESTING  
16 CHANGES IN WATER RIGHTS FOR THE  
17 CALIFORNIA WATERFIX PROJECT

18 CALIFORNIA WATER RESEARCH'S  
19 MOTION TO STRIKE PORTIONS OF  
20 TESTIMONY OF MARIN GREENWOOD  
21 AND RICHARD WILDER

22 Deirdre Des Jardins, principal at California Water Research (“California Water  
23 Research”) hereby moves to strike brief references to “reasonable protection” in testimony by  
24 Marin Greenwood, Exhibit DWR-1221, and Richard Wilder, Exhibit DWR-1229.

25 The witnesses’ testimony relied on comparisons between Petitioner’s alleged proposed  
26 project, CWF H3+, with the No Action Alternative. The Department of Water Resources  
27 successfully argued that cross-examination on whether current project operations or the No  
28 Action Alternative were sufficiently protective was beyond the scope of rebuttal, because  
29 mentions of “reasonable protection” in the section headers or brief sentences were not sufficient  
30 to open cross-examination on current project operations or the No Action Alternative.

31 But as California Water Research argued orally in the hearing, the standard of  
32 “reasonable protection” is an absolute standard, not relative to the Petitioners’ CEQA baseline,

1 the No Action Alternative. To the extent that brief allusions to absolute protection of aquatic  
2 resources in the witnesses' testimony resurrected issues raised by protestants in Part 2 Cases in  
3 Chief, but without substantiating testimony that could be cross-examined, the allusions are  
4 beyond the scope of the witnesses' rebuttal testimony and also mischaracterize the testimony.

5 The Natural Resources Defense Council successfully moved to strike one such brief  
6 allusion to "reasonable protection" orally in the hearing, based on not being able to do cross-  
7 examination on current project operations. The appropriate remedy for protestants not being able  
8 to do cross-examination on brief, unsubstantiated assertions in the witnesses' rebuttal testimony  
9 about "reasonable protection" is to strike the brief assertions. The court in *Manufactured Home*  
10 *Communities v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 712 states,

11 Where it makes a decision based on a party's testimony, the adversary is entitled to  
12 question his or her opponent. (515 Associates v. City of Newark (1977 D. New Jersey)  
13 424 F.Supp. 984, 995, fn. 20; see also Goldberg v. Kelly, supra, 397 U.S. at pp. 269-270,  
14 90 S.Ct. 1011; Palmer v. Rent Control Bd. of Brookline, supra, 386 N.E.2d at p. 1050;  
15 Rivera v. Div. of Industrial Welf., supra, 265 Cal.App.2d at p. 586, 71 Cal.Rptr. 739.)

16 Clearly allowing brief assertions in witnesses' rebuttal testimony, which are so unsubstantiated  
17 that they cannot be cross-examined, is problematic.

18 Based on the above points and authorities, California Water Research moves to strike the  
19 following brief allusions to "reasonable protection in Marin Greenwood's testimony, Exhibit  
20 DWR-1221.

- 21 1. Move to strike the header for Section III on p. 20 at 18-19, which states:

22 III. APPLICATION OF THE NOBRIGA AND ROSENFELD (2016)  
23 POPULATION DYNAMICS MODEL SUGGESTS THAT CWF H3+ WILL  
24 REASONABLY PROTECT LONGFIN SMELT

25 And to strike the following sentence on p. 20 at 20-22, which simply reiterates Greenwood's  
26 Case in Chief testimony:

27 As I described in my previous testimony, I considered that CWF H3+ will reasonably  
28 protect Longfin Smelt by implementing spring outflow criteria developed in coordination  
with the California Department of Fish and Wildlife (Exhibit DWR-1012, pp. 24:16 to  
26:9).

1 Argument:

2 Greenwood's Case in Chief Testimony is already in the record, and cross-examination on  
3 Greenwood's Case in Chief was ruled beyond the scope of rebuttal. Greenwood's testimony also  
4 refers to comparisons with the NAA in the body of section III on p. 21 at 6-10:

5 Dr. Corey Phillis and I reproduced the Nobriga and Rosenfield (2016) population  
6 dynamics model and applied it to the CalSim scenarios for CWF H3+ and NAA  
7 (Exhibit DWR-1352). This gave small differences (3% or less) in predicted fall  
8 midwater trawl abundance index between the CWF H3+ and NAA scenarios  
9 (Table 1).

10 But section III had no discussion on whether the "No Action Alternative" is reasonably  
11 protective that would allow cross-examination under the rulings on scope of cross-examination.

12 2. Move to strike the header for Section V. on p. 25 at 12-13, which states:

13 V. CWF H3+ WILL REASONABLY PROTECT FOOD WEB PRODUCTIVITY IN  
14 THE BAY-DELTA

15 and to strike the reiteration on the next line at 14:

16 In my opinion, CWF H3+ will reasonably protect food web productivity in the Bay-  
17 Delta.

18 Argument:

19 Greenwood compares the alleged proposed project to the No Action Alternative on p. 25 at 15-  
20 16:

21 In my previous testimony I described that the assessment of food web material  
22 entrainment (specifically phytoplankton carbon) at the NDD suggested little, if any,  
23 effects from CWF H3+ ...

24 But there was no testimony on why the state of the food web in the Bay-Delta under the No  
25 Action Alternative was reasonably protective that would have allowed cross-examination on this  
26 assertion under the hearing rulings.

1 3. Move to strike the header for section VI on p. 27 at 18, which states

2 VI. CWF H3+ WILL REASONABLY PROTECT THE BAY-DELTA ECOSYSTEM

3 and to strike the sentence reiterating the statement on the next line at 19:

4 It is my opinion that CWF H3+ will reasonably protect the Bay-Delta ecosystem.

5 Argument:

6 The opinion on Microcystis in the rest of the section p. 28 at 16-21 implicitly refers to the No

7 Action Alternative baseline in section B, which simply reiterates Greenwood's Case in Chief:

8 as I noted in my previous testimony (Exhibit DWR-1012, p. 27:13-14), the testimony  
9 provided by Dr. Michael Bryan indicates little potential for Microcystis increase from  
CWF H3+ operations (Exhibit DWR-81).

10 Again, this testimony was part of Greenwood's Case in Chief, and cross-examination on it was

11 beyond the scope of rebuttal under the hearing rulings.

12 In addition to these sections of Marin Greenwood's testimony, I move to strike the introductory  
13 summary on p. 2 at lines 3-4, 6, and 7, which simply reproduces the section headers listed above:

14  
15 2. Application of the Nobriga and Rosenfield (2016) population dynamics model  
suggests that CWF H3+ will reasonably protect Longfin Smelt.

16 [...]

17 4. CWF H3+ will reasonably protect food web productivity in the Bay-Delta.

18 5. CWF H3+ will reasonably protect the Bay-Delta ecosystem.

19 And move to strike the conclusory summary on p. 38 at lines 22-23, 25, and 26 which also  
20 reproduces the section headers:

21 2. Application of the Nobriga and Rosenfield (2016) population dynamics model  
suggests that CWF H3+ will reasonably protect Longfin Smelt.

22 [...]

23 4. CWF H3+ will reasonably protect food web productivity in the Bay-Delta.

24 5. CWF H3+ will reasonably protect the Bay-Delta ecosystem.

1 Based on the same points and authorities, California Water Research moves to strike the  
2 following abbreviated statements in the testimony of Richard Wilder, Exhibit DWR-1229.

3 1. Motion to strike section header on p. 7 at 10-11

4 D. CWF will provide reasonable protection of upstream life stages of salmonids

5 Argument:

6 The testimony in section D only addresses increases in salmonid mortality over the  
7 baseline. Cross-examination was limited to comparison with the baseline.

8 2. Motion to strike sentence on p. 11 at 16-19

9 It is my opinion that each of these permit terms is unnecessary because CWF is  
10 reasonably protective of upstream aquatic resources , as I describe throughout Exhibit  
11 DWR-1013.

12 Argument:

13 This testimony attempts to incorporate Wilder's entire Case in Chief testimony into  
14 rebuttal. It is therefore beyond the scope of rebuttal.

15 Thank you for your consideration of this motion.

16 Dated August 15, 2018

17 Respectfully submitted,

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20 Deirdre Des Jardins  
21 Principal, California Water Research  
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**STATEMENT OF SERVICE**

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

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

**California Water Research's Motion to Strike Portions of Testimony  
of Marin Greenwood and Richard Wilder**

to be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated August 14, 2018, posted by the State Water Resources Control Board at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

*Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.*

I certify that the foregoing is true and correct and that this document was executed on August 15, 2018.

Signature:



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Title: Principal, California Water Research

Party/Affiliation:  
Deirdre Des Jardins

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