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12 Attorneys CITY OF STOCKTON

13  
14 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

15  
16 In the matter of Hearing re California  
17 WaterFix Petition for Change

CITY OF STOCKTON'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  
1A CASE IN CHIEF

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22 The City of Stockton ("Stockton" or "City") objects to the written testimony and  
23 many of the exhibits submitted by the California Department of Water Resources (DWR)  
24 and United States Bureau of Reclamation (Reclamation) (collectively, "Petitioners") as  
25 part of their case in chief for Part 1A of the California WaterFix petition for change  
26 proceeding. The testimony and exhibits do not provide evidence that is competent to  
27 support the conclusion reached by Petitioners' witnesses that California WaterFix  
28 (Project) will not injure other legal users of water, and in particular that it will not injure

1 Stockton. For these reasons, and as more particularly described herein and as  
2 described in the objections of the Sacramento Valley Water Users, which Stockton joins,  
3 Stockton respectfully requests that the State Water Resources Control Board (State  
4 Water Board) exclude portions of the testimony of specific witnesses and the  
5 accompanying exhibits relied on by these witnesses.

6 **I. BACKGROUND**

7 Stockton is a municipal corporation in San Joaquin County, California, with a  
8 population of approximately 300,000. A significant portion of the City is within the  
9 Sacramento-San Joaquin River Delta (Delta). The City's primary source of potable  
10 drinking water derives from diversions from its Delta Water Supply Project (DWSP)  
11 Water Treatment Plant (WTP), which diverts from the Delta at the southwest tip of  
12 Empire Tract pursuant to a State Water Board-issued permit that provides for diversion  
13 of up to 33,600 acre-feet per year at a rate up to 317 cubic feet per second for municipal  
14 and industrial purposes (Permit No. 21176, issued on Application 30531A). The City  
15 also has other current and future interests in the right of use of Delta water, including  
16 uses under Application 30531B (for 92,300 acre-feet per year with the point of diversion  
17 at the DWSP), as well as other Delta surface and groundwater resources that may be  
18 affected, directly or indirectly, by the proposed petition for change. In addition, the City  
19 owns and operates a wastewater collection system and the Stockton Regional  
20 Wastewater Control Facility (RWCF), which discharges treated effluent to the  
21 San Joaquin River after extensive treatment including tertiary filtration, and nitrification  
22 for ammonia removal. Because the City's ability to divert water at the DWSP is linked to  
23 the amount of wastewater it may discharge from the RWCF, changes in flows or water  
24 quality that affect the City's operation of the RWCF also affect the City's ability to  
25 exercise its water right. The well-being of the City, its residents, and economy thus is  
26 inextricably linked to the Delta, the quantity and quality of Delta water supplies, and the  
27 Delta ecosystem.

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1 Starting in 2008, Stockton repeatedly has raised concerns to Petitioners regarding  
2 the effect on its water supply (and hence its water right) of potential water quality and  
3 supply changes caused by the Project. As those concerns have gone unanswered,  
4 Stockton timely filed a protest to Petitioners' Petition for Change (Petition) to add points  
5 of diversion to water rights for both the State Water Project and Central Valley Project as  
6 necessary for the Project. The Petition seeks to add three new points of diversion from  
7 the Sacramento River in the north Delta to convey water to the south Delta for diversion  
8 and/or export. Both in their Petition and May 31, 2016 submittal of testimony supporting  
9 their case in chief, Petitioners assert that the Petition will not adversely affect legal users  
10 of water, including effects from changes in water quality. However, the Petition does not  
11 provide operating criteria or propose permit terms to support this assertion, and no  
12 information is provided in the petition to support these assertions with regard to the City's  
13 drinking water supply.

14 Significantly, pursuant to the regulations governing this proceeding, and as  
15 emphasized in the State Water Board's February 11, 2016 Pre-Hearing Conference  
16 Ruling (February 11 Ruling), Petitioners were required to submit information showing  
17 "*any effects of the proposed change(s) on other known users of water, including*  
18 *identification in quantitative terms of any projected change in water quantity, water*  
19 *quality, timing of diversion or use, consumptive use of the water, reduction in return*  
20 *flows, or reduction in the availability of water within the streams affected by the proposed*  
21 *change(s).*" (Cal. Code. Regs., tit. 23, § 794(a)(9) (emphasis added).) The State Water  
22 Board hearing officers directed Petitioners to provide this information in a "succinct and  
23 easily identifiable format." (February 11 Ruling at p. 7.)

24 On May 31, 2016, Petitioners submitted written testimony and exhibits to support  
25 the Petition. Despite years of active participation by Stockton and multiple written  
26 requests that Petitioners analyze and identify the specific changes to water quality at the  
27 location of Stockton's municipal water intake, Petitioners do not so much as mention  
28 Stockton in their testimony, nor do they even attempt to provide the required information

1 that would address the issues raised by Stockton's protest (see e.g., DWR-324). Thus  
2 the conclusions offered in the written testimony are not supported by the necessary data  
3 or analysis, do not meet basic evidentiary standards, and otherwise do not satisfy the  
4 information requirements of the February 11 Ruling or the governing regulations.

5 **II. OBJECTIONS**

6 Detailed objections to Petitioners' evidence, and legal argument supporting those  
7 objections, have been filed by the Sacramento Valley Water Users (SVWU). Stockton  
8 shares the concerns raised by SVWU and joins in the SVWU's objections to evidence, in  
9 their entirety, and incorporates them by reference herein in full, on behalf of the City. In  
10 addition, Stockton submits the following objections relevant to the issues raised in  
11 Stockton's Protest.

12 A. Testimony of Jennifer Pierre (Exhibit DWR-51)

13 Stockton objects to the testimony of DWR witness Jennifer Pierre on the grounds  
14 that it offers improper expert opinion (legal issue), does not meet the evidentiary  
15 requirements of title 23 of the California Code of Regulations, section 794, and lacks  
16 foundation. Through the testimony of Ms. Pierre, Petitioners admit that initial Project  
17 operating criteria are not available; rather, Petitioners state, criteria will be developed  
18 sometime prior to operation of the Project. (DWR-51, at p. 10:6-7.) In the absence of  
19 initial operating criteria, Petitioners analyze effects on legal users of water by  
20 undertaking a boundary analysis. (DWR-51, at p. 10:2-16.) Petitioners contend that the  
21 boundaries are broad enough that any Project operations will have been evaluated with  
22 regard to effects on legal users of water. (DWR-51, at p. 10:11-14.) Stockton objects to  
23 this testimony on the grounds that the boundary analysis does not provide the kind of  
24 specificity with respect to Project operations that is necessary for Petitioners' experts to  
25 draw conclusions about effects on legal users of water, including Stockton. (See Cal.  
26 Code. Regs., tit. 23, § 794(a).) Moreover, even if sufficient information were provided to  
27 demonstrate that the boundary analysis adequately addressed potential water quality  
28 effects at Stockton's drinking water intake, the Petition does not include any permit

1 conditions that would ensure that Project operations would conform to the assumptions  
2 in the boundary analysis, and thus any conclusions about the effects of legal users of  
3 water based on this analysis lack foundation.

4 For these reasons, Stockton objects to the following testimony of Ms. Pierre and  
5 associated exhibits:

- 6 • DWR-51, at pp. 10:8-16, 13:17-14:9
- 7 • DWR-114
- 8 • DWR-116

9 To the extent that other DWR or Reclamation testimony or exhibits rely on the  
10 boundary analysis or conclusions regarding the import of that analysis as set forth in the  
11 testimony of Ms. Pierre, Stockton also objects to that testimony. (E.g., Testimony of  
12 Maureen Sergent, Exhibit DWR-53 Exhibit DWR-324; Testimony of Armin Munévar,  
13 Exhibit DWR-71; Exhibits DWR-513, DWR-514, DWR-515; Testimony of Parviz Nader  
14 Tehrani, Exhibit DWR-66).

15 B. Testimony of Maureen Sergent (Exhibit DWR-53)

16 Stockton objects to the testimony of DWR witness Maureen Sergent on the  
17 grounds that it offers improper expert opinion (legal issue) and lacks foundation.

18 Ms. Sergent testifies that the information submitted with Petitioners' case in chief  
19 supports a finding that the Project will not injure legal users of water. (DWR-53, at  
20 p. 3:2.) Stockton objects to Ms. Sergent's testimony on the grounds that legal opinion  
21 testimony concluding that legal users of water will not be injured by the change is  
22 improper for an expert and should be excluded, and in any event she is not qualified to  
23 testify as to the legal conclusion of whether the Project will result in injury to Stockton as  
24 a legal user of water. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.)

25 Stockton further objects to portions of Ms. Sergent's testimony asserting that that  
26 the Project will not result in injury to legal users of water (including her testimony that  
27 Delta water quality changes will be "minor") as lacking foundation, because it is based on  
28 Project modeling and the testimony of Armin Munévar (DWR-71) and Parviz Nader-

1 Tehrani (DWR-66). That modeling and associated witness testimony lack foundation  
2 because, among other reasons, including those set forth by the SVWU in their  
3 objections, they rely on assumptions about future operating conditions that are not  
4 supported by proposed permit conditions and do not include evidence relating to actual  
5 water quality changes at the location of Stockton's drinking water intake.

6 Stockton also objects to Exhibit DWR-324, submitted by Ms. Sergent, on the  
7 grounds that it does not provide the information required by Section 794(a), including  
8 any information showing "effects of the proposed change(s) . . . including identification in  
9 quantitative terms of any projected change in water quantity, water quality, timing of  
10 diversion or use, consumptive use of the water, reduction in return flows, or reduction in  
11 the availability of water within the streams affected by the proposed change(s)" on  
12 Stockton, a known user of water. Petitioners rely on so-called "adaptive management"  
13 that is lacking in any substantive basis. (DWR-324, at pp. 5-6.) The lack of concrete  
14 information about how the Project may operate under the loosely described "adaptive  
15 management" process results does not permit anything more than speculation about  
16 future water quality downstream of the Project intakes, and thus a lack of foundation for  
17 conclusions about future effects on Stockton and other legal users of water.

18 Furthermore, instead of identifying "in quantitative terms" any projected change in water  
19 quality, quantity, or other matters required by the regulations, the Petitioners rely  
20 generally on the improper modeling testimony of Mr. Nader-Tehrani and Mr. Munévar to  
21 describe potential effects to users and real time operations. (DWR-324, at p. 8.)  
22 Nothing in DWR-324 remedies the lack of clarity regarding operational criteria, actual  
23 project effects, or mitigation that will be incorporated into the Project.

24 Based on the foregoing, Stockton specifically objects to the following testimony of  
25 Ms. Sergent and associated exhibit:

- 26 • DWR-53, at pp. 3:22-25, 8:14-21, 10:24-15:11, 24:5-28
- 27 • DWR-324

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1           Because Ms. Sergent’s opinion testimony and supporting exhibit DWR-324 lack  
2 foundation, do not make clear the underlying factual foundations for the opinion offered,  
3 and constitute improper expert testimony regarding a legal conclusion, and Stockton and  
4 others have objected to this testimony, the State Water Board must exclude it. (Evid.  
5 Code, § 803; *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564; see also  
6 Ruling on Motions Filed in the Matters of Administrative Civil Liability Complaint Against  
7 Byron-Bethany Irrigation District and Draft Cease and Desist Order Against the West  
8 Side Irrigation District (BBID Ruling) (March 18, 2016) at pp. 4, 7 (“We will disregard any  
9 testimony that we find to be entirely conclusory or lacking foundation.”).

10           B.     Testimony of John Leahigh (Exhibit DWR-61)

11           Stockton objects to the testimony of DWR witness John Leahigh on the grounds  
12 that it offers improper expert opinion (legal issue) and lacks foundation.

13           Specifically, Stockton objects to Mr. Leahigh’s testimony that the Project will be  
14 “as protective if not more, of existing beneficial uses” as lacking foundation, generally,  
15 and specifically with regard to Stockton. (DWR-61, at p. 17:5-11.) No information is  
16 provided in the testimony regarding the Project’s effect on water quality at Stockton’s  
17 drinking water intake, and thus there is no basis for the conclusion that the Project would  
18 be as protective, let alone more so, of Stockton’s existing beneficial uses of water.  
19 Stockton further objects to Mr. Leahigh’s testimony that the Project will not result in injury  
20 to legal users of water during severe water shortages as improper expert testimony  
21 regarding a legal conclusion and lacking foundation. Petitioners admit that the modeling  
22 does not reflect how the Project would operate during severe water shortages, because  
23 Petitioners state they would file temporary urgency change petitions to modify operations  
24 during these shortages. (DWR-61, at p. 8; also see Biological Assessment § 3.7.2, at p.  
25 3-214.) Petitioners provide no information about what might be contained in any  
26 approval of a temporary urgency change petition, and thus the conclusion that the  
27 Project will not injure any legal user of water is speculative and lacking foundation.

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1 Based on the foregoing, Stockton objects to the following testimony of  
2 Mr. Leahigh and associated exhibits:

- 3 • DWR-61, at pp. 5:23-25, 6:6-8, 7:18-22, 8:3-8, 16:9-15, 17:3-11, 17:23-19:26,  
4 19:15-26, 20:6-18.

5 Because Mr. Leahigh's opinion testimony lacks foundation, does not make clear  
6 the underlying factual foundations for the opinion offered, and constitutes improper  
7 expert testimony regarding a legal conclusion, and Stockton and others have objected to  
8 this testimony, the State Water Board must exclude it. (Evid. Code, § 803; *Lockheed*  
9 *Litigation Cases* (2004) 115 Cal.App.4th 558, 564; see also BBID Ruling at pp. 4, 7 ("We  
10 will disregard any testimony that we find to be entirely conclusory or lacking  
11 foundation.")).

12 C. Testimony of Armin Munévar (Exhibit DWR-71)

13 Stockton objects to the testimony of DWR witness Armin Munévar on the grounds  
14 that it offers improper expert opinion (legal issue) and lacks foundation. The written  
15 testimony of several Reclamation and DWR witnesses offers opinions based on  
16 computer modeling of various scenarios for the operation of the proposed new points of  
17 diversion. The assumptions and results of the computer modeling are presented in Mr.  
18 Munévar's testimony. For the reasons stated in the objections of the SVWU, in which  
19 Stockton joins, this evidence fails to meet the evidentiary standards of this proceeding,  
20 lacks foundation, and does not provide sufficient information to support Petitioners'  
21 conclusions that the Project will not injure legal users of water, and Stockton in  
22 particular, contrary to the purpose of Section 794(a) of the governing regulations.  
23 Stockton thus specifically objects to the following testimony of Mr. Munévar and all  
24 exhibits relied on in that testimony, including Exhibits DWR-513, DWR-514, and  
25 DWR-515:

- 26 • DWR-71, at pp. 2:19-23, 12:27-13:20; 15:5-24, 16:12-21, 17:7-14, 19:10-24,  
27 19:26-21:6
- 28 • DWR-513

- 1 • DWR-514
- 2 • DWR-515

3 Because Mr. Munévar's opinion testimony lacks foundation, does not make clear  
4 the underlying factual foundations for the opinion offered, and constitutes improper  
5 expert testimony regarding a legal conclusion, and Stockton and others have objected to  
6 this testimony, the State Water Board must exclude it and all opinion testimony based on  
7 that modeling. (See Objections to Testimony of Maureen Sergent and John Leahigh,  
8 *supra*, and Parviz Nader-Tehrani, *infra*.)

9 B. Testimony of Parviz Nader-Tehrani (Exhibit DWR-66)

10 Stockton objects to the testimony of DWR witness Parviz Nader-Tehrani on the  
11 grounds that it offers improper expert opinion (legal issue) and lacks foundation.

12 To the extent that the particular results from the modeling analysis that supports  
13 Mr. Munévar's testimony is lacking, and Mr. Tehrani's opinions rely on that modeling,  
14 Mr. Tehrani's opinions concerning the Project's impacts on water quality and water levels  
15 in the Delta lack foundation.

16 Based on the foregoing, Stockton objects to the following testimony of Mr. Nader-  
17 Tehrani and associated exhibits:

- 18 • DWR-66 in its entirety, and specifically, at pp. 2:10-3:19, 4:23-7:21, 8:7-11:18
- 19 • DWR-513
- 20 • DWR-514
- 21 • DWR-515

22 Because Mr. Nader-Tehrani's opinion testimony lacks foundation, does not make  
23 clear the underlying factual foundations for the opinion offered, and constitutes improper  
24 expert testimony regarding a legal conclusion, and Stockton and others have objected to  
25 this testimony, the State Water Board must exclude it and all opinion testimony based on  
26 that modeling. (See Objections to Testimony of Maureen Sergent, John Leahigh, and  
27 Armin Munévar, *supra*.)

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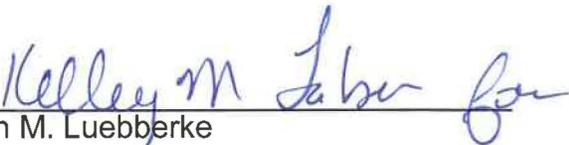
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**III. CONCLUSION**

Much of the witness testimony and associated exhibits submitted by Petitioners lack necessary foundation and is insufficient to provide the basis for necessary findings. Moreover, these witnesses' conclusions improperly rely on speculation and improper evidence, and/or contain legal conclusions inappropriate for an expert. For these reasons, the Stockton objects to the State Water Board's consideration of the evidence discussed herein as well as the evidence discussed in the objections of the SVWU.

Date: July 12, 2016

Respectfully submitted,  
CITY OF STOCKTON

  
\_\_\_\_\_  
John M. Luebberke  
City Attorney

Date: July 12, 2016

Respectfully submitted,  
SOMACH SIMMONS & DUNN

  
\_\_\_\_\_  
Paul S. Simmons  
Attorneys for the City of Stockton

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 CITY OF STOCKTON'S OBJECTIONS TO WRITTEN TESTIMONY AND EXHIBITS  
6 SUBMITTED BY PETITIONERS U.S. BUREAU OF RECLAMATION AND CALIFORNIA DEPARTMENT OF WATER SERVICES

7 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 July 11, 2016, posted by the State Water Resources Control Board at  
8 [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):  
9

10 I certify that the foregoing is true and correct and that this document was executed on July 12, 2016.  
11

12 Signature: Michelle Bracha  
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