



**BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

**JOINT MOTION IN CALIFORNIA WATER FIX CHANGE PETITION HEARING TO  
DISQUALIFY CERTAIN PETITIONERS' WITNESSES AND TO EXCLUDE CERTAIN  
WITNESS'S TESTIMONY AND EXHIBITS IN WHOLE OR IN PART, AND JOINT  
OBJECTIONS TO PETITIONERS' WITNESSES' TESTIMONY AND EXHIBITS**

**July 11, 2016**

**Introduction**

Protestants Friends of the River, Sierra Club California, Environmental Water Caucus and Planning and Conservation League (hereafter these protestants) hereby move to disqualify certain petitioners' witnesses and to exclude and object to certain testimony and exhibits in whole or in part.

This Motion and these Objections are filed pursuant to the Hearing Officer Rulings and Schedules of April 25, 2016 and June 10, 2016.

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## **MOTION TO DISQUALIFY WITNESSES AND TO EXCLUDE TESTIMONY AND EXHIBITS, AND OBJECTIONS**

### **Required Exclusion of Evidence because it is not Relevant and Reliable**

Pursuant to 23 Cal. Code Regs § 648.5.1 evidence in State Water Board proceedings must meet the standards set forth in Government Code § 11513. Section 11513(c) provides that:

The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

“However, even in such [administrative] proceedings, with the relaxed standards of admissibility, *the evidence must be relevant and reliable.*” *Aengst v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 275. *Accord, Salvitella v. City of San Francisco* (N.D. Cal. 2009) 2009 WL 5206425 \*5 (emphasis added).

It will be shown below that petitioners’ evidence must be excluded because it is not relevant and is not reliable. No responsible person would rely on the “evidence” submitted by petitioners to determine whether to create a huge new diversion point upstream from the most important, already seriously degraded, estuary in the Western Hemisphere.

### **Adoption of Motions to Disqualify and Exclude and Objections filed by other protestants**

These protestants hereby adopt and incorporate by reference as though fully set forth herein: all motions to disqualify petitioners’ witnesses; all motions to exclude petitioners’ witnesses’ testimony in whole or in part; and all objections to petitioners’ witnesses and exhibits; filed by other protestants in this Hearing. This adoption includes, but is not limited to, the Sacramento Valley Water Users’ objections to written testimony and exhibits filed July 8, 2016, as well as objections filed by other protestants after we file these objections. Adoption of objections filed by other protestants is necessary because the sheer volume of exhibits submitted by petitioners has made it impossible to comprehensively evaluate all exhibits for objections

within the time allowed. Moreover, adoption of objections filed by other protestants reduces repetition and reduces the length of these objections.

**Required Disqualification of 12 Witnesses and Exclusion of their Testimony in whole or in part**

The Hearing Officer Ruling of April 25, 2016 specified that noon on May 31, 2016 was the:

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

(Ruling, April 25, 2016, p. 4) (emphasis added).

Petitioners clearly understood the Ruling as they did file proposed testimony for 8 witnesses. As to 12 other witnesses, all that petitioners included in terms of "testimony" was one sentence stating that the witness helped review someone else's written testimony, or contributed information to someone else's testimony. Each of these 12 witnesses is identified and his or her one sentence of proposed "testimony" is set forth as follows:

**Steve Centerwall, DWR-52**

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

**Michael Anderson, DWR-64**

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

**Eric Reyes, DWR-67**

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

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

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

**Jamie Anderson, DWR-69**

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

**Tara Smith, DWR-70**

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

**Kristin White, DOI-6**

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

**Gwendolyn Buchholz, DWR-72**

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

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

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

**Shanmugam (Praba) Pirarooban, DWR-54**

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

**Sergio Valles, DWR-58**

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

**Robert Cooke, DWR-60**

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

We move to disqualify each of the above witnesses from testifying. “It is the policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits.” 23 Cal. Code Regs § 648.4(a). In the event they are not disqualified our motion seeks to exclude their testimony in whole or in part. Protestants were entitled to receive proposed testimony, if any, from each of the above witnesses by May 31, 2016. Instead, no substantive proposed

testimony was provided for any of the above 12 witnesses.<sup>1</sup> Using one example, to avoid belaboring what may be a non-issue depending on the intent and Hearing conduct of petitioners, the first of the 12 witnesses listed above is Steve Centerwall. His proposed “testimony” submitted on May 31, 2016 was: “I testify that I helped review the written testimony of Jennifer Pierre.” He should be disqualified from testifying. If he is not disqualified from testifying, any testimony from him during the Hearing should be excluded. If his testimony is not excluded in whole, it should be excluded in part, to exclude him from providing any testimony other than what was provided on May 31: “I testify that I helped review the written testimony of Jennifer Pierre.”

The same relief is requested as to each of the 11 other witnesses listed above. Allowing any of the above 12 witnesses to testify would violate the April 25, 2016 Ruling requiring receipt and service of witnesses’ proposed testimony by May 31, 2016. Allowing their testimony would also deprive protestants of due process by allowing admission of testimony in violation of the Ruling and in the absence of the opportunity for protestants to have and review the proposed testimony, including the witnesses’ opinions, basis/reasons for their opinions, and factual testimony, well in advance of the commencement of the Hearing. Admission of any testimony from these witnesses would be prejudicial to protestants and must be excluded pursuant to 23 Cal. Code Regs § 648.4(e).

### **Subjects for Official Notice supporting this Motion and these Objections**

Agencies may take official notice of any facts which can be judicially noticed by courts. Government Code § 11515. “The Board or presiding officer may take official notice of such facts as may be judicially noticed by the courts of this state.” 23 Cal. Code Regs § 648.2. Courts take judicial notice of the obvious and the undeniable. Evidence Code § 452(c) authorizes judicial notice of an official act of the executive departments of the State of California and the United States. Judicial notice of undeniable facts, conditions, and requirements is also appropriate pursuant to Evidence Code § 452(g), facts of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and § 452(h), facts that are not reasonably subject to dispute and are capable of immediate and accurate

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<sup>1</sup> We make this portion of this motion out of an abundance of caution. It is possible, but unknown to us, that petitioners will not be attempting to elicit testimony from any of the above witnesses.

determination by resort to sources of reasonably indisputable accuracy. Judicial and thus official notice of the decisional, constitutional, and public statutory law of this State and of the United States is *mandatory* under Evidence Code § 451(a).

The issues raised below apply to all of petitioners' testimony and exhibits, and support our Motion and all of our Objections. These issues are raised now, below, to avoid repetition and to reduce the length of our written Motion and Objections.

### **No Update of the Bay-Delta Plan adopted in 1995**

The State Water Board is aware of the status of its own planning. The Water Quality Control Plan for the San Francisco Bay/San Joaquin -Sacramento Delta Estuary (WQCP) (Water Rights Decision 1641, D-1641) was adopted in 1995, and amended without substantive changes in 2006. "The state Water Board is in the process of a periodic update of the WQCP, which is occurring in phases." (Reference, DWR-51, Jennifer Pierre testimony p.4, fn.4). The statement in the State Water Board February 11, 2016 Ruling (p.4) reflecting reality is that: "The appropriate Delta flow criteria will be more stringent than petitioners' current obligations and may well be more stringent than petitioners' preferred project." The State Water Board has acknowledged "that the WaterFix, if approved, would be a significant component of Delta operations, and it would be preferable to have Phase 2 [of the Plan update] completed prior to acting on the change petition." (February 11, 2016 Ruling, pp. 4-5).

There is more than failure to update the Bay-Delta Plan. The Delta Reform Act mandates that any order approving a diversion point change "shall include appropriate Delta flow criteria and shall be informed by the analysis conducted pursuant to this section." Water Code § 85086(c)(2). The Water Board has violated the Delta Reform Act by failing to adopt appropriate Delta flow criteria. The Board puts the cart before the horse in considering the change petition before updating the Plan and adopting appropriate Delta flow criteria.

Consequently, testimony offering opinions that the California Waterfix (CWF) will comply with existing standards is not relevant, and testimony offering opinions that there will not be negative effects to human uses of water is neither relevant nor reliable.<sup>2</sup> A number of

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<sup>2</sup> As used herein, human uses of water includes injury to legal users of water and also injury extending beyond legal users of water including environmental justice concerns as allowed by the Rulings of February 11 and March 4, 2016.



protestants have repeatedly raised the point that the planning needs to take place before, not after, having a hearing on a Change Petition of this magnitude.

### **No Compliance with the Delta Reform Act**

On May 18, 2016, the Superior Court, County of Sacramento issued its 73 page ruling in the Delta Stewardship Council Cases (Judicial Council Coordination Proceeding No. 4758). In pertinent part, the Ruling (pp. 26, 38) ordered that:

A peremptory writ shall issue from this Court to Respondent [the DSC], ordering Respondent to revise the Delta Plan and any applicable regulations to:  
Include quantified or otherwise measurable targets associated with achieving reduced Delta reliance, reduced environmental harm from invasive species, restoring more natural flows, and increased water supply reliability, in accordance with the Delta Reform Act.

The Delta Plan is supposed to be “the comprehensive, long-term management plan for the Delta as adopted by the council in accordance with this division.” Delta Reform Act (Water Code) § 85059. As explained by the Ruling, Delta Reform Act § 85308(b) “provides that the Delta Plan shall, ‘include quantified or otherwise measurable targets associated with achieving the objectives of the Delta Plan.’” (Ruling, p. 8). The Ruling further explains that quantified or measurable targets would include a numeric designation or an amount that can be identified. (Ruling, pp. 8-9). The Court also noted in its Ruling that there is “legislative direction that the Delta Plan be ‘legally enforceable’. (§ 85001.)” (Ruling, p. 9). In addressing DSC argument, the Court found that “WR R1 is not an enforceable policy and does not describe how progress will be measured.” (Ruling, p. 12). The Court found “the Delta Plan fails to ‘include quantified or otherwise measurable targets associated with achieving’ reduced Delta reliance as required by the Delta Reform Act.” (Ruling, p. 12).

The Ruling also ordered that (p. 38):

A peremptory writ of mandate shall issue from this court to Respondent, ordering Respondent to revise the Delta Plan and any applicable regulations to:  
1) Provide a flow policy that includes ‘quantified or otherwise measurable targets;’

The Court expressly found that “the Delta Plan fails to ‘include quantified or otherwise measurable targets associated with’ restoring more natural flows as required by the Delta Reform Act.” (Ruling, p. 36). The Court explained that § 85302(e)(4) “provides, ‘The following sub goals and strategies for restoring a healthy ecosystem shall be included in the Delta Plan... (4)

Restore Delta flows and channels to support a healthy estuary and other ecosystems.” (Ruling, p. 34). The Court explained that a goal of “progress:”

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

(Ruling, p. 36).

And finally, the Ruling (pp. 38, 72) ordered that:

A peremptory writ of mandate shall issue from this Court to Respondent, ordering Respondent to revise the Delta plan and any applicable regulations to:  
[2) on Ruling p. 38, 1) on Ruling p. 72] Promote options for water conveyance and storage systems.

The Court found that “simply recommending the BDCP’s completion does not promote any options.” (Ruling, p. 37). “[T]he Delta Reform Act. . . does require Respondent to promote options for water conveyance.” (Ruling, p. 59). The court held that the failure to promote options for water conveyance is a violation of the Delta Reform Act. (Ruling, pp. 37-38, 59).

On June 24, 2016, the Court issued its Ruling in response to motions for “clarification”, adhering to its Ruling set forth above including “Specifically, with regard to reduced Delta reliance, the Court found the Plan failed to include targets that would ensure reduced reliance, as required by the Delta Reform Act.” The Court reiterated that the Delta Plan must be revised “to include quantified or otherwise measurable targets associated with achieving reduced Delta reliance, . . . restoring more natural flows, and increased water supply reliability.” The Court clarified its earlier ruling, by determining: “To be clear, the Delta Plan is invalid and must be set aside until proper revisions are completed.”

The Court Rulings of May 18 and June 24, 2016 are attached. Judicial notice of these Rulings is required by Evidence Code §§ 451(a), 452(c), and 453. Consequently, official notice is requested of these Rulings.

Of course it is necessary to have more stringent Delta flow criteria. The Delta Reform Act requires measures to “Restore Delta flows and channels to support a healthy estuary and other ecosystems.” Water Code § 85302(e)(4). The Act establishes State policy “to reduce reliance on the Delta in meeting California’s future water supply needs through a statewide

strategy of investing in improved regional supplies, conservation, and water use efficiency.” Water Code § 85021. State policy is to: “Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.” Water Code § 85020(c).

Again, testimony offering opinions that the California Waterfix (CWF) will comply with existing standards is not relevant, and testimony offering opinions that there will not be negative effects to human uses of water is neither relevant nor reliable. The status quo does not meet the express requirements of the Delta Reform Act and does not meet the Court decision enforcing that law. Instead, reliance on the Delta must be reduced, and more natural Delta flows must be restored.

Finally, the Delta Stewardship Council failed to comply with the Delta Reform Act and has been sent back to the start line by the Court as explained above. That will also be the fate of this process if the State Water Board continues to put the cart before the horse by failing to adopt the appropriate Delta flow criteria required by the Delta Reform Act, Water Code § 85086, before proceeding to consider the change petition, as explained above. Even in games like soccer or football, the teams know the rules before the game starts. Far more important than any game, this proceeding will determine the fate of the Delta but the Board is going to make up the rules during or after the proceeding. That violates the Delta Reform Act.

### **The Modeling relied upon is not Relevant and is not Reliable**

To start, the modeling does not take into account the legal mandates of the Clean Water Act and the Delta Reform Act for the State Water Board to update the water quality control plan (Clean Water Act) and adopt appropriate Delta flow criteria (Delta Reform Act). The modeling lacks any relevance whatsoever to what the State Water Board is supposed to have already done and is supposed to now be doing.

The modeling done in CalSim II and DSM2 does not meet the proper standards to be relied upon as an exhibit. The models both lack proper verification, validation, accreditation, and peer review. The verification, validation, external peer review, and accreditation steps are an essential part of scientific and engineering practice, and the completion of these steps in developing a simulation is part of the “best available science”. “Ultimately, best available science requires scientists to use the best information and data to assist management and policy decisions. The processes and information used should be clearly documented and effectively communicated to foster improved understanding and decision making”. Cal. Code Regs. tit. 23, §

Appendix 1A. There has been no comprehensive formal review of the models that have been proposed for the WaterFix hearing. Since the modeling in CalSim II and DSM2 does not meet the proper standards required for modeling, the models do not represent the best available science.

The model was peer reviewed in 2003 and 2006 but only at a general level. The 2003 review only looked at a general approach. There were noted problems and the recommendations for these problems still have not been followed. In 2006, the model was peer reviewed for validity and the panel declined to endorse the use of the model for any purpose. The 2006 review also gave recommendations on providing error estimates, which have not been followed. With no acceptable peer review, no validation, and no verification, the CalSim II and DSM2 models do not meet the standard to be considered the best available science. The models are not admissible and consequently, testimony based on the models is not admissible

Finally, as explained below, the testimony of Mr. Armin Munevar, DWR-71 establishes that ““In summary, the CalSim II and DSM2 results should only be used comparatively.” (p. 13). “Because of the technical limitation of the models, they cannot reliably predict specific operations. The models should only be used to estimate trends in a comparative framework.” (p. 13).

In short, the modeling relied upon by petitioners is not relevant and is not reliable. We join in the June 20, 2016 request for official notice by California Water Research/Deirdre Des Jardins of the 2012 State Water Board panel on Analytical Tools for Evaluating Water Supply, Hydrodynamic and Hydropower Effects. The modeling relied upon fails to meet any known, valid standards for reliability.

### **There is No CEQA-Required Final EIR/EIS or Adequate Draft EIR/EIS**

There is no Final EIR/EIS and petitioners May 31, 2016 letter (p.3) currently estimates it will not be completed until August. Moreover, on October 30, 2015, the U.S. Environmental Protection Agency (EPA) issued its letter reviewing the Water Fix SDEIS as required by Section 309 of the Clean Air Act. The EPA has, in that letter, given the SDEIS a rating of “‘ 3’ (*Inadequate*)”. (EPA Letter, October 30, 2015, p. 4). The EPA findings about missing information are consistent with the State Water Board’s October 30, 2015 comment letter including; “there is a large degree of uncertainty regarding the exact effects of the project due to a number of factors.” (Board Letter, p. 2). Official notice is requested of the EPA findings of

inadequacy and the contents of the letter.<sup>3</sup> A number of protestants have repeatedly raised the CEQA violations taking place by the State Water Board having a hearing on the Change Petition in the absence of a Final EIR/EIS, and in the absence of even an adequate Draft EIR/EIS.

Consequently, testimony offering opinions that the California Waterfix (CWF) will comply with existing standards is not relevant, and testimony offering opinions that there will not be negative effects to human uses of water is neither relevant nor reliable. We have a government of laws, not of rulers. One of our laws is CEQA. The starting point for determining whether there will be negative effects to human uses of water would be an adequate Final EIR/EIS. Instead, petitioners present testimony and exhibits untethered to the starting point for analysis of environmental impacts under California law— an adequate Final EIR/EIS. Instead of complying with CEQA, the State Water Board is unlawfully allowing the Hearing to proceed on the basis of the self-serving “testimony” and exhibits offered by the project proponents.

**No Alternatives are presented to the WaterFix, even though CEQA Requires Alternatives**

In prior correspondence including our (Friends of the River and Sierra Club California) Protest, and letters of November 24, 2015, January 21, 2016, and February 17, 2016 we and other protestants have specifically pointed out the continued failure of the lead BDCP/Water Fix agencies to develop, consider, and circulate for public and decision-maker review and comment the CEQA required range of reasonable alternatives to the Delta Water Tunnels Water Fix proposed project. We specifically requested development and consideration of the Environmental Water Caucus (EWC) alternative, *A Sustainable Water Plan for California* (May 2015) and attached a copy of that alternative to our January 21, 2016 letter. The State Water Board in its February 11, 2016 Ruling recognized that we argued “that the draft EIR does not include a reasonable range of alternatives that is adequate for purposes of the State Water Board’s decision-making process.” (Ruling, p. 9). Embracing a classic *act first think later* approach prohibited by CEQA, the Ruling stated “If during the course of this proceeding, the State Water Board determines that the range of alternatives evaluated by DWR is not adequate to support the Board’s decision, then either DWR or the Board will need to prepare subsequent or supplemental documentation.” (Ruling, p. 9). We repeat our request for development and consideration of the EWC alternative along with good faith variants of that alternative. By way

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<sup>3</sup> The EPA letter was attached to the November 24, 2015 letter from the California Sportfishing Protection Alliance, Environmental Water Caucus, Friends of the River, and Restore the Delta to the State Water Board.

of brief summary, the *Sustainable Water Plan* alternative includes reducing exports out of the Delta to 3,000,000 acre-feet. Also included are: spending funds on such modern water measures as water conservation, water recycling, groundwater treatment and desalination and agricultural water conservation including conversion to drip irrigation in export areas, annual crops in export areas that can be fallowed in drought years, and staged removal from production of drainage-impaired lands in export areas that worsen water quality by such consequences as selenium discharge.

Again, testimony offering opinions that the California Waterfix (CWF) will comply with existing standards is not relevant, and testimony offering opinions that there will not be negative effects to human uses of water is neither relevant nor reliable. There should be a range of reasonable alternatives before the State Water Board and the alternatives should be the focus of any Change Petition Hearing and testimony and exhibits submitted in such Hearing. As we have said before, any decision to approve the Water Fix project will be a nullity in the absence of CEQA compliance, including preparation, consideration, and circulation for public review and comment of an adequate Draft or Subsequent EIR including presentation of a range of reasonable alternatives including but not limited to the *A Sustainable Water Plan for California* alternative.

### **Disqualification and Exclusion of Specific Witnesses and Exhibits, and Objections**

#### **Jennifer Pierre, DWR-51 Objections**

Her testimony (p. 9) must be excluded that: “Each intake has a maximum capacity to divert 3000 cfs (a total of 9000 cfs from the NDD), although actual operations will be governed by the operational criteria and based on hydrologic conditions and fish presence.” This testimony is not relevant and is not reliable in reciting operations and impacts. Stating that “actual operations will be governed by the operational criteria and based on hydrologic conditions and fish presence” is vague and meaningless.

She admits that “the approving agencies need to consider a reasonable range of alternatives, . . .” (p. 10). Her conclusions that alternatives have been considered (pp. 10-12) including: “The inclusion of alternative operating scenarios responds to the State Water Board’s request that the EIR/EIS evaluate a sufficiently broad range of alternatives in order for the State Water Board to consider changes to water rights.” (p. 12) must be excluded. Her testimony is not relevant and is not reliable. Her testimony is contrary to the evidence. The Draft EIR/EIS, and RDEIR/SDEIS do not include a range of reasonable alternatives. Among the obvious alternatives

that must be included pursuant to CEQA but have not been included are alternatives increasing through-Delta flows by reducing exports and not establishing new conveyance upstream from the Delta for the exporters. This deliberate violation of CEQA is not going away.

### **John W. Leahigh, DWR-61 Objections**

The proffered expert testimony must be excluded because the witness's qualifications do not extend to the subject matter at issue. John Leahigh is Chief for the State Water Project Water Operations Office and has a background in civil engineering. Mr. Leahigh is a civil engineer and he is not qualified to give testimony on salinity, water quality, and fishery objectives. John Leahigh states in his testimony, "Based on my knowledge, and experience it is my opinion that the SWP/CVP will continue to meet existing Delta water quality and fishery objectives and any additional regulatory requirements for the CWF at a similar success rate as demonstrated historically." This is outside the scope of his expertise and he is not qualified to testify as to whether the WaterFix Project will meet water quality requirements, fishery objectives, or salinity requirements.

This witness sets forth several times: "My opinion is that regulatory compliance with the CWF will be at least as good, if not better, as today given that CWF will add infrastructure flexibility to system operations."(pp. 7, 17, 20). This testimony must be excluded because it is not relevant and is not reliable. His testimony is not relevant or reliable because regulatory compliance must be with a lawfully updated Bay-Delta Plan. As explained above in the Official Notice section the updated Plan Delta flow criteria will be more stringent than petitioners' current obligations. His testimony that the SWP/CVP will continue to meet existing Delta water quality and fishery objectives (p. 17) is not relevant because there will be new fishery objectives established by the upcoming Biological Opinions for the Water Fix.

His opinion that "Although our state-of-the-art models are not sophisticated enough to replicate the nuances of real-time operations, they do represent the best available tools for analyzing the feasibility of any significant change to the water operation system as is the case with the CWF." (p. 20) is not relevant and is not reliable. As shown above, the modeling information relied upon by the persons he refers to must be excluded because it is not reliable. The testimony of Mr. Munevar, below, establishes that the models "cannot reliably predict specific operations."

Accordingly, Mr. Leahigh's opinions must be excluded.

## **Parviz Nader-Tehrani, DWR-66 Objections**

This testimony must be excluded because it is not based on the “best available science”. There is no foundation for it. Parviz Nader Tehrani’s testimony pertains to CalSim II and the hydraulic modeling. Basing the testimony on the results from CalSim II would be incorrect because CalSim II is not the best available science. CalSim II has at least three major problems; it was not subject to external peer review, it was not compared with historical data, and there was no strategic review. The SWRCB held a workshop on “Analytical Tools for Evaluating Water Supply, Hydronamic and Hydropower Effects”, in which it was made clear that models and model results used in Board proceedings should be better documented and include a discussion of the strengths, weaknesses, and limitation for each application. It is for these reasons that CalSim II is not the best available science and the testimony relying on results from this model is highly objectionable. Relying on results from CalSim II which was not peer-reviewed or calibrated creates a defective foundation on which the witness relies. His opinion “that the modeling results are accurate” (p. 2) is not relevant and is not reliable. The modeling deficiencies have been set forth above.

He states his opinion several times that there will not be negative effects to legal users of water due to water level changes. (pp. 3, 10, 11). He claims that “It is my opinion that the modeling cannot completely mimic operational decisions but it does show that D- 1641 water quality objectives can be met.” (p. 11). His opinions are based on modeling that is not relevant and is not reliable. His testimony is based on speculation and assumes facts that are not in evidence. As shown above in the Official Notice section, the Bay-Delta Plan has not been updated; there has not been compliance with the Delta Reform Act reducing reliance on the Delta, restoring more natural flows and adopting appropriate Delta flow criteria; and there is no CEQA required Final EIR/EIS or adequate Draft EIR/EIS. He bases everything on the claimed compliance with D- 1641. Again, that is a Plan that has not been updated in 20 years. The past 20 years have seen ever worsening conditions in the Delta resulting from changed conditions ranging from increased exports to climate change resulting in reduced mountain runoff and increased sea level rise worsening the salinity problem in the Delta. As explained above, the Board has already determined that Delta flow criteria will be more stringent than petitioners’ current obligations. And, as explained below, the testimony of Mr. Munevar, below (p. 13) establishes that the models cannot reliably predict future operations.



Parviz Nader-Tehrani's testimony must be excluded.

### **Armin Munevar, DWR-71 Objections**

Armin Munevar's testimony is similar to Parviz Nader Tehrani's in that they both rely on CalSim II for modeling results and give their expert opinion based on these results. As mentioned above, CalSim II is a defective model and provides a defective foundation for this expert testimony. The documentation of model assumptions and error analyses would have to be completed. Without this, the CalSim II model is not valid for any use. Therefore, the direct testimony relying on the modeling is not the best available science and provides a defective foundation.

Mr. Munevar's proposed testimony helps illustrate why the CalSim II modeling relied upon is not relevant and is not reliable evidence in this Hearing. He says that DWR used the 2010 version of CalSim II in developing a Draft EIR/EIS and RDEIR/EIS and that CalSim II is also used for the presentation of evidence in support of this petition. (p. 9). He explains that the CalSim II results differ from real-time operations given that not all the regulatory requirements (such as upstream temperature requirements, or reservoir releases ramping rates) for real-time operational adjustments to Shasta operations are modeled in CalSim II. (p. 11). He explains that when systemwide storage levels are at or near dead pool, also described as stressed water supply conditions, the CalSim II should not necessarily be understood to reflect actually what would occur in the future under a given scenario. (p. 12). He admits that because results of daily conditions are always averaged to a monthly time step, "the use of sub monthly results of CalSim II should be used with caution." (p. 12).

Mr. Munevar admits: "Because it is a simulation, based on a combination of historical hydrology, the current regulatory environment and projected changes to the hydrology due to climate change, CalSim II cannot be calibrated and therefore, should not be used in a predictive manner. CalSim II results are intended to be used in a comparative manner, which allows for assessing the changes in the SWP/CVP system operations and resulting incremental effects between two scenarios. The model should be used with caution 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." (pp. 12-13). "In summary, the CalSim II and DSM2 results should only be used comparatively." (p. 13).

“Because of the technical limitation of the models, they cannot reliably predict specific operations. The models should only be used to estimate trends in a comparative framework.” (p. 13).

The testimony of Mr. Munevar establishes the lack of relevance and reliability of use of the CalSim II and DSM2 models for opining on whether approval of the California Water Fix will injure other legal users of water. This testimony also establishes the lack of relevance and reliability of the testimony of other witnesses relying on Mr. Munevar’s testimony and testimony based on the CalSim II and DSM2 models including testimony of: John Leahigh, above (Leahigh testimony pp. 7, 20 refers to modeling testimony of Munevar); Parviz Nader-Tehrani, above (Nader-Terhani testimony p. 2 establishes he relied on Munevar’s testimony about the CalSim II output that feeds into the DSM2 model); Maureen Sergent, below (Sergent testimony p. 3 establishes that her testimony to support a decision that the CWF can be constructed and operated without injuring other legal users of water builds on other testimony including Munevar, Nader-Tehrani and Leahigh); Ron Milligan, below (Milligan testimony p. 4 based on the modeling of project operations); and Ray Sahlberg, below (Sahlberg testimony p. 2 establishes he joins the testimony of Sergent that the requested changes will not injure other legal users of water).

### **Maureen Sergent, DWR 53 Objections**

#### *Water Rights Opinions*

Maureen Sergent’s proposed testimony as to water rights must be excluded because it is unsupported by the material on which she relies. A large portion of the testimony pertains to the CWF Petition for Change not constituting a new water right. As evidence for this claim Ms. Sergent uses SWRCB’s Order WR 2009-0061 which denies reconsideration by Camp Pendleton of the SWRCB’s order refusing to accept Camp Pendleton’s Protest for Change. Camp Pendleton protested that a water right holder or applicant should not be able to petition the State Water Board to change a permit to allow for direct diversion when the permit is for diversion for storage because this would constitute a new water right. Ms. Sergent uses this previous ruling by SWRCB to assert that the WaterFix Project will also be a change of a water right and not a new water right, but the two cases are fundamentally different.

First, the WaterFix Project is not changing the Point of Diversion from direct diversion to storage, but rather is adding three new Points of Diversion(POD). This is a fundamental

difference. “A fundamental principle of water right law, however, is that a right cannot be so changed that it in essence constitutes a new right. (Cal. Code Regs., tit. 23, §791, subd. (a).) Using the Camp Pendleton case as evidence for why the WaterFix Project does not constitute a new water right lacks the proper foundation to support her claim. The Camp Pendleton case is changing the purpose of the points of diversion not adding three new POD’s which completely changes the scope of the diversion.

Ms. Sergent also uses the Camp Pendleton case to show the definition of a new water right. “An appropriator cannot expand an existing right to appropriate a greater amount of water, to increase the season of diversion, or to use a different source of water. (Cal. Code Regs., tit. 23, §699; Johnson Rancho County Water District v. State Water Rights Board (1965) 235 Cal. App. 2d 863, 879). However, relying on that as the sole definition for what qualifies as a new water right would be wrong. “The common feature among the changes that have been found to constitute the creation of a new right, as opposed to a change in an existing right, is that the changes that initiate a new right increase the amount of water taken from a water source at a given time.” (see Johnson Rancho County Water District v. State Water Rights Board). Ms. Sergent’s testimony improperly asserts the definition of a new water right based on order WR 2009-0061 by the State Water Rights Board, but her definition lacks the entirety of the definition from the order and only uses pieces of the definition laid out in the order. The proffered expert testimony must be excluded because it is unsupported by the material on which the expert relies.

#### *Injury to Legal Users of Water Opinions*

Ms. Sergent offers opinions building on testimony of others including Armin Munevar, John Leahigh, and Parviz Nader-Terhani that the CWF can be operated without injuring other legal users of water. (pp. 3, 10, 13, 24).

The testimony of Mr. Munevar, above, establishes the lack of relevance and reliability of use of the CalSim II and DSM2 models for opining on whether approval of the California Water Fix will injure other legal users of water. This testimony also establishes the lack of relevance and reliability of the testimony of other witnesses relying on Mr. Munevar’s testimony and testimony based on the CalSim II and DSM2 models including testimony of: John Leahigh, above (Leahigh testimony pp. 7, 20 refers to modeling testimony of Munevar); Parviz Nader-Tehrani, above (Nader-Terhani testimony p. 2 establishes he relied on Munevar’s testimony about the CalSim II output that feeds into the DSM2 model; and Ray Sahlberg, below (Sahlberg

testimony p. 2 establishes he joins the testimony of Sergent that the requested changes will not injure other legal users of water).

In other words, because the models cannot reliably predict specific operations, all of the testimony by all of the witnesses relying on the models or relying on testimony relying on the models collapses because the evidence is not relevant and is not reliable. Everything that would or should be relevant and reliable such as: relevant and reliable modeling; a completed update of the Bay-Delta Plan; compliance with reducing reliance on the Delta and restoring more natural flows as required by the Delta Reform Act; and an adequate Final EIR/EIS; is absent. Everything that is supplied by petitioners is speculation or based on speculation; contrary to facts and actions that must be officially noticed; and is therefore inadmissible.

Consequently, Ms. Sergent's opinions that CWF operations would not injure other legal users of water must be excluded.

#### **Ron Milligan, DOI-7 Objections**

Mr. Milligan's opinions (p. 4) based on modeling and that Reclamation has reviewed the DWR testimonies and agrees with their characterizations of project operations are not relevant and are not reliable. The testimony is speculative, contrary to evidence, and based on modeling that is inadmissible. His opinions must be excluded.

#### **Ray Sahlberg, DOI-4 Objections**

Mr. Sahlberg joins the testimony of Maureen Sergent that the petition does not initiate a new water right and that the requested changes will not injure other legal users of water. (p. 2, 6, 9). His testimony is based on testimony that is not relevant, is not reliable, and must be excluded for the same reasons that Ms. Sergent's testimony must be excluded as explained above.

#### **John Bednarski, DWR-57 Objections**

Joint protestants have focused their objections throughout on the impacts of project operations as opposed to the impacts arising from construction of the project. We rely completely upon the objections of other protestants relating to construction impacts and the testimony of Mr. Bednarski. That said, the adverse visual and aesthetic impacts of the intake structures and other features of this huge project would radically transform and degrade what is now a scenic rural riverside area with extraordinary aesthetic values.

### **DWR-505, 507, 513, 514, 515 Objections**

These five exhibits are all grouped under the same objection because they are the results of the CalSim II modeling and the DSM2 modeling. The modeling done in CalSim II and DSM2 does not meet the proper standards to be relied upon as an exhibit. The models both lack proper verification, validation, accreditation, and peer review. The verification, validation, external peer review, and accreditation steps are an essential part of scientific and engineering practice, and the completion of these steps in developing a simulation is part of the “best available science”. Ultimately, best available science requires scientists to use the best information and data to assist management and policy decisions. The processes and information used should be clearly documented and effectively communicated to foster improved understanding and decision making. There has been no comprehensive formal review of the models that have been proposed for the WaterFix hearing. Since the modeling in CalSim II and DSM2 do not meet the proper standards required for modeling, they do not represent the best available science.

The model was peer reviewed in 2003 and 2006 but only at a general level. The 2003 review only looked at a general approach. There were noted problems and the recommendations for these problems still have not been followed. In 2006, the model was peer reviewed for validity and the panel declined to endorse the use of the model for any purpose. The 2006 review also gave recommendations on providing error estimates, which have not been followed. With no acceptable peer review, no validation, and no verification the CalSim II and DSM2 models do not meet the standard to be considered the best available science. Mr. Munevar’s testimony, as explained above, establishes the lack of relevance and reliability of the models to predict whether the Water Fix will injure other human uses of water.

In conclusion, we object to and request the exclusion of the listed exhibits filed by the Petitioners.

### **DWR-5 Objections**

The modeling PowerPoint gives results and summaries drawn from the CalSim II and DSM2 models and shows their projections to meet the D-1641 objectives. The modeling PowerPoint should be excluded because relying on CalSim II and DSM2 to support the WaterFix Project would be relying on models that fail to conform to the basic systems engineering standards which would invalidate any conclusions from the modeling. A key step in modeling is validation by internal and external review which has never happened. Validation is the process of

determining the degree to which a model and its associated data are an accurate representation of the real world from the perspective of the intended uses of the model. Normally, this is done before the model is used, but in the case at hand there was never validation because there was no peer review. The petitioners have claimed that CalSim II has been validated and calibrated, however, this is incorrect. There was an external review for validation done in 2014 by Walter Bourez, but he found many issues. Without documentation of model assumptions and error analyses completed the CalSim II model should not be allowed for any use. The model lacking peer review validation and calibration flaws causes a defective foundation on which the PowerPoint relies.

### **DWR-3 Objections**

The Water Rights PowerPoint must be excluded in part or whole because its slides pertaining to whether or not the WaterFix Project establishes a new water right and whether or not there is an injury to other legal users of water are based on testimony that is not relevant and not reliable. The PowerPoint uses the same reasoning for forming the definition of a new water right as Ms. Sergent's testimony. It relies on Water Right Order 2009-0061 to give the definition of a new water right. As explained above in why Ms. Sergent's testimony should be excluded, this definition is an incomplete definition and is not reliable. The PowerPoint has many slides saying that the WaterFix Project will not injure other legal users of water. This should be excluded as well because this is speculation and contrary to facts.

### **DWR-404, SWRCB-21, SWRCB-27, SWRCB-30 Objections**

The Water Right Decision of 1641 (D-1641) standards should be excluded because any reliance in determining water rights based on D-1641 is not valid. D-1641 does not set acceptable standards to be presented as an exhibit. D1641 is based on a Plan that has not been updated in 20 years. The past 20 years have seen ever worsening conditions in the Delta resulting from changed conditions ranging from increased exports to climate change resulting in reduced mountain runoff and increased sea level rise worsening the salinity problem in the Delta. Therefore, D-1641 is not reliable and must be excluded.

### **DWR-401, 402, 413 Objections**

The Bay-Delta Compliance Metrics assumes only periods of compliance and excludes other years when water periods were waived. Excluding the periods when water periods were waived makes the metrics incomplete and does not present any metric that is reliable. Since these

three exhibits all show the metrics of compliance, it would be unacceptable to rely on these exhibits without showing the periods which were waived. Moreover, the “periods of compliance” were only pro forma, not substantive.

### **DWR-511 Objections**

The Memo to C. Crothers on August 22, 2013 was not authenticated or finalized. The memo is true and correct only to the extent that it is a draft. Since, the memo is a draft and not a final version it should not be relied upon. The purpose of the memo is also unclear and there is no explanation in regards to its relevance. With no explanation, the draft memo should be excluded from the exhibits on the merits that it is incomplete with no purpose or relevance.

### **SWRCB-3, SWRCB-4, SWRCB-5, SWRCB-102 Objections**

The 2013 BDCP Draft EIR/EIS and 2015 California WaterFix RDEIR/SDEIS must both be excluded because they are inadequate science and they do not present reasonably prudent alternatives. The U.S. Environmental Protection Agency (EPA) issued its letter reviewing the Water Fix SDEIS as required by Section 309 of the Clean Air Act. The EPA has, in that letter, given the SDEIS a rating of “‘ 3’ (*Inadequate*)”. (EPA Letter, October 30, 2015, p. 4). Since the RDEIR/SDEIS is inadequate, is not a Final ER/EIS, fails to include a reasonable range of alternatives and fails to include the comments on the 2013 Draft and 2015 RDEIR/SDEIS, these documents must be excluded as they are not relevant and are not reliable.

## **OBJECTIONS TO WITNESS TESTIMONY AND TO EXHIBITS**

Our objections to testimony and to exhibits are set forth above in our motion to disqualify witnesses and to exclude testimony. Our objections above all go to admissibility. In any instance where the Hearing Officers do not disqualify the witness or exclude the testimony or exhibit, our objections are also offered as going to the weight that should be afforded to the particular testimony, portion of testimony, or exhibit.

## **RESERVATION OF RIGHTS**

These protestants expressly reserve their rights to move to disqualify, move to exclude, and object to evidence as these proceedings move forward. Due to the sheer volume of exhibits and the complexity and volume of the modeling information, it has not been possible for protestants within the time allowed to comprehensively review all of the exhibits for possible objections. As just one example, when petitioners on June 21, 2016 added the 2013 Draft BDCP

EIR/EIS and 2015 Water Fix RDEIR/SDEIS as exhibits they offer into evidence, those exhibits alone consist of approximately 48,000 pages.

### CONCLUSION

Based on the foregoing it is respectfully requested that: petitioner's witnesses be disqualified; petitioner's witnesses' proposed testimony be excluded in whole or in part; that petitioner's exhibits be excluded in whole or in part; and that our objections be sustained; as set forth above. Please call Robert Wright, Senior Counsel, Friends of the River at (916) 442-3155 ext 207 or email to [bwright@friendsoftheriver.org](mailto:bwright@friendsoftheriver.org) if you experience any problem with receiving this Motion or the attachments.<sup>4</sup>

Respectfully submitted,



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Conner Everts, Facilitator  
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Kyle Jones, Policy Advocate  
Sierra Club California



Jonas Minton, Senior Water Policy Advisor  
Planning and Conservation League

Attachment: Service Certificate  
Attachments: Rulings from Superior Court

cc: All by electronic service  
Tom Howard, Executive Director, State Water Resources Control Board (SWRCB)  
Michael Lauffer, Chief Counsel, SWRCB  
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<sup>4</sup> David Smyle, summer law intern for Friends of the River, and law student at UC Davis School of Law, assisted in the research for and preparation of this Motion and these Objections.



Diane Riddle, Environmental Program Manager, SWRCB  
All party representatives on July 8, 2016 SWRCB service list