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8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

9
10 HEARING IN THE MATTER OF
11 CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
12 BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF
13 DIVERSION FOR CALIFORNIA WATER
14 FIX

**DEPARTMENT OF WATER
RESOURCES' RESPONSE TO PACIFIC
COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS AND
INSTITUTE FOR FISHERIES
RESOURCES MOTION TO
DISQUALIFY WITNESSES AND
EXCLUDE THEIR TESTIMONY AND
EXHIBITS**

15
16 California Department of Water Resources ("DWR") submits this response specific
17 to objections submitted by Protestants Pacific Coast Federation Of Fishermen's
18 Associations and Institute For Fisheries Resources (collectively "PCFFA/IFR" or
19 "Protestants"), in the matter of DWR and U.S. Bureau of Reclamation's (collectively
20 "Petitioners") Request for a Change in Point of Diversion for California Water Fix. Where
21 applicable in this response, DWR cites to the Master Response to Similar Objections
22 Made by Protestants Collectively ("Master Response") filed on July 20, 2016, which also
23 provides a common Statement of Facts and Evidentiary Standards for DWR's separate
24 responses to individual Protestants' objections.

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INTRODUCTION

1 PCFFA/IFR's 35-page motion attempts to exclude all testimony and exhibits of
2 Petitioners' case-in-chief. The motion is replete with objections that apply inapplicable
3 standards in Board Proceedings, ignore prior rulings of the Board, and couch legal
4 arguments as evidentiary objections. At times, PCFFA/IFR's motion is a transparent
5 effort to argue the merits of the Petition, rather than the admissibility of the evidence in
6 this proceeding. For the reasons stated below, PCFFA/IFR's objections should be
7 overruled.

ARGUMENT

10 A. PCFFA/IFR's Argument That Legal Predicates For Petitioners' Testimony Is 11 Lacking is Meritless and a Thinly Veiled Attempt to Reassert an Argument the Board Has Already Decided

12 I. **The Board has Already Determined that Part 1 of the Evidentiary** 13 **Hearing May Proceed without the Completion of Parallel Regulatory** **Proceedings or Certification of a Final EIR/EIS.**

14 Couching their argument as an evidentiary objection to *all* evidence, Protestants in
15 Section II of their motion, make the argument that Board should not go forward with the
16 Petition until the 1995 Bay-Delta Plan has been updated (Subsection A), adequate flow
17 criteria are adopted by the Board as required by the Delta Reform Act (Subsection B),
18 and the environmental review documents for the WaterFix are certified as final
19 (Subsection D). Protestants blatantly ignore the fact that the Board has not only already
20 addressed such arguments in its rulings of February 11th, March 4th and April 25th but
21 also expressly warned the parties not to make duplicative motions on issues previously
22 ruled on by the Board. DWR's response to this objection is addressed in Section I of the
23 Master Response and incorporated herein. As stated in the Master Response, the
24 Board has already determined that it may proceed with Part 1 of the Evidentiary Hearing.

1 **II. Protestants' Objections to Evidence Based on a Purported Failure to**
2 **Meet the "Kelly-Frye" Standard Are Without Merit.**

3 Regarding the "objection" part of Protestants argument, Protestants assert that,
4 because these parallel regulatory proceedings have not been concluded and a final
5 EIR/EIS certified and since the primary environmental standards governing management
6 of the Delta have been deemed inadequate, *all* of Petitioners' proffered evidence is not
7 reliable or relevant because it fails to meet the standard of admissibility for scientific
8 evidence under the Kelly-Frye standard. (See Motion p. 8:15-9:13.) Protestants state
9 that this is because Petitioners' evidence is erroneously premised on the false
10 assumption that compliance with existing environmental standards will assure the
11 WaterFix will harm no legal users of water. (Id., p. 9:8-11.)

12 As a preliminary matter, DWR's Master Response sets for the evidentiary standard
13 applicable to Board hearings. (Master Response, pp. 5-6.) The Kelly-Frye standard is
14 not applicable to Board proceedings as has been previously ruled on by the Board in the
15 recently-concluded enforcement proceedings against Byron-Bethany Irrigation District
16 and the West Side Irrigation District. (See March 18, 2016 Ruling on Motions in the
17 enforcement proceedings against Byron-Bethany Irrigation District and the West Side
18 Irrigation District; see also DWR Master Response, Section E, p. 17 [Section E
19 addresses objections to Petitioners' modeling analyses using CALSIM II and DSM2].)
20 Because Protestants rely on the inapplicable Kelly-Frye standard, the objections should
21 be overruled on this basis alone.

22 In addition, whether the WaterFix as proposed will cause harm to a legal user of
23 water is ultimately a determination for the Water Board applying all currently-existing
24 applicable standards and upon considering the evidence in the record. In making this
25 determination, it is also the purview of the Water Board to weigh the reliability and
26 accuracy of the evidence, including the assumptions contained therein. Here,
27 Petitioners' evidence, including testimony, is based on the best available information,
28 including an understanding of currently applicable standards. As such it is reliable

1 evidence on which a responsible person would rely, and is properly admitted as
2 evidence in this proceeding for the Board's consideration.

3
4 **B. PCFFA/IFR's Objections to Exclude All Evidence Should Be Disregarded as
an Improper De Facto Motion for Judgment**

5 In Sections II of its "Motion", Protestants seek to exclude *all* of Petitioners' case-in-
6 chief. As more extensively discussed in the DWR's Master Response, Section C (pp.
7 10:11-11:9.), the Board should reject blanket objections to "all testimony" as the
8 functional equivalent of a motion for judgment, which the Board generally disallows in
9 evidentiary proceedings. As noted in the Master Response, it is generally the Board's
10 policy to consider all relevant evidence, according evidence its proper weight, when
11 making its rulings.

12 **C. PCFFA/IFR's Argument That All Modeling Testimony and Exhibits Based on
13 the CalSim II and DSM2 models must be Excluded Is Without Merit and
14 Based on an Inapplicable Evidentiary Standard**

15 Protestants allege that all of Petitioners' testimony and exhibits based on CalSim II
16 and DS2M models must be excluded because Petitions have failed to demonstrate that
17 the evidence meets the Kelly-Frye standard requiring acceptance by the scientific
18 community and to demonstrate the reliability and accuracy of the models. Protestants'
19 objections are without merit. DWR's Master Response, Section E addresses this
20 common objection to the modeling analyses, and is incorporated herein.

21 As stated in the Master Response, the Kelly-Frye standard does not apply to
22 administrative proceedings before the Board, a matter on which the Board has
23 previously ruled. (See March 18, 2016 Ruling on Motions filed in the enforcement
24 proceedings against Byron-Bethany Irrigation District and the West Side Irrigation
25 District). Objections based on application of the Kelly-Frye standard should be
26 overruled.

1 The Master Response further discusses the wide acceptance and credibility of the
2 models utilized by Petitioners, in particular CalSim II. (Motion, p. 17:11-18:26). As stated
3 in the Master Response, these models have been in the public domain and in wide and
4 accepted use for over 15 years, and the Board has relied on these models and analyses
5 to reach several important decisions. (Master Response, Section E.) In addition, DWR
6 witness Armin Munevar also provides testimony regarding the development and peer
7 review of the CalSim II model. (DWR-71, pp. 7-10.) Protestants challenges to the use of
8 such models go to the weight such evidence should be afforded by the Board and not
9 the admissibility of evidence. Protestants will have ample opportunity to test the
10 proffered evidence, including the sufficiency of the analyses, in the evidentiary hearing.

11 Protestants also allege, without citation to any particular testimony or evidence,
12 that the modeling evidence is not “based on the best available science” because
13 Petitioners have failed to demonstrate the accuracy and validity of the data on which the
14 models rely. Protestants argue that the underlying data supporting the models should
15 have been submitted with the Petition so protestants would be able to review it in a
16 timely manner. The modeling data (model assumptions that describe input and results
17 that describe output) is part of Petitioners’ case in chief served on all parties (see DWR-
18 5, DWR-66 and DWR-71). (Master Response, p. 16:20-17:3). Moreover, packages of
19 the model information (which includes the models, input, output and “diff” files) were
20 made available upon request to all parties. Finally, modeling analysis is provided in both
21 the RDEIR/SEIS and 2013 BDCP EIR/EIS. (Id.)

22 Finally, Protestants allege that Petitioners’ failure to disclose the basis of their
23 exclusion of environmentally more protective alternatives is objectionable, and somehow
24 a basis on which the Board should exclude all modeling testimony and exhibits. This is
25 not an objection to evidence but rather an argument regarding the adequacy of
26 environmental review under CEQA. The Water Board has already held that the
27 adequacy of CEQA documentation “is not a key hearing issue,” and has rejected the
28 idea that “an adequate document must be prepared before the State Water Board may

1 hold a hearing on the change petition.” (See Feb. 11, 2016 Ruling, p. 8; Master
2 Response, Section I, pp. 23.).

3 **D. PCFFA/IFR Misconstrues the Nature and Scope of Panel Witness Testimony**

4 PCFFA/IFR seeks to exclude the testimony of 12 panel witnesses offered by
5 Petitioners, asserting that Petitioners failed to provide their testimony by the May 31
6 deadline. (Motion, pp. 20-22.) As set forth in Petitioners’ Master Response, Section G,
7 incorporated herein, this argument is based on a misunderstanding of the structure of
8 Petitioners’ presentation of its case-in-chiefs in panels of primary and secondary
9 witnesses, which the Board has already accepted. The twelve panel witnesses will not
10 provide additional direct evidence beyond the evidence timely submitted with Petitioners
11 case-in-chief. Rather, these secondary witnesses are available for cross examination
12 and, as requested by the Hearing team, DWR has submitted short statements regarding
13 their scope of expertise for cross examination. Accordingly, Petitioners are not
14 attempting to introduce “surprise testimony” within the meaning of 23 C.C.R. section
15 648.4(a). As set forth in the Master Response, Section G, the objections to DWR’s use
16 of panels of witnesses appear calculated to disrupt DWR’s presentation of evidence
17 rather than to foster greater understanding of the information.

18 **E. PCFFA/IFR’s Remaining Objections to the Testimony of All Witness and**
19 **Specified Exhibits Are All Without Merit**

20 Section C of Protestants Arguments provides a lengthy list of objections to
21 specific testimony and exhibits. As a preliminary matter, Protestants makes a large
22 number of hearsay objections to testimony. However, hearsay evidence is admissible
23 and may be used to supplement or explain other evidence, but over timely objection it
24 shall not be sufficient in itself to support a finding unless it would be admissible over
25 objections in civil actions. (Gov’t Code § 11513(d).) Protestants’ hearsay objections do
26 not constitute a grounds for exclusion of evidence from the proceeding.

27 Further, Protestants also challenge a large number of exhibits on the grounds that
28 such exhibits lack proper identification. Formal authentication under the Evidence Code

1 is not required in Board proceedings. Instead, the standard for admissible evidence is
2 that the evidence must be the sort of evidence on which responsible persons are
3 accustomed to rely in the conduct of serious affairs. (Gov't Code § 11513(c).) Any
4 uncertainty regarding a document's origin, chain of custody or other issues related to the
5 genuineness or authenticity of a document are taken into account in evaluating the
6 weight of the evidence.

7 Finally, much of Protestants' objections regarding testimony and evidence as
8 vague or speculative goes more to the weight that should be afforded such evidence
9 than to its admissibility. Moreover, in many instances, Protestant here is attempting to
10 provide contrary evidence as "factual objection" in order to improperly interject testimony
11 and argument. (See Master Response, Section B.)

12 **1. Jennifer Pierre, DWR-51**

13 PCFFA/IFR asserts a "general objection" to Ms. Pierre's testimony asking the
14 Board to exclude her testimony to the extent it relies on modeling to which PCFFA/IFR
15 has also objected as generally unaccepted in their field and not based on "best available
16 science." Because PCFFA/IFR's objections to modeling evidence are meritless as
17 addressed above, objections to Ms. Pierre's testimony on these grounds are similarly
18 meritless.

19 Protestants then lodge a number of "specific objections" against Ms. Pierre's
20 testimony, most of which are conclusory accusations that snippets of testimony are
21 vague, speculative or unsupported. Protestants first complain that Ms. Pierre's
22 testimony, in various places, purports to characterize the legal effect of various
23 agreements also admitted as exhibits. DWR's Master Response, Section H,
24 incorporated herein, responds to this specific objection to Ms. Pierre's testimony, and
25 demonstrates why Ms. Pierre's referenced testimony is admissible.

26 Protestants also complain that Ms. Pierre's testimony at DWR-51, 9:6-8 "Each
27 intake has a maximum capacity to divert 3,000 cfs (a total of 9,000 cfs from the NDD),
28 although actual operations will be governed by the operational criteria and based on

1 hydrologic conditions and fish presence.”) is vague irrelevant or unreliable.” This is one
2 sentence taken out of context by Protestants is neither vague, irrelevant or unreliable.
3 Ms. Pierre is a program manager for the CWF and participated in the development of
4 operational criteria for the CWF. This sentence is from testimony summarizing the
5 physical components of the CWF.

6 Similarly, Protestants’ argument that Ms. Pierre’s testimony at 3:9, “include new or
7 additional criteria,” is vague and unsupported is without merit. Ms. Pierre’s testimony at
8 DWR-51, 3:9 is part of a brief overview of the Project Description to aid the Board in
9 understanding the Petitioners case-in-chief and in full provides “Proposed operations
10 with a dual conveyance system would include new or additional criteria related to Old
11 River and Middle River flows, Head of Old River Gate (HORG) operations, Delta outflow,
12 and north Delta bypass flows, and would comply with SWP/CVP permit requirements.”
13 Ms. Pierre’s testimony later goes on to provide an overview of existing operational
14 criteria, a presentation of the new operational criteria, and an introduction of the criteria
15 used to develop the boundary approach set forth in other testimony.

16 Protestants next argue that Ms. Pierre’s testimony at 5:16-19 that “North Delta
17 Diversion structures will improve conditions in the Delta” in a section describing the
18 project objectives is speculative and based on unsupported assumptions and evidence
19 and constitutes improper legal opinion. Protestants actually misstate the sentence of
20 Ms. Pierre’s testimony which states:

21 There is a need to improve and modernize the existing Delta conveyance
22 system and address the above concerns. Many of the challenges with the
23 current water delivery system could be improved by the construction and use
24 of proposed North Delta Diversion (NDD) structures with state-of-the-art fish
25 screens operating in coordination with the existing south Delta SWP/CVP
26 facilities. (emphasis added)

27 Ms. Pierre’s statement does not implicate applicable environmental laws and merely
28 represents her understanding as a consulting deputy program manager for the CWF as
to the project objectives, testimony she is more than qualified to provide.

1 Likewise, there is no merit to the argument that Ms. Pierre's testimony at pages
2 10-12, providing an overview of the alternatives analyzed in the EIR/EIS, usurps the fact-
3 finding of trier of fact. Ms. Pierre's testimony merely represents Ms. Pierre's
4 understanding of the development of the alternatives analysis. Protestants have not
5 shown how Ms. Pierre's statement is not relevant or reliable, nor has Protestants
6 demonstrated that the testimony is contrary to any evidence merely by expressing
7 merely a legal opinion as to the adequacy of the document pursuant to CEQA.

8 Finally, Protestants challenge exhibits DWR-114-116 as lacking proper
9 identification. These exhibits are referenced and used by Ms. Pierre in her testimony,
10 and to which she provides testimony that the exhibits are true and correct copies.
11 Exhibit 115, is a map created ICF, as indicated on the figure, Ms. Pierre's employer. As
12 stated above, questions of genuineness or authenticity of documents generally go to the
13 weight of the evidence and not admissibility in Board proceedings.

14 **2. John Leahigh, DWR-61**

15 PCFFA/IFR asserts a "general objection" to Mr. Leahigh's testimony asking the
16 Board to exclude his testimony to the extent it relies on modeling to which PCFFA/IFR
17 has also objected as generally unaccepted in "their field" and not based on "best
18 available science." Because PCFFA/IFR's objections to modeling evidence are
19 meritless as addressed above, objections to Mr. Leahigh's testimony on these grounds
20 are similarly meritless.

21 Without citation to specific sections of Mr. Leahigh's testimony, Protestants also
22 seek to exclude testimony that allegedly purports to characterize the legal effect of
23 various reports, decisions or agreements citing Evidence Code Section 1521. Evidence
24 Code Section 1521 does not apply in proceedings before the Board. Responding
25 generally, since no specific testimony was challenged, Mr. Leahigh's testimony explains
26 the current operations of the SWP and CVP, the SWP/CVP's record of compliance with
27 water quality standards and the anticipated manner of SWP/CVP operations following
28 construction of the WaterFix. (DWR-61, p. 2:15-29.) An acknowledged expert in SWP

1 operations, Mr. Leahigh's testimony in explaining current and anticipated SWP/CVP
2 operations necessarily includes his understanding of the regulatory and contractual
3 requirements on the SWP/CVP. Not all testimony that includes legal terms or a parties
4 understanding of legal obligations is inappropriate. A distinction must be made between
5 testimony that is helpful to a clear understanding of a witness' testimony and that which
6 does no more than make conclusory statements about the law. The Hearing Officers
7 have the ability to distinguish and disregard testimony that is essentially legal argument.
8 (See also Master Response, Section H responding to similar objections regarding Ms.
9 Pierre's and Ms. Sergent's testimony.)

10 PCFFA/IFR spuriously attack Mr. Leahigh's well-known qualifications to provide
11 an opinion on the SWP/CVP's ability to meet existing water quality and fishery objectives
12 and any additional regulatory requirements for the CWF at a similar rate of success as
13 demonstrated historically. (DWR-61, p. 17:5-11.) As the lead manager for SWP
14 operations, Mr. Leahigh is eminently qualified to express his opinions on these topics.
15 As shown in Mr. Leahigh's testimony, DWR-61, p. 1:17-19, and his qualifications, DWR-
16 21, Mr. Leahigh is a water resources engineer with more than 24 years of experience
17 who prepares and directs SWP water operations, planning and management including
18 waters supply forecasts, Delta compliance reports, scheduling system-wide SWP water
19 operations and analyzing annual SWP water delivery capabilities based on forecasted
20 water supply.

21 Protestants also object that Mr. Leahigh's opinion as to future regulatory
22 compliance is not relevant and not reliable on the grounds that updated flow criteria in
23 the future will be more stringent than current obligations. (DWR-61, p. 7:25-27, DWR-
24 61, p. 17, 20.) Whether future flow criteria are more stringent or not in no way affects or
25 undermines the relevance or reliability of Mr. Leahigh's straightforward testimony that, in
26 his opinion, "regulatory compliance with the CWF will be at least as good, if not better, as
27 today given that CWF will add infrastructure flexibility to system operations." Similarly,
28 Protestants argue that Mr. Leahigh's testimony that existing Delta water quality and

1 fisheries objectives will be met is not relevant because there will be new objectives
2 established by the new Biological Opinion. By narrowing in on existing fisheries
3 objectives truncate Mr. Leahigh's testimony which lays a foundation for his opinion
4 (pages 16-17) that the SWP/CVP will not only continue to meet existing Delta water
5 quality and fishery objectives **as well as** any additional requirements for the CWF at a
6 similar success rate as demonstrated historically. Mr. Leahigh's testimony concluding on
7 page 17 is relevant to the current proceeding.

8 Protestants also seek to exclude the testimony at DWR-61, p. 7:13-22 as
9 "inadmissible hearsay". The cited testimony merely orients the Board as to the role and
10 relevance of Mr. Leahigh's in relation to Mr. Munevar's and Mr. Nader-Tehrani's
11 testimony. Further, as noted above, hearsay is not grounds for the exclusion of
12 evidence in Board proceedings. (Gov't Code § 11513 (d).) As such, this objection is
13 without merit.

14 Protestants also object to the admission of exhibits DWR-401 to 402 and DWR
15 404-12 on the grounds that the exhibits lack proper identification. As noted above,
16 formal authentication under the Evidence Code is not required in Board proceedings for
17 admissibility. With respect to all of these exhibits, Mr. Leahigh's testimony provides the
18 purpose for which the exhibits are included and attests that the referenced exhibits are
19 true and correct copies. (See DWR 61, pp. 8:1-12, 9:12-13, 13:16-17, 14:7, 14:7-22,
20 15:3-4, 18:6-11 and 19:3-5.) With regards to DWR-401, DWR-402, DWR-409-412, the
21 testimony identifies that the exhibits were compiled by either Mr. Leahigh or DWR staff at
22 Mr. Leahigh's direction. (DWR-61, pp. 8:20-24, 13:16-15:8, 18:6-11; 18:26-19:5, .)
23 Similarly, Mr. Leahigh's testimony also clearly states that DWR-406-408 were prepared
24 at his direction by State Climatologist Michael Anderson. (DWR-61, p. 13:16-17.)
25 Exhibit DWR-405 bears the label of the DWR's Operational Compliance and Studies
26 Section. Finally, Protestants objections to Mr. Leahigh's citations in footnotes to
27 websites for lack of proper authentication is equally spurious. (Motion, p. 25:26-28.)
28

1 These footnotes merely provide the source of the data used to prepare exhibits DWR-
2 406, 407 and 408.

3 **3. Parviz Nader-Tehrani**

4 In their general objections to Dr. Nader-Tehrani's testimony, PCFFA/IFR first
5 reiterate their argument that the hydrologic modeling relied on by Petitioners, CalSim II
6 and DSM2 is inadmissible, in particular under the Kelly-Frye standard. DWRs
7 addressed these objections is in section C of this response.

8 Without citation to any specific testimony, Protestants also object in one
9 conclusory sentence to Dr. Nader-Tehrani's testimony that allegedly purports to
10 characterize the legal effect of various reports, decisions or agreements citing Evidence
11 Code Section 1521. Evidence Code Section 1521 does not apply in proceedings before
12 the Board. Without reference to any specific testimony, Protestants' objection is
13 unfounded. Further, not all testimony that includes legal terms or a parties
14 understanding of legal obligations is inappropriate. A distinction must be made between
15 testimony that is helpful to a clear understanding of a witness' testimony and that which
16 does no more than make conclusory statements about the law. The Hearing Officers
17 have the ability to distinguish and disregard testimony that is essentially legal argument.

18 Again in conclusory fashion, Protestants also provide a general objection to Dr.
19 Nader-Tehrani's hearsay evidence but fail to actually point out which, if any, portions of
20 his testimony constitute hearsay. As such, Protestant's objection should be deemed
21 waived.

22 Protestants object to Dr. Nader-Tehrani's opinion that there will not be negative
23 effects to legal user of water due to water level changes as speculative, assumes facts
24 not in evidence and is neither relevant or reliable based on Protestants' unsupported
25 terse allegation that "operational decisions cannot be accurately modeled." Protestants
26 have failed to establish that Dr. Nader-Tehrani's testimony on modeling of water levels
27 (DWR-66) is speculative or assumes facts not in evidence or that it is in any way not
28 reliable or relevant.

1 Protestants next cursorily object to parts of Dr. Nader-Tehrani's testimony on the
2 grounds that the testimony lacks foundation. Dr. Nader-Tehrani, however, provides
3 ample testimony regarding the models used and the analysis undertaken regarding
4 water quality and water levels laying an adequate foundation for his opinions.

5 Protestants allege that the testimony which is based on monthly fails to show impacts in
6 particular water-year types, such as successive dry years. As such, Protestants
7 continue, Dr. Nader-Tehrani's statement that "water quality is shown to meet the water
8 quality objectives" likewise lacks foundation because objectives are based on water-year
9 types. Protestants provide no additional explanation or support for this critique, which
10 itself lacks foundation. Protestants also critique Dr. Nader-Tehrani's water level analysis
11 for not addressing "reliability or delivery" and for not defining "negative effects." Under
12 the established hearing procedures, Protestants are afforded an opportunity to test Dr.
13 Nader-Tehrani's testimony under cross examination and to submit evidence to establish
14 any alleged shortcomings in Petitioners' testimony the Board should consider in making
15 its determinations.

16 Protestants also assert that "negative effects" is a legal question on which
17 testimony cannot be offered, providing no further explanation. However, even assuming
18 "negative effects" is a legal question, not all testimony that includes legal terms is
19 inappropriate.

20 Finally, Protestants allege that DWR-513 lacks authentication. As noted above,
21 formal authentication under the Evidence Code is not required in Board proceedings for
22 admissibility. Even so, the purpose and source of DWR-513 is clear from Dr. Nader-
23 Tehrani's testimony, which states that the results of modeling performed by CH2M Hill at
24 DWR's direction and by DWR at Dr. Nader-Tehrani's direction are presented in Exhibit
25 513, which consists of a series of and referenced in Dr. Nader-Tehrani's testimony. Dr.
26 Nader-Tehrani also testifies that DWR-513 is a true and correct copy of these modeling
27 results. (See DWR-66, p. 2: 12-24.)
28

1 **4. Armin Munevar, DWR-71**

2 PCFFA/IFR's

3 In their general objections to Mr. Munevar's testimony, PCFFA/IFR again reiterate
4 their argument that the hydrologic modeling relied on by Petitioners, CalSim II and DSM2
5 is inadmissible, in particular under the Kelly-Frye standard. DWRs addressed these
6 objections is in section C of this response above.

7 Protestants also object in one conclusory sentence to Mr. Munevar's testimony
8 that allegedly purports to characterize the legal effect of various reports, decisions or
9 agreements but identifies no specific testimony that could be characterized as improper
10 legal opinion. Protestants generally cite to Mr. Munevar's testimony concerning the
11 RDEIR/SDEIS DWR-71, p. 2, but nothing in Mr. Munevar's testimony on page 2 could be
12 construed as legal opinion.

13 Protestants also provide a general objection to Mr. Munevar's alleged hearsay
14 evidence but fail to actually point out which, if any, portions of his testimony constitute
15 hearsay. As such, Protestant's objection should be deemed waived.

16 Protestants make a "Specific objection" to Mr. Munevar's testimony that CalSim II
17 is the state of the art model for purpose of comparing various CWF scenarios, which is
18 again based on Protestants' objection that the model is not "generally accepted as
19 reliable by the relevant scientific community, as required by the Kelly-Frye standard. As
20 fully discussed in Section C of this response above, the Kelly-Frye standard is
21 inapplicable in Board proceedings and, further, Protestants' arguments that the CalSim II
22 model is not accepted by the relevant "scientific community" is unfounded. Protestant's
23 allegations that Mr. Munevar's statement is unsupported is without merit. Further, Mr.
24 Munevar also provides ample testimony supporting the use of the CalSim II model in a
25 comparative manner. (See DWR-71, pp. 10-13.)

26 There is no merit to the objection that Munevar "makes reference to documents
27 that are not admitted into evidence," – experts are allowed to do so. An expert's opinion
28 may be based on evidence "whether or not admissible" ... if it is the kind of information

1 experts reasonably rely upon in forming an opinion on the subject matter involved.
2 (Evidence Code § 801(b).) Here, challenged documents are merely citations to
3 published sources of information referenced in the testimony: a peer review of CalSim II
4 in a scholarly journal (DWR-71,p 8:22-25) and public websites hosting referenced annual
5 reports submitted to the Water Board regarding refinements to Cal Sim II (DWR-71, p.
6 7:28) and a 2003 Cal Sim II peer review report and 2004 DWR response submitted to
7 the California Bay Delta Science Program (DWR-71, p. 8:1-9.)

8 **5. Maureen Sergent, DWR-53**

9 In their general objections to Ms. Sergent's testimony, PCFFA/IFR reiterate yet
10 again their argument that the hydrologic modeling relied on by Petitioners, CalSim II and
11 DSM2 is inadmissible, in particular under the Kelly-Frye standard, and that testimony
12 that relies on the modeling must be excluded. These objections were fully addressed
13 above in Section C of this Response.

14 Protestants then object that Ms. Sergent's testimony on the grounds that it consist
15 "solely of her legal opinion." DWR's Master Response, Section H, incorporated herein,
16 responds to this specific objection to Ms. Sergent's testimony, and demonstrates why
17 Ms. Sergent's testimony is admissible.

18 Protestants next object to Ms. Sergent's alleged "hearsay evidence" arguing that
19 such testimony should be "stricken as inadmissible." As stated above, in Board
20 proceedings, hearsay evidence is admissible and may be used to supplement or explain
21 other evidence. (Gov't Code § 11513(d).) Protestants' hearsay objections do not
22 constitute a grounds for exclusion of evidence. Moreover, the challenged testimony at
23 DWR-53, p. 3:23-25 is not even hearsay. In its entirety, this testimony merely states:
24 "My testimony builds on the information of other testimony in Part 1 to provide additional
25 information to the State Water Board to support a decision that, within the framework of
26 DWR's water rights, regulations, and contracts, the CWF can be constructed and
27 operated without injuring other legal users of water." Likewise, the referenced testimony
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1 on "DWR-53, pp. 3-4, 5, n. 6 & 7 [merely pointing to additional testimony on the issues
2 referenced], and 24 does not constitute hearsay.

3 Protestants' also object to Ms. Sergent's reliance on Board Order WR 2009-0061
4 characterizing it as "misplaced." However, differing understandings or interpretations of
5 a Board order are not the basis for a valid evidentiary objection to exclude testimony.

6 Finally, Protestants object that DWR-330 lacks "identifying information" and, thus,
7 should be excluded, and also object to Ms. Sergent's references to webpages in her
8 testimony. However, formal authentication of documents under the Evidence Code is
9 not required in Board proceedings. With regards to DWR-330, Ms. Sergent's testimony
10 describes the purpose of the table summarizing DWR's water rights and attests that the
11 exhibit is a true and correct copy of the document. (DWR-53, 4:17-5:2.) Further, Ms.
12 Sergent's references to webpages in her testimony merely provide locations where
13 referenced publically available information can be found including for DWR Bulletins,
14 Water Board decisions and orders and copies of SWP water supply contracts. Such
15 documents were not required to be entered as exhibits.

16 **6. Ron Milligan**

17 PCFFA/IFR asserts that Milligan's testimony must be stricken as "inadmissible
18 hearsay" to the extent it relies on modeling for which insufficient documentations and
19 authentication has been provided. However, Protestants provide no citation to Mr.
20 Milligan's testimony where reliance on such information purportedly occurs except to one
21 sentence which is not even hearsay. (DWR-7, p. 4.) In full, it states: I am aware of the
22 modeling of Project operations to support the petition before the Board. In this modeling,
23 it is anticipated that the north Delta diversion points would be preferred in the winter and
24 spring months during higher flow periods in the Sacramento River." As such,
25 Protestants' hearsay objection should be overruled.

26 Protestants appear to be challenging Mr. Milligan's qualifications to make this
27 statement (DWR-7, p. 4) claiming that he has little experience with direct modeling,
28 authentication of modeling or documentation of modeling. Nothing in the cited statement

1 necessitates any particular expertise in authentication and documentation of modeling.
2 Moreover, as a civil engineer who oversees the operations of the CVP, Mr. Milligan has
3 the technical background and expertise to interpret the results of modeling. (DOI-7, p. 1;
4 DOI-3.) Protestants provide no explanation as to why Mr. Milligan's testimony is
5 irrelevant and misleading.

6 **7. Ray Sahlberg**

7 As with Milligan, PCFFA asserts that Sahlberg's testimony must be stricken as
8 "inadmissible hearsay." Id. at 32:25. However, relevant hearsay is admissible in
9 adjudicative proceedings before the Board, and may be used to supplement or explain
10 other evidence. Gov. C. section 11513(d). Further, simply "basing" or "supporting"
11 testimony on the results of modeling results and testimony is not necessarily hearsay.
12 Protestants identify no specific statement that qualifies as hearsay.

13 Citing evidence Code section 720, Protestants also argue that Mr. Sahlberg's
14 testimony must be excluded because the witnesses' qualifications do not extend to the
15 subject matter at hand. Evidence Code Section 720 does not apply in Board
16 proceedings. (See 23 Cal. Code Regs. § 648(b).) Moreover, this conclusory argument
17 by Protestants fails to specify which subject matter in Mr. Sahlberg's testimony is being
18 challenged or provide any explanation why Mr. Sahlberg is unqualified. For this reason,
19 Protestant has failed to prove its evidentiary objection. Moreover, as shown in DOI-1,
20 Mr. Sahlberg's experience and education qualify him to provide the testimony in DOI-4.

21 Finally, Protestants make the objection that Mr. Sahlberg's statement that
22 Reclamation operates its facilities to meet all statutory and regulatory requirements prior
23 to satisfying contractual obligations" on the grounds that, in Protestants' opinion, the
24 statement is "clearly" in error. Disagreement with a statement is not an evidentiary
25 objection. Second, Protestant's explanation makes no sense and appears to be a
26 CEQA based assertion concerning the consideration of all alternatives. Protestants'
27 objection is without merit.
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8. John Bednarski, DWR-57

In their general objections to Mr. Bednarski's testimony, PCFFA/IFR reiterate yet again their argument that the hydrologic modeling relied on by Petitioners, CalSim II and DSM2 is inadmissible, in particular under the Kelly-Frye standard, and that testimony that relies on the modeling must be excluded. These objections were fully addressed above in Section C of this Response above.

Protestants next object that Mr. Bednarski's should be stricken in its entirety because it consists of numerous attempts to characterize the legal effect of submitted agreements, reports and decisions. Not all testimony that includes legal terms or a parties understanding of legal obligations is inappropriate. A distinction must be made between testimony that is helpful to a clear understanding of a witness' testimony and that which does no more than make conclusory statements about the law. The Hearing Officers have the ability to distinguish and disregard testimony that is essentially legal argument. Here, Mr. Bednarski's testimony, DWR-57, provides the engineering project description of the CWF facilities. Other than testimony on page 2 of Mr. Bednarski's testimony, Protestants fail to identify any testimony that allegedly provides improper legal opinion. Moreover, the identified testimony on page 2 describing the EIR/EIS and the NPDES Stormwater General Permit is not improper legal opinion. For these reasons, this objection should be overruled.

Protestants also provide a general objection to Mr. Bednarski's alleged hearsay evidence but fail to actually point out which, if any, portions of his testimony constitute hearsay. As such, Protestants' objection should be deemed waived.

9. DWR-505, 507, 513, 514, 515

Protestants' objections to CalSim II and DSM2 modeling were fully addressed in Section C of this Response above.

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10. DWR-5, Modeling PowerPoint

DWR-5 is the powerpoint slide presentation that summarizes Petitioners direct testimony on modeling. Protestants' objections to CalSim II and DSM2 modeling were fully addressed in Section C of this Response above.

11. DWR-3, Water Rights PowerPoint

DWR-5 is merely the powerpoint slide presentation that summarizes Petitioners direct testimony on SWP water rights. Protestants seek to exclude the testimony on the grounds that Ms. Sergent's testimony is not relevant and reliable and is based on faulty reasoning, apparently on the grounds of differing interpretation of Water Rights Order 2009-0061, which does not constitute a valid evidentiary objection. Plaintiffs fail to demonstrate how Ms. Sergent's testimony is irrelevant, unreliable or faulty. Protestants further object that slides stating that the WaterFix will not injure other legal users of water are speculative and contrary to fact and law but fail to provide any explanation as to what makes such statements speculative or contrary to fact and law. For this reason, Protestants' objections are conclusory and without merit.

12. Objections to DWR-404, SWRCB-21, SWRCB-27, SWRCB-30

These objections amount to a legal argument about the relevant water quality standards, arguing that existing regulation D-1641 (SWRCB-21) is not reliable and should be excluded. Along with D-1641, Protestants apparently also seek to exclude the 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (SWRCB-30), the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (SWRCB-27) and an exhibit titled "D-1641 Standards (Figure 1)" (DWR-404). Protestants have failed to proffer a proper evidentiary objection. Conclusory statements that lack foundation, moreover, do not demonstrate that D-1641 is unreliable.

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1 **13. Objections to DWR-401, 402, 413**

2 Protestants argue that the exceedance records contained in DWR-401, 402 and
3 413 are “unreliable” because the “Metrics” are allegedly incomplete. Protestants provide
4 no citation for its allegations, which lack foundation, and fail to demonstrate how the
5 alleged deficiencies render the exhibits unreliable. Further, Protestants’ allegations, if
6 true, go more to the weight of the evidence rather than admissibility. Protestants will be
7 afforded the opportunity at hearing to cross examine Petitioners’ witnesses and
8 introduce evidence if it believes this evidence is “unreliable” and should be afforded less
9 weight by the Board.

10 **14. Objection to DWR-511, Modeling Assumptions Table**

11 Protestants object to DWR-511 on the grounds that it is not authenticated or final.
12 Formal authentication under the Evidence Code is not required in Board proceedings.
13 Instead, the standard for admissible evidence is that the evidence must be the sort of
14 evidence on which responsible persons are accustomed to rely in the conduct of serious
15 affairs. (Gov’t Code § 11513(c).)

16 DWR-511 is a memo from Witnesses Parviz Nader-Tehrani and Erik Reyes. As
17 stated in DWR-511, p.1 , this memo describes CalSim and DSM2 and their appropriate
18 applications and addresses whether CalSim and DSM2 82-year simulations are the “best
19 available model” for the BDCP process. The exhibit is cited in reference to testimony in
20 DWR-66, p. 4, specifically concerning DSM2 runs of 16 years as opposed to 82 years.
21 As the author of the memo, witness Dr. Nader-Tehrani attests that the document is a
22 true and correct copy (DWR-66, p. 4.). There is little question of the exhibit’s purpose or
23 authentication.

24 As to whether a draft is admissible. The standard is merely whether a responsible
25 person would rely on the document. Other than pointing out that it is labeled a draft,
26 Protestants provide no further information demonstrating that the memo is either
27 incomplete or unreliable. As such, Protestants’ objections to DWR-511 should be
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1 overruled. At hearing, Protestants, of course, may cross examine Dr. Nader-Tehrani
2 regarding the memo's reliability and relevance.

3 **15. Objections to SWRCB-3, SWRCB-4, SWRCB-5, SWRCB-102**

4 Protestant's argument improperly couches a legal argument as an evidentiary
5 objection alleging that the RDEIR/SDEIS and EIR/EIS are legally and factually
6 inadequate pursuant to CEQA. For this reason, Protestants "objection" should be
7 overruled. Further, the Board has ruled already that it need not wait for a final EIR/EIS
8 prior to starting Phase 1 of the proceeding and also stated that it would not entertain
9 arguments as to the adequacy of the environmental review documents pursuant to
10 CEQA. (See Feb. 11, 2016 Ruling, p. 8; Master Response, Section I.)

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12 Dated: July 22, 2016

CALIFORNIA DEPARTMENT OF WATER
RESOURCES

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17 Robin McGinnis
Office of the Chief Counsel