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COUNTY SANITATION DISTRICT

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10 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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12 In the matter of Hearing re California
13 WaterFix Petition for Change

SACRAMENTO REGIONAL COUNTY
SANITATION DISTRICT'S
OBJECTIONS TO WRITTEN
TESTIMONY AND EXHIBITS
SUBMITTED BY PETITIONERS U.S.
BUREAU OF RECLAMATION AND
CALIFORNIA DEPARTMENT OF
WATER RESOURCES IN SUPPORT
OF PART 1 CASE IN CHIEF

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18 Sacramento Regional County Sanitation District (Regional San) objects to the
19 written testimony and many of the exhibits submitted by the California Department of
20 Water Resources (DWR) and United States Bureau of Reclamation (Reclamation)
21 (collectively, "Petitioners") and as part of their case in chief for Part 1A of the California
22 WaterFix petition for change (Petition) proceeding. The testimony and exhibits do not
23 provide evidence that is competent to support the conclusion reached by Petitioners'
24 witnesses that the California WaterFix (Project) will not injure other legal users of water,
25 and in particular that it will not injure Regional San. For these reasons, and as more
26 particularly described herein, Regional San respectfully requests that the State Water
27 Resources Control Board (State Water Board) exclude portions of the testimony of
28 specific witnesses and the accompanying exhibits relied on by these witnesses.

1 **I. BACKGROUND**

2 Regional San owns and operates the Sacramento Regional Wastewater
3 Treatment Plant (SRWTP). The SRWTP receives and treats wastewater from
4 businesses and approximately 1.4 million people in the urban Sacramento County region
5 and City of West Sacramento. With an authorized discharge of 181 million gallons per
6 day (mgd), average dry weather flow, the SRWTP currently provides secondary
7 treatment and disinfection prior to discharge to the Sacramento River near Freeport.
8 Under the \$2 billion EchoWater Project, nitrification and denitrification, and tertiary
9 filtration will be provided prior to disinfection and discharge.

10 Regional San's current and future activities and interests also relate to direct and
11 indirect re-use of treated water. Under applicable law, Regional San may obtain permits
12 to divert and beneficially use water from the Sacramento River or Delta based on the
13 amounts of water that it has discharged to the Sacramento River, or dedicate water to
14 instream purposes. Currently, Regional San conducts recycling and reuse in
15 accordance with the July 31, 1996 State Water Board Order on Application WW-28. The
16 authorized use recognized in that order is 10 mgd, and current use is approximately
17 3.5 mgd. Regional San is also actively pursuing further recycled water use
18 opportunities, including a water recycling project that would deliver up to 50,000 acre-
19 feet per year of disinfected tertiary treated recycled water to approximately 16,000 acres
20 of irrigated land in southern Sacramento County. This project would advance state
21 recycling goals and provide various benefits related to regional water reliability, reduced
22 burdens on groundwater resources for irrigation, raising groundwater levels, improving
23 Cosumnes River flow and fishery conditions, and providing water for wetlands resources.

24 Approval of the Petition will, or may threaten to, impair Regional San's prior rights
25 to divert water downstream of its discharge based on the amount of treated effluent
26 discharge; and to re-use treated effluent, or deliver effluent to others for re-use, rather
27 than discharge such water to the Sacramento River. Under the water rights system,
28 water currently discharged or authorized for discharge by Regional San is not subject to

1 appropriation or call by others. Further, pursuant to Water Code section 1212, Regional
2 San has the right to dedicate flows to instream purposes, on a temporary or permanent
3 basis. Diversion of such water at new (or any existing) points of diversion is not
4 permissible.

5 The Petition seeks to add three new points of diversion from the Sacramento
6 River in the north Delta below the SRWTP discharge, to convey water to the south Delta
7 for diversion and/or export. The Petition does not provide any information or explanation
8 regarding whether, or to what extent, Petitioners assume that Regional San's treated
9 effluent will continue to be discharged to the Sacramento River, or that treated effluent
10 would be available to meet obligations, standards, or objectives that are directly or
11 indirectly related to flow. Regional San thus timely filed a protest to the Petition, on the
12 grounds that any action based on an assumption that Regional San's treated effluent will
13 continue to be discharged to the Sacramento River, or that treated effluent would be
14 available to meet obligations, standards, or objectives that are directly or indirectly
15 related to flow would injure Regional San, a legal user of water under its prior, superior
16 rights, and would be contrary to law.

17 Both in their Petition and May 31, 2016 submittal of testimony supporting their
18 case in chief, Petitioners assert that the Petition will not adversely affect legal users of
19 water. However, the Petition does not provide operating criteria or propose permit terms
20 to support this assertion. Moreover, no information is provided in the Petition or
21 testimony to support assertions of no injury to Regional San's rights to dedicate water to
22 instream flows and divert water downstream of its discharge based on the amount of
23 treated effluent discharge; and to re-use treated effluent, or deliver effluent to others for
24 re-use, rather than discharge such water to the Sacramento River. Accordingly, the
25 conclusions offered in the written testimony are not supported by the necessary data or
26 analysis, do not meet evidentiary standards, or otherwise satisfy the information
27 requirements of the State Water Board's February 11, 2016 Pre-Hearing Conference
28 Ruling (February 11 Ruling) or the governing regulations.

1 **II. OBJECTIONS**

2 Regional San submits the following objections relevant to the issues raised in
3 Regional San's Protest.

4 A. Opinion Testimony Based on Computer Modeling, and Further Opinion
5 Based on That Testimony, Lacks Foundation Because the Underlying
6 Factual Basis Has Not Been Submitted and Should Be Excluded

7 The written testimony of several of Petitioners' witnesses offers opinions based on
8 computer modeling of various scenarios for the operation of the proposed new points of
9 diversion. The assumptions and results of the computer modeling are presented in the
10 testimony of Armin Munévar (DWR-71) and related exhibits. However, the evidence
11 submitted by Petitioners lacks any information or explanation that would address the
12 issues identified in Regional San's protest relating to assumptions regarding SRWTP
13 discharges. The modeling testimony does not include a technical memorandum
14 describing the modeling approach or assumptions or data tables for critical modeling
15 results or an explanation of the specific inputs to CalSimII. For example, the testimony
16 of Armin Munévar (DWR-71 at p. 4:5-17) refers to inputs to CalSimII including "return
17 flows," but the testimony and supporting exhibits do not identify or quantify these return
18 flows, including whether this flow is assumed to include continued discharge from
19 SRWTP and if so, at what levels and at what times. Also, Exhibit DWR-515 does not
20 explain the model's logic, assumptions, or operations. It is at best an outline and is full
21 of acronyms and abbreviations that make it very difficult to follow and understand. The
22 testimony also lacks information regarding how the two boundary scenarios were
23 developed or are likely to represent actual operation of the projects. (See e.g., DWR-51,
24 at pp. 13-14.) In fact, the testimony of Armin Munévar admits that the modeling does not
25 reflect actual operations. (DWR-71, at pp. 4:24-27, 12:15-18, 12:27-13:20; 15:8-10.)
26 The evidence thus fails to "clearly identify and explain the logic, assumptions,
27 development and operations of the model," as the State Water Board has explicitly
28 required in this hearing. (Notice of Petition (October 30, 2015), at p. 33.) Furthermore,
instead of identifying "in quantitative terms" any projected change in water quantity or

1 quality, Petitioners rely generally on the improper modeling testimony of Mr. Nader-
2 Tehrani and Mr. Munévar to describe potential effects to users. (DWR-324, at p. 8.) For
3 these reasons, Petitioners have failed to respond to the Hearing Officers' direction in
4 their February 11 Ruling to provide the information required by California Code of
5 Regulations, title 23, section 794(a) "in a succinct and easily identifiable format."
6 (February 11 Ruling at p. 7.)

7 Moreover, the Petitioners must be able to "explain and support the manner in
8 which the [modeling] analysis was constructed and used" and "whether the analysis
9 ma[kes] sense in application to these . . . proceedings." (See Byron-Bethany Irrigation
10 District Ruling, State Water Board Order WR 2016-0015, at p. 16.) Without this
11 information, including the necessary explanation of assumptions relating to return flows
12 in general, and SRWTP discharge in particular, Regional San and the State Water Board
13 cannot follow the analytical path used by Petitioners to reach their conclusions that the
14 Petition will not injure legal users of water, in violation of Section 794(a).

15 For the reasons above, Petitioners' modeling testimony lacks foundation and is
16 insufficient to provide the basis for necessary findings, and should be excluded. (Evid.
17 Code, § 803; *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564; see also
18 Ruling on Motions Filed in the Matters of Administrative Civil Liability Complaint Against
19 Byron-Bethany Irrigation District and Draft Cease and Desist Order Against the West
20 Side Irrigation District (BBID Ruling) (March 18, 2016) at pp. 4,7 ("We will disregard any
21 testimony that we find to be entirely conclusory or lacking foundation.").)

22 Because Petitioners' modeling testimony lacks foundation and is not supported by
23 sufficient evidence to demonstrate the modeling's assumptions or reliability, Petitioners'
24 expert testimony concerning the Project's effect on other legal users of water also lacks
25 foundation and is not reliable because its sole basis is the modeling. Several of
26 Petitioners' key witnesses rely on the modeling testimony to support their opinions,
27 particularly in opining that that Project will not injure other legal users of water.

28 (DWR-51, at pp. 10:8-16, 13:17-14:9 (Jennifer Pierre); DWR-53, at pp. 8:17-19, 11:20-

1 12:16 (Maureen Sergent); DOI-4, at pp. 6-7, 9 (Ray Sahlberg), DOI-5 at pp. 14, 17, 18
2 (Ray Sahlberg PowerPoint); DOI-7, at p. 4 (Ron Milligan).)

3 Based on the foregoing, Regional San objects to the following testimony and
4 exhibits submitted by Petitioners:

- 5 1. DWR-5, at pp. 16-17, 28-82
- 6 2. Testimony of Jennifer Pierre (DWR-51, at pp. 10:8-16, 13:17-14:9)
- 7 3. DWR-114
- 8 4. DWR-116
- 9 5. Testimony of Maureen Sergent (DWR-53, at pp. 8:17-19, 11:20-12:16)
- 10 6. Testimony of Armin Munévar (DWR-71, at pp. 2:19-23, 15:5-24, 16:12-21)
- 11 7. DWR-513
- 12 8. DWR-514
- 13 9. DWR-515
- 14 10. Testimony of Parviz Nader-Tehrani (DWR-66, at pp. 2:10-11, 4:23-7:21,
15 8:7-11:18)
- 16 11. Testimony of Ray Sahlberg (DOI-4, at pp. 6-7, 9)
- 17 12. PowerPoint of Ray Sahlberg (DOI-5, at pp. 14, 17, 18)
- 18 13. Testimony of Ron Milligan (DOI-7, at p. 4)
- 19 B. Opinion Testimony Based on Speculation or Concluding That Legal Users
20 of Water Will Not Be Injured by the Change Is Improper for an Expert and
Should Be Excluded

21 Regional San objects to Petitioners' witness testimony because it is based on
22 speculation, which is not a proper basis for an expert's opinion. (See *Cooper v. Takeda*
23 *Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555, 577 ("An expert's opinion
24 that something could be true if certain assumed facts are true, without any foundation for
25 concluding those assumed facts exist in the case ... does not provide assistance to the
26 [trier of fact] because the [trier of fact] is charged with determining what occurred in the
27 case before it, not hypothetical possibilities."); see also *Roscoe Moss Co. v. Jenkins*
28 (1942) 55 Cal.App.2d 369, 380 (expert may not base opinion upon a comparison if the

1 matters compared are not reasonably comparable); *Long v. Cal.-Western States Life Ins.*
2 Co. (1955) 43 Cal.2d 871, 882 (speculative or conjectural data are not properly the
3 subject of expert testimony).)

4 Petitioners admit that initial operating criteria are not available, but will be
5 developed prior to operation of the Project. (DWR-51, at p. 10:6-7.) In the absence of
6 initial operating criteria, Petitioners analyze effects on legal users of water by
7 undertaking a boundary analysis. (DWR-51, at p. 10:2-16.) Petitioners contend that the
8 boundaries are broad enough that any operations considered with this change will have
9 been evaluated with regard to effects on legal users of water. (DWR-51, p. 10:11-14.)
10 However, the testimony and exhibits do not provide sufficient specificity regarding
11 Project operations for Petitioners' experts to draw conclusions about effects on legal
12 users of water. (See Cal. Code. Regs., tit. 23, § 794(a).) Instead of offering a specific
13 "proposed diversion, release and return flow schedule," as required by Section 794(a)(6),
14 Petitioners note the complexity of State Water Project/Central Valley Project operations
15 and rely on so-called "adaptive management" that is lacking in any substantive basis.
16 (DWR-324, at pp. 5-6.) Moreover, the Petition does not include any permit conditions
17 that would ensure that Project operations would conform to the assumptions in the
18 modeling (boundary) analysis, or that the conclusions Petitioners draw from the
19 modeling would reflect real-life operations. Thus, any conclusions about the effects of
20 legal users of water based on this analysis are speculative and lack foundation.
21 Furthermore, Petitioners' testimony does not explain where additional water for outflows
22 in the Boundary 2 scenario would come from, and therefore does not support the
23 Petitioners' conclusion that the Project will not harm other legal users of water. Finally,
24 Petitioners' conclusions that the Project will not result in injury to legal users of water
25 during severe water shortages lack foundation. Petitioners admit that the modeling does
26 not reflect how the Project would operate during severe water shortages, because
27 Petitioners state they would file temporary urgency change petitions to modify operations
28 during these shortages. (Testimony of John Leahigh, DWR-61, p. 8; see also Biological

1 Assessment § 3.7.2, p. 3-215.) Without knowing what might be contained in any
2 approval of a temporary urgency change petition, Petitioners' experts are left to
3 speculate about future operations scenarios. By speculating about future project
4 operations with California WaterFix in place, Petitioners' experts cannot properly
5 conclude now that the Project will not injure any legal user of water.

6 Regional San further objects to Petitioners' witness testimony on the grounds that
7 legal opinion testimony concluding that legal users of water will not be injured by the
8 change is improper for an expert and should be excluded, and in any event Petitioners'
9 experts are not qualified to testify as to the legal conclusion of whether the Project will
10 result in injury to Regional San as a legal user of water. (*Summers v. A.L. Gilbert Co.*
11 (1999) 69 Cal.App.4th 1155, 1178.)

12 Based on the foregoing, Regional San objects to the following testimony and
13 exhibits submitted by Petitioners:

- 14 1. DWR-3, at pp. 8-9, 16-17
- 15 2. DWR-4, at p. 38
- 16 3. DWR-5, at pp. 16-17, 28-8.
- 17 4. Testimony of Jennifer Pierre (DWR-51, at pp. 10:8-16, 13:17-14:9)
- 18 5. DWR-114
- 19 6. DWR-115
- 20 7. Testimony of Maureen Sergent (DWR-53, at pp. 3:22-25, 8:14-19, 10:24-
21 15:11, 24:5-28)
- 22 8. Testimony of John Leahigh (DWR-61, at pp. 5:23-25, 6:6-8, 7:18-22, 8:3-8,
23 16:9-15, 17:5-11, 17:23-18:25, 19:15-26, 20:6-18)
- 24 9. Testimony of Armin Munévar (DWR-71, at pp. 2:19-23, 12:15-18, 12:27-
25 13:20, 15:5-24, 16:12-21, 17:7-14, 19:10-24, 19:26-21:4)
- 26 10. Testimony of Parviz Nader-Tehrani (DWR-66).¹

27
28 ¹ Mr. Tehrani's analysis relies on the testimony of Mr. Munévar, specifically the CalSimII output that feeds into the DSM-2 model. (DWR-66, at p. 2:10-11.) To the extent that the particular results from the

- 1 11. DWR-324
- 2 12. DWR-513
- 3 13. DWR-514
- 4 14. DWR-515
- 5 15. Testimony of Ray Sahlberg (DOI-4, at pp. 6-7, 9)
- 6 16. PowerPoint of Ray Sahlberg (DOI-5, at p. 18)
- 7 17. Testimony of Ron Milligan (DOI-7, at p. 4)

8 **III. CONCLUSION**

9 Because much of the witness testimony and associated exhibits submitted by
10 Petitioners lack necessary foundation, do not make clear the underlying factual
11 foundations for the opinion offered, rely on speculation and constitutes improper expert
12 testimony regarding a legal conclusion, and since Regional San (and others) have
13 objected to this testimony, the State Water Board must exclude it.

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15 Date: July 12, 2016

16 Respectfully submitted,
17 SOMACH SIMMONS & DUNN

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19 Andrew M. Hitchings
20 Attorneys for Sacramento Regional County Sanitation
21 District

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27 modeling analysis that supports Mr. Munévar's testimony is lacking, Mr. Tehrani's opinions concerning the
28 California WaterFix's impacts on water quality and water levels in the Delta lack foundation.

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 caused a true and correct copy of the following document(s):

5 SACRAMENTO REGIONAL COUNTY SANITATION DISTRICT'S OBJECTIONS TO
6 WRITTEN TESTIMONY AND EXHIBITS SUBMITTED BY PETITIONERS U.S. BUREAU
7 OF RECLAMATION AND CALIFORNIA DEPARTMENT OF WATER RESOURCES IN
8 SUPPORT OF PART 1 CASE IN CHIEF

9 to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the Current
10 Service List for the California WaterFix Petition hearing, dated July 11, 2016, posted by
11 the State Water Resources Control Board at
12 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

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

15 Signature: 
16 Name: Michelle Bracha
17 Title: Legal Secretary
18 Party/Affiliation: Sacramento Regional County Sanitation District
19 Address: 500 Capitol Mall, Suite 1000
20 Sacramento, CA 95814