
From: Bee Speer <bee@mohanlaw.net>
Sent: Wednesday, August 22, 2018 9:20 AM
To: CWFhearing; Doduc, Tam@Waterboards; Marcus, Felicia@Waterboards; aferguson@somachlaw.com; ahitchings@somachlaw.com; ajr@bkslawfirm.com; akrieg@volkerlaw.com; amy.aufdemberge@sol.doi.gov; apeltzer@prlawcorp.com; awarn@nrdc.org; barbara@restorethedelta.org; barbarav@aqualliance.net; barry@solagra.com; bdalymn@citlink.net; bjohnson@tu.org; blancapaloma@msn.com; bobker@bay.org; bpulsen@eid.org; bradpappa@gmail.com; brettgbaker@gmail.com; burkew@saccounty.net; bwright@friendsoftheriver.org; caroleekrieger7@gmail.com; Collins, John@Waterboards; connere@gmail.com; CWFhearing; daladjem@downeybrand.com; daniel@kaydix.com; dcooper@minasianlaw.com; dcoty@bpmnj.com; ddj@cah2oresearch.com; S. Dean Ruiz; deltakeep@me.com; dkelly@pcwa.net; dmwolk@solanocounty.com; dobegi@nrdc.org; 'Daniel J. O'Hanlon'; dorth@davidorthconsulting.com; empappa@gmail.com; evielma@cafecoop.org; ewehr@gwdwater.org; elamoe@minasianlaw.com; fetherid@ebmud.com; fmorrissey@orangecoveid.org; gadams@fclaw.com; hwalter@kmtg.com; info@californiadelta.org; Mizell, James@DWR; jailin@awattorneys.com; jtb@bkslawfirm.com; jconway@rd800.org; jfox@awattorneys.com; jennifer@spalettalaw.com; John Herrick; jminasian@minasianlaw.com; 'Jonas Minton'; john.luebberke@stocktonca.gov; jph@tulareid.org; jrubin@westlandswater.org; jsagwomack@gmail.com; jsalmon@ebmud.com; jvolker@volkerlaw.com; kcorby@somachlaw.com; kelweg1@aol.com; kharrigfeld@herumcrabtree.com; kobrien@downeybrand.com; kpoole@nrdc.org; ktaber@somachlaw.com; kurtis.keller@cc.cccounty.us; kyle.jones@sierraclub.org; lcaster@fclaw.com; Mae Empleo; matlas@downeybrand.com; matthew@mlelaw.com; melissa.poole@wonderful.com; mghafar@earthjustice.org; mhagman@lindmoreid.com; michael@brodskylaw.net; mjatty@sbcglobal.net; mkropf@countyofcolusa.com; mlarsen@kdwcd.com; mnikkel@downeybrand.com; mvanzandt@hansonbridgett.com; mvoss@cityofsacramento.org; myoung@awattorneys.com; Nick@semlawyers.com; nrobertson@earthjustice.org; office@ecosacramento.net; osha@semlawyers.com; philip.pogledich@yolocounty.org; pkf@bkslawfirm.com; pminasian@minasianlaw.com; pp@planetarysolutionaries.org; psimmons@somachlaw.com; pwilliams@westlandswater.org; rharms@kmtg.com; rebecca.akroyd@sldmwa.org; rbernal@ci.antioch.ca.us; rmaddow@bpmnj.com; rdenton06@comcast.net; rmburness@comcast.net; roland@ssjmud.org; rsb@bkslawfirm.com; rsmith@downeybrand.com; russell@spalettalaw.com; ryan.hernandez@dcd.cccounty.us; rzwilling@defenders.org; sae16@lsid.org; schaffin@awattorneys.com; sclarke@volkerlaw.com; sdalke@kern-tulare.com; sgeivet@ocsnet.net; smorris@swc.org; sonstot@awattorneys.com; srothert@americanrivers.org; ssaxton@downeybrand.com; ssdwaterfix@somachlaw.com; stephen.siptroth@cc.cccounty.us; sunshine@snugharbor.net; svolker@volkerlaw.com; sgrady@eslawfirm.com; red@eslawfirm.com; tara.mazzanti@stocktonca.gov; tgohring@waterforum.org; tgstoked@gmail.com; tim@restorethedelta.org; 'Thomas H. Keeling'; trobancho@freemanfirm.com; towater@olaughlinparis.com; vkincaid@olaughlinparis.com; wes.miliband@aalrr.com; wfemlen@solanocounty.com; wirthsoscranes@yahoo.com; abl@bkslawfirm.com

Subject: CWF- SDWA Parties' Opposition to Motion to Strike Portions of Thomas Burke's Testimony
Attachments: 180822 SDWA Parties' Opposition to Motion to Strike Portions of Tom Burke's Testimony.pdf; 180822 Statement of Service.pdf

Good Morning All,

Please see attached. Should you have trouble opening or viewing the attachment please do not hesitate to contact our office.

Thank you,

Bee Speer, Paralegal

MOHAN, HARRIS, RUIZ, WORTMANN, PERISHO & RUBINO, LLP

3439 Brookside Road., Ste. 208

Stockton, CA 95219

Tel: (209) 957-0660

Fax: (209) 957-0595

Email: bee@mohanlaw.net

Lodi Office:

1806 W. Kettleman Lane, Suite L

Lodi, CA 95242

1 S. DEAN RUIZ, ESQ. – SBN 213515
2 MOHAN, HARRIS, RUIZ
3 3439 Brookside Rd. Ste. 208
4 Stockton, California 95219
5 Telephone: (209) 957-0660
6 Facsimile: (209) 957-0595
7 dean@mohanlaw.net

8 JOHN HERRICK, ESQ. – SBN 139125
9 LAW OFFICE OF JOHN HERRICK
10 1806 Kettleman Lane, Suite L
11 Lodi, California 95242
12 Telephone: (209) 224-0660
13 Facsimile: (209) 224-5887

14 On behalf of South Delta Water Agency,
15 Central Delta Water Agency, Lafayette Ranch,
16 Heritage Lands, Mark Bachetti Farms
17 and Rudy Mussi Investments L.P.

18 **STATE OF CALIFORNIA**

19 **STATE WATER RESOURCES CONTROL BOARD**

20 Hearing in the Matter of California
21 Department of Water Resources and
22 United States Department of the Interior,
23 Bureau of Reclamation Request for a
24 Change in Point of Diversion for
25 California Water Fix

26 **SOUTH DELTA WATER AGENCY
27 PARTIES' OPPOSITION TO MOTION TO
28 STRIKE PORTIONS OF THOMAS K.
BURKE'S TESTIMONY**

29 The South Delta Water Agency Parties herein oppose the motion filed by DWR and the
30 State Water Contractors to strike portions of the Part-2 Rebuttal testimony of Thomas K. Burke,
31 and the related exhibits. For the reasons set forth below, Mr. Burke's testimony responds to
32 Petitioners' Part-2 Case in Chief has a clear place in evidentiary record and should be allowed.

1 **Mr. Burke's Testimony Related to Boundary 1 and Boundary 2 Should be Allowed**
2 **Because the Boundaries Remain Part of the Change Petition**

3 On August 17, 2017 DWR and the State Water Contractors moved to strike Dr. Denton's
4 testimony concerning Boundary 1. In overruling the motion, the hearing officer cited to Ms.
5 Buchholz's testimony (DWR – 1010) at p. 9 lines 12-17 wherein she asserts that CWF H3+ is
6 within the range of Boundary 1 and 2. Similar to the testimony provided by Dr. Denton over
7 DWR's objection on August 17, 2018, Mr. Burke's testimony rebuts DWR's repeated assertions
8 in its Part-2 Case in Chief that the CWF H3+ scenario is the project. As the hearing officers are
9 aware, DWR, initiated these proceedings with the Boundary conditions as the preferred operating
10 scenario, then changed the preferred alternative to the BA Scenario, then surprised everyone with
11 CWF H3+ as its so called "Adopted Project," in its Part 2 case in chief. While CWF H3+ maybe
12 Petitioner's preferred operating scenario, the Change Petition which is the subject of these
13 proceedings, includes B1, B2, H3 and H4 as operating scenarios. Therefore, Mr. Burke's
14 testimony responds to DWR and is appropriate rebuttal testimony. DWR is free to file an
15 amended Change Petition which does not include Boundary 1, Boundary 2, H3 or H4.

16
17 **Mr. Burke's Testimony Related to DSM2 Bathymetry Responds to Petitioners' Part 2**
18 **Case in Chief and Should be Allowed**

19
20 Mr. Burke's testimony responds directly to Tara Smith's testimony in DWR-1015. The
21 third bullet of Ms. Smith's testimony, (page 4 beginning at line 22) clearly discusses water level
22 effects for CWF H3+, the BA H3+, as compared to H3 and H4. Beginning on page 28 at line 11
23 of DWR-1015, Ms. Smith discusses the impacts from CWF H3+ on water levels at Old River at
24 Tracy Blvd and opines that the results for CWF H3+ are very similar to H3 and H4 with only
25 slight variations. Although Ms. Smith's water level testimony contains broad conclusions
26 without supporting analysis it is, necessarily, based on DSM2 Modeling results. Despite the lack
27 of supporting analysis, the SDWA Parties have the right to rebut Ms. Smith's opinions.

1 In response to Ms. Smith’s water level testimony, Mr. Burke commissioned a bathymetric
2 survey of portions of Old and Middle River which demonstrates that the channel depths in the
3 DSM2 model being used by DWR are assumed to be significantly deeper than they actually are.
4 Therefore, Mr. Burke’s testimony explains that Ms. Smith’s testimony is based on incorrect
5 assumptions rendering her opinions inaccurate and unreliable.

6 Additionally, Ms. Smith discussed the South Delta DSM2 channel profiles during cross-
7 examination. With regard to the topic of channel cross sections in Old River, when Mr. Herrick
8 asked Ms. Smith if it would be important to have the most recent data on the conditions in the
9 South Delta in order to achieve reliable DSM2 results, Ms. Smith replied,
10 “not necessarily.” (TR volume 6; part 2; page 13; lines 11-23). Mr. Burke’s testimony responds
11 to Ms. Smith’s cross-examination testimony by demonstrating that having current south delta
12 channel survey data does have a direct impact on water level modeling results. Moreover, Mr.
13 Burke’s analysis is not based on “some undisclosed study,” as claimed in the motion to strike
14 filed by DWR/SWC but, rather, is based on the July 2018 survey data which contained in SDWA
15 – 326 and SDWA – 327.

16
17 **Mr. Burke’s Testimony Relating to DSM2 Time Steps and the Use of DSM2 in a**
18 **Predictive Mode Responds to Petitioners’ Part 2 Case in Chief and Should be Allowed**

19
20 Mr. Burke’s opinion 7 with regard to appropriate use of time steps in the Models responds
21 both to Mr. Reyes’ direct cross-examination testimony. Beginning at page 2 line 26 and
22 continuing through page 3 line 5 of Mr. Reyes’ testimony (DWR – 1016) he incorporates what
23 he describes as the extensive testimony during Part-1 of the proceedings with respect to the
24 appropriate comparative use of the models. Mr. Reyes ‘cautions’ that aid testimony remains
25 relevant to Part-2. In response to cross-examination testimony during Part-2 of the proceedings
26 (TR February 27, 2018; volume 6 beginning at page 48; line 9 and continuing through page 49
27 line 21), Mr. Reyes references the same Part-2 direct testimony and goes on to discuss that the
28

1 models being used for the CWF should not be used to analyze results over short time steps.
2 Rather, he contends that the models are appropriately used to consider longer term changes. Mr.
3 Burke's opinion 7 simply responds to Mr. Reyes' testimony and opines that shorter time steps,
4 including in 15-minute increments, is an appropriate and effective use of the models.

5 Similarly, Mr. Burke's testimony beginning on p. 29 of SDWA 323-revised and
6 continuing through p. 30, rebuts Mr. Reyes' testimony that the models should not be used in a
7 predictive manner. From the standpoint of common sense, the models are obviously used in
8 predictive a predictive manner all the time. Although DWR does not like the results of using the
9 models in a predictive manner, common sense provides that the models are regularly used in this
10 manner. For example, testimony provided by Mr. Reyes and Ms. Smith that CWF H3+ shows
11 the same or similar levels of compliance with D-1641 compared to the NAA is, of course, using
12 the model to make a prediction. Mr. Burke specifically uses SDWA – 325 to refute Mr. Reyes'
13 testimony that the models should not be used in a predictive manner by demonstrating that DWR
14 regularly uses the models in such manner, and, specifically, to forecast the anticipated results on
15 water quality in the south delta from water transfers.

16
17 **Mr. Burke's Testimony Appropriately References the Rebuttal Testimony to Which it**
18 **Responds**

19 Mr. Burke's written rebuttal testimony (SDWA – 323 revised) references and
20 summarizes the opinions provided by Ms. Smith and Mr. Reyes to which his rebuttal testimony
21 responds. The hearing officers have been consistent in not requiring that rebuttal testimony cite
22 to the specific pages and lines to which it pertains. Mr. Burke's rebuttal is consistent with
23 previous rebuttal testimony in this regard.

24
25 ///

26 ///

27 ///

28 ///

1 **Conclusion**

2 For the reasons set forth above, the motion filed DWR and the State Water Contractors
3 to strike portions of Mr. Burke's testimony and related exhibits should be denied.
4

5
6 Respectfully Submitted,
7

8
9 Date: August 22, 2018

10 **MOHAN, HARRIS, RUIZ,**
11 **WORTMANN, PERISHO & RUBINO, LLP**

12 By: *Dean Ruiz*
13 S. DEAN RUIZ, ESQ.
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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):

- **SOUTH DELTA WATER AGENCY PARTIES' OPPOSITION TO MOTION TO STRIKE PORTIONS OF THOMAS K. BURKE'S TESTIMONY**

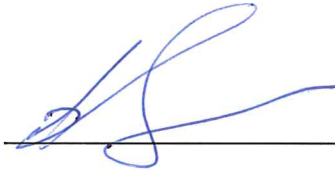
to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated 8/14/2018, posted by the State Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

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 8/22/2018.

Signature: _____



Name: Bee Speer

Title: Legal Assistant

Party/Affiliation: Mohan, Harris, Ruiz,
Wortmann, Perisho & Rubino

Address: 3439 Brookside Rd, Ste 208
Stockton, CA 95219