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4 **CALIFORNIA DEPARTMENT OF WATER**
5 **RESOURCES**

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BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

HEARING IN THE MATTER OF
CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF
DIVERSION FOR CALIFORNIA WATER
FIX

**CALIFORNIA DEPARTMENT OF
WATER RESOURCES' RESPONSE TO
OBJECTION TO TESTIMONY OF JOHN
BEDNARSKI AND JOINDER IN
OBJECTIONS FILED BY
SACRAMENTO VALLEY WATER
USERS**

Petitioner California Department of Water Resources ("DWR") submits this response to the Objection to Testimony of John Bednarski ("Bednarski," DWR-57) and Joinder in Objections Filed by Sacramento Valley Water Users ("SVWU") that was submitted by Brannan-Andrus Levee Maintenance District, Reclamation District 407, Reclamation District 2067, Reclamation District 317, Reclamation District 551, Reclamation District 563, Reclamation District 150, Reclamation District 2098, and Reclamation District 800 (Byron Tract) (such filing, the "Objection," and such parties, the "Protestant") in the matter of DWR and U.S. Bureau of Reclamation's (collectively "Petitioners") Request for a Change in Point of Diversion for California Water Fix. Protestant joined and incorporated in full by reference the objections raised by SVWU. DWR responded separately to the objections raised by SVWU and incorporates those

1 responses as though fully set forth herein. DWR also incorporates the Master Response
2 to Similar Objections Made by Protestants Collectively (“DWR’s Master Response”) filed
3 on July 20, 2016, which also provides a common Statement of Facts and Evidentiary
4 Standards for DWR’s separate responses to individual objections. Protestant objects to
5 opinions included in Bednarski’s testimony regarding water quality, pavement conditions,
6 and levee conditions. In each instance, Protestant’s arguments are without merit and the
7 request to exclude Bednarski’s statements should be denied.

8 **A. Protestant’s Objection to Opinion Regarding Water Quality Should be**
9 **Denied Because it is Conclusory and Unsupported by Fact or Analysis**

10 Protestant offers no argument or analysis in support of its contention that
11 Bednarski’s statement that “CWF construction will not result in any impairment of water
12 quality or significantly affect other legal users of water” lacks foundation. (Objection at 2.)
13 In support of its allegation, Protestant offers nothing more than its own conclusory
14 opinion, specifically that that the statement “lacks foundational support from the sources
15 cited within his testimony.” (Objection at 2.) In fact, Bednarski’s testimony is replete with
16 citations to exhibits that provide a foundation for his statements (See *e.g.* DWR-57 at 2,
17 describing NPDES Stormwater General Permit for Stormwater Discharges Associated
18 with Construction and Land Disturbance Activities, and DWR-57 at 13, describing
19 identification of existing intakes which together demonstrate familiarity with the proposed
20 location of the project and applicable best management practices for protecting water
21 quality, thus providing a foundation for the witness’ opinion).

22
23 To the extent Protestant appears to argue instead that the issue with the witness’
24 statement is that it constitutes a legal opinion (Objection at 2, lines 24 – 25), Petitioner
25 disagrees and refers the Board to Section H of DWR’s Master Response, which is
26 incorporated herein by this reference. (Master Response, Section H, at 22.)

27
28 As the foregoing paragraphs demonstrate, the testimony contains a foundation for

1 the witness' opinion and therefore the witness' overall conclusion. Since Protestant's
2 argument has no other basis, it fails and the request to exclude Bednarski's opinion
3 regarding harm to water users must be denied.

4 **B. Protestant's Objection to Opinions Regarding Pavement and Levee**
5 **Conditions Should be Denied Because the Objection is Based Upon**
6 **Selectively Quoted Text and it Conflates Procedurally Driven CEQA**
7 **Conclusions and Expert Conclusions**

8 Protestant's objection that Bednarski's opinion regarding pavement and levee
9 conditions lacks foundation is without merit and should be denied because it is based
10 upon selectively quoted text and it conflates procedurally driven CEQA conclusions and
11 expert conclusions without support. Specifically, Protestant asserts that the witness'
12 opinion that "construction activities will not worsen pavement and levee conditions" lacks
13 foundation and should be excluded. (Objection at 4, lines 7 – 9.)

14 Bednarski's opinion is based in part upon the entire discussion of CEQA
15 mitigation measures proposed for Alternative 4, Impact Trans-2 (SWRCB-3, Chapter 19
16 – Transportation, Appendix A, at 19 – 133) which is cited in Bednarski's written
17 testimony. (DWR-57 at 27, lines 1 – 2.) Protestant quotes less than one sentence in the
18 CEQA conclusion for Impact Trans-2. The quoted CEQA conclusion for Impact Trans-2
19 is, "Increased Construction Vehicle Trips Exacerbating Unacceptable Pavement
20 Conditions is based upon the analysis of three mitigation measures, 2a – 2c." Contrary
21 to what Protestant would have you believe,¹ the Recirculated Draft Environmental Impact
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24 ¹ Protestant writes "the document's description of potential increased transportation impacts states
25 that 'Mitigation Measures Trans-2a through Trans-2c are available to reduce [such an] effect, but not
26 necessarily to a level that would not be adverse....' (*Id.* at 19-84)." (Objection, p. 4, lines 3 – 7, *quoting*
27 SWRCB-3, Chapter 19 – Transportation, Appendix A.) Two things are worth noting about Protestant's
28 assertion. First, the citation is to a section of SWRCB-3, Chapter 19 – Transportation, Appendix A,
discussing the 15,000 cfs Alternative 2B and not the 9,000 cfs project proposed by Petitioner. Second, if
the ellipses in the quotation are replaced with the remainder of the sentence Protestant quotes, the
conclusion goes on to say that the reason for the conclusion is that "as the BDCP proponents cannot
ensure that the agreements or encroachment permits will be obtained from the relevant transportation

(continued...)

1 Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) does not
2 come to the conclusion that Petitioner cannot ensure that the mitigation measures would
3 be effective. It merely states that Petitioner cannot guarantee that permits required to
4 implement the mitigation will be issued. (SWRCB-3, Chapter 19 – Transportation,
5 Appendix A, at 19-133.)

6 The caveat that permits must be obtained before feasible mitigation may be
7 implemented merely acknowledges the simple fact that it is not within Petitioner's
8 authority to implement the mitigation without seeking further approval. This procedure is
9 driven by CEQA.² It is within the scope of Bednarski's experience as an expert to offer
10 his opinion based on experience described in his SOQ that such agreements and
11 permits are regularly granted or obtained. (DWR-17, "Plan and manage...all construction
12 management activities for Metropolitan Capital Investment Program which includes
13 approximately \$100 million in annual construction work.") Indeed, if these and other
14 construction permits were not issued, the project would not be implemented. The full
15 discussion in the RDEIR/SDEIS concludes that "impacts would be reduced to less than
16 significant" provided, that, Petitioner is able to obtain permits and agreements necessary

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19 (...continued)

20 agencies." (SWRCB-3, Chapter 19 – Transportation, Appendix A, 19-84.) The conclusion therefore does
21 not go to the efficacy of the proposed mitigation measures.

22 ² In instances where mitigation to a level of less than significant depends upon the decision of
23 another agency following approval of the project by the lead agency, the lead agency's proper finding for
24 CEQA purposes is that the mitigation can and should occur in the future subject to an action by another
25 agency. The finding follows from Public Resources Code section 21081, subdivision (a)(2), which states in
26 relevant part:

27 "Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or
28 carry out a project for which an environmental impact report has been certified which identifies one or
29 more significant effects on the environment that would occur if the project is approved or carried out unless
30 both of the following occur: (a) The public agency makes one or more of the following findings with respect
31 to each significant effect (2) Those changes or alterations are within the responsibility and jurisdiction of
32 another public agency and have been, or can and should be, adopted by that other agency." The CEQA
33 finding for the potentially significant impact mitigation for which is dependent on the future action by
34 another agency is "significant and unavoidable". This conclusion is not based upon an assessment of the
35 efficacy of mitigation, but merely reflects the fact that the lead agency does not know with certainty what
36 other agencies will do, and thus cannot take the implementation of mitigation for granted.

1 to implement measures 2a – 2c. (SWRCB-3, Chapter 19 – Transportation, Appendix A,
2 at 19-133.) The CEQA conclusion therefore provides a foundation for Bednarski’s
3 opinion with respect to the efficacy of the mitigation measures Petitioner commits to
4 implementing. Protestant’s request that Bednarski’s opinion insofar as it regards
5 pavement condition be excluded should be denied.

6 Protestant argues that Bednarski’s opinion regarding levee condition should be
7 excluded because Bednarski “has not shown that DWR is committed to making the
8 mitigation commitments necessary to protect levee stability.” In support of this argument,
9 Protestant states that the supporting material the witness cites to describes a settlement
10 monitoring program but does “not contain any mention of the other potential mitigation
11 commitments provided in Bednarski’s testimony.” (Objection at 3, lines 11 – 16.)

12 Protestant is incorrect.

13
14 The “other measures” Bednarski discusses in his testimony, and that Protestant
15 asserts are not mentioned elsewhere in Bednarski’s testimony, are in fact discussed in
16 the full text of the very commitment that Protestant admits describes the settlement
17 monitoring program³ and are also described in Mitigation Measure Trans 2-c. The latter
18 measure is cited to in the same paragraph of Bednarski’s testimony that cites to
19 Petitioner’s commitment to implement a settlement monitoring program. (DWR-57 at
20

21 ³ In the absence of compliance with these geotechnical studies, the risks associated with structural
22 failure, and personal injury, death or loss of property as a result of construction activities would be higher,
23 which could result in a significant impact. However, it is unlikely that implementation of this environmental
24 commitment alone would ensure less-than-significant geology- and seismicity-related impacts. Other
25 environmental commitments, such as such design codes, guidelines, and standards, such as the
26 California Building Code and resource agency and professional engineering specifications, and the
27 Division of Safety of Dams Guidelines for Use of the Consequence Hazard Matrix and Selection of Ground
28 Motion Parameters, DWR’s Division of Flood Management FloodSAFE Urban Levee Design Criteria, and
USACE’s Engineering and Design—Earthquake Design and Evaluation for Civil Works Projects would also
be implemented to help reduce the severity of these impacts to a less-than-significant level. Conformance
to these and other applicable design specifications and standards would ensure that the impacts related to
risk such as ground movement and structural failure would not jeopardize the integrity of the levees,
conveyance facilities, and other features constructed for this project. (SWRCB-3, Appendix A, Appendix
3B Environmental Commitments at 3B-17, *emphasis added.*)

1 26:21 – 27:2.) In fact, Protestant quotes the very citation to Measure Trans-2c in its
2 objection just six lines after asserting that such a reference is lacking. (Objection at 3,
3 lines 23-26.) Protestant's request that Bednarski's opinion insofar as it regards levee
4 condition be excluded should be denied.

5 **C. CONCLUSION**

6 For the reasons set forth above, Petitioner requests that the Objection be denied
7 its entirety.

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10 Dated: July 22, 2016

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RESOURCES



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