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9 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

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

**JOINDER IN MOTION TO STRIKE THE
PART 2 REBUTTAL TESTIMONY OF DR.
HUTTON**

1 The Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute
2 (“NRDC et al”) join in and support the motion to strike the Part 2 rebuttal testimony of Dr.
3 Hutton (DWR-1224) filed by San Joaquin County et al. As discussed at length in that motion,
4 Dr. Hutton’s testimony does not respond to testimony offered in Part 2 case in chief, and it
5 should have been presented during DWR’s case in chief. In addition, the probative value of the
6 testimony is outweighed by the probability that admission of the testimony would necessitate an
7 undue consumption of time. For these same reasons we hereby join in the motion by San Joaquin
8 County et al to strike the numerous exhibits submitted by DWR that are cited in or support Dr.
9 Hutton’s rebuttal testimony, including: DWR-1285, DWR-1286, DWR-1287, DWR-1288,
10 DWR-1289, DWR-1290, DWR-1291, DWR-1384, and DWR-1385.

11 First, the motion by San Joaquin County appropriately explains why Dr. Hutton’s
12 testimony is not responsive to testimony offered by protestants in their Part 2 case in chief. For
13 instance, Dr. Hutton does not cite any testimony that he is rebutting regarding trends in annual
14 Delta outflows, *see* DWR-1224 at 4-9, and to our knowledge no party provided testimony
15 regarding trends in annual outflows during their Part 2 case in chief. Similarly, Dr. Hutton’s
16 testimony regarding pre-development or “natural” Delta conditions likewise does not
17 meaningfully respond to protestants’ testimony in their Part 2 cases in chief. *See* DWR-1224 at
18 27-34. Again, while Dr. Hutton references a sentence or two from the 2010 SWRCB Flows
19 Report and 2017 SWRCB Scientific Basis Report and a few sentences of witness testimony, his
20 response goes far beyond the scope of the testimony that was offered in Part 2 cases in chief, and
21 there are no such citations to any witness testimony in parts IV.A, IV.C, and IV.D of his
22 testimony. None of the protestants’ testimony cited in DWR-1224 addresses in any detail what
23 Delta outflow was during pre-development conditions, and the cited exhibits (2010 SWRCB
24 Flows Report and 2017 SWRCB Scientific Basis Report) also have not been cited in testimony
25 for the purposes of showing what pre-development or “natural” outflow conditions would be. In
26 contrast, NRDC-58 Errata, including its citations to the 2010 SWRCB Flows Report and 2017
27 SWRCB Scientific Basis Report, focus primarily on the biological effects of Delta outflow on
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1 the abundance and survival of numerous fish and wildlife species, and do not address “natural”
2 or pre-development Delta outflow conditions. *See* NRDC-58 at 10, 19, 24-29, 34-35, 39-40.

3 Similarly, on August 13, 2018 the Hearing Officers granted DWR’s motion to bar NRDC
4 from cross-examining a witness from the Bureau of Reclamation regarding the Bureau of
5 Reclamation’s failure to comply with existing and future regulations of the State Water
6 Resources Control Board, finding that a sentence in that witness’ testimony regarding the
7 Bureau’s purported compliance with regulatory standards was insufficient grounds for cross-
8 examination on this issue during the rebuttal phase. The same standard should apply here, where
9 DWR’s witness is now seeking to introduce voluminous new evidence on Delta outflow in
10 response to a few sentences in protestants’ testimony and exhibits, where those few sentences do
11 not raise core issues in the Protestants’ testimony.

12 Second, Dr. Hutton’s testimony should have been included in DWR’s case in chief. *See*
13 February 21, 2017 Ruling at 1–2; July 27, 2018 Ruling at 3-4. The SWRCB’s 2010 Flows Report
14 was introduced into evidence in Part 1 of this hearing, and to the extent that DWR wanted to
15 provide testimony rebutting conclusions in the 2010 SWRCB Flows Report or raising new issues
16 about Delta outflow, that evidence would have been timely as part of their case in chief, not in
17 rebuttal. Scientific evidence regarding what constitutes pre-development Delta outflow has not
18 been raised as a key issue in this hearing by Protestants in their Part 2 case in chief testimony,
19 and Dr. Hutton’s testimony goes far beyond the few select statements in the SWRCB 2010 Flows
20 Report and protestants’ testimony.¹ If DWR wanted to make “natural” flow conditions a key
21 issue in the hearing, they had the opportunity to do so in their case in chief, but cannot expand
22 and add new issues in the rebuttal phase.

23 Finally, Dr. Hutton’s testimony should be excluded because the probative value of the
24 testimony is outweighed by the probability that admission of the testimony would necessitate an
25 undue consumption of time. *See* July 27, 2018 Ruling at 4; August 8, 2018 Ruling. In the cited
26 rulings, the Hearing Officers struck proposed testimony of SJTA witnesses seeking to rebut
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28 ¹ In addition, as a hydrologist lacking expertise and training in biology, Dr. Hutton lacks the foundation
to provide the opinions in section IV.D of his testimony.

1 portions of the 2010 SWRCB Flow Report, concluding that this was a marginal issue in the
2 hearing, would result in extensive cross-examination and likely sur-rebuttal testimony, and that
3 on balance the “testimony should be excluded because its probative value is substantially
4 outweighed by the probability that its admission will necessitate undue consumption of time.”
5 July 27, 2018 Ruling at 4. The same is true here: Dr. Hutton’s testimony and voluminous
6 exhibits largely address issues that Protestants have not raised as key hearing issues, and the
7 cross-examination of Dr. Hutton and sur-rebuttal will consume significant hearing time.
8 Moreover, if this testimony and exhibits are admissible, Due Process requires that the Hearing
9 Officers provide Protestants with the opportunity to provide sur-rebuttal testimony after the final
10 transcripts of the Phase 2 rebuttal phase are made public, which will consume significant time
11 and resources for the Hearing Officers and parties and significantly delay the resolution of this
12 hearing.

13 For these reasons, NRDC et al join in the motion to strike the rebuttal testimony of Dr.
14 Hutton and the related exhibits offered by DWR.

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16 Dated: August 17, 2018

Natural Resources Defense Council

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Doug Obegi

21 On behalf of the Natural Resources Defense
22 Council, Defenders of Wildlife, and the Bay
23 Institute
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