

1 STEPHAN C. VOLKER (CSB #63093)
ALEXIS E. KRIEG (CSB #254548)
2 STEPHANIE L. CLARKE (CSB #257961)
JAMEY M.B. VOLKER (CSB #273544)
3 LAW OFFICES OF STEPHAN C. VOLKER
1633 University Avenue
4 Berkeley, California 94703
Tel: 510/496-0600
5 Fax: 510/845-1255

6 Attorneys for Protestants
PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS
7 and INSTITUTE FOR FISHERIES RESOURCES

8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

9 HEARING REGARDING PETITION FILED)
BY THE DEPARTMENT OF WATER) **MOTION OF PCFFA AND IFR FOR**
10 RESOURCES AND U.S. BUREAU OF) **RECONSIDERATION OF THE JULY 27,**
RECLAMATION REQUESTING CHANGES) **2018 RULING ON PART 2 REBUTTAL**
11 IN WATER RIGHTS FOR THE CALIFORNIA) **TESTIMONY STRIKING IN PART PCFFA-**
WATERFIX PROJECT) **202 AND LAND-290**

13 _____)
14 **I. INTRODUCTION**

15 Protestants Pacific Coast Federation of Fishermen’s Associations and Institute for
16 Fisheries Resources (collectively, “PCFFA”) hereby request reconsideration of the Hearing
17 Officers’ July 27, 2018 Ruling on Part 2 Rebuttal Testimony (“Ruling”) because the Ruling
18 strikes portions of PCFFA-202 and LAND-290 that are proper rebuttal testimony. As explained
19 below, the stricken portions of the testimonies of Noah Oppenheim and Thomas Stokely are
20 responsive to the Part 2 testimony of other witnesses. Accordingly, the Hearing Officers should
21 reconsider their July 27 Ruling, and on reconsideration, reinstate this stricken testimony.

22 **II. ARGUMENT**

23 **A. THE STRICKEN PORTIONS OF THE TESTIMONY OF NOAH OPPENHEIM**
24 **WERE PROPER REBUTTAL TESTIMONY WHICH SHOULD BE REINSTATED**

25 The Ruling states on page 2 that page 13, lines 3-12 of PCFFA-202 (Rebuttal Testimony
26 of Noah Oppenheim) should be stricken. The “revised” version of PCFFA-202 that the Hearing
27 Officers uploaded to the State Water Board website for this proceeding additionally strikes
28 page 15, lines 22-23 and page 16, lines 1-4 of PCFFA-202. None of these portions of Mr.

1 Oppenheim’s Rebuttal Testimony should have been stricken because all are proper rebuttal, as
2 shown below.

3 Mr. Oppenheim’s Rebuttal Testimony states on page 13, lines 3-12 as follows:

4 Yet DWR’s Final Environmental Impact Report/Statement (FEIR/S)
5 indicates that numerous other fish species are likely to be in the vicinity of the
6 proposed North Delta Diversions throughout the year, including Delta smelt
7 (SWRCB-102, p. 11A-3 to 11A-5), Longfin smelt (*id.*, pp. 11A-30 to 11A-32),
8 Sacramento splittail (*id.*, p. 11A-146), white sturgeon (*id.*, p. 11A-178), Pacific
9 lamprey (*id.*, pp. 11A-191 to 11A-192), and river lamprey (*id.*, pp. 11A-198 to 11A-
10 199). The FEIR/S also indicates that green sturgeon (*id.*, p. 11A-162) and
11 Central Valley steelhead (*id.*, pp. 11A-129 to 11A-130) are likely to be in the
12 vicinity of the North Delta Diversion for significant portions of the year. Many of
13 these species are not listed, but are public trust resources. As of now, DWR has
14 failed to provide adequate evidence that these resources, including their food
15 sources, will be protected if the Change Petition is granted.

16 The foregoing testimony immediately follows Mr. Oppenheim’s summary of his Rebuttal
17 Testimony on page 11, line 26 through page 13, line 2 in which he recommended minimum
18 flow criteria to protect fish (*id.* at 11:15-25) and summarized Dr. Jonathan Rosenfield’s
19 testimony regarding minimum flow criteria (*id.* at 11:26-13:2). In his discussion of Dr.
20 Rosenfield’s testimony, Mr. Oppenheim explained that the minimum bypass flows proposed by
21 Dr. Rosenfield “depend[] upon adequate monitoring at Knight’s Landing” and, quoting Dr.
22 Rosenfield, “might have been ‘myopically focused on the Chinook Salmon and the bypass
23 flows on the smelt’ and [thus] did not consider flows necessary for other species” as Dr.
24 Rosenfield appeared to concede, and that Dr. Rosenfield’s “proposed bypass flow criteria
25 [were] not designed to address these food-web impacts, or to benefit species other than
26 salmon.” PCFFA-202 at 12:11-12 and 12:22-13:1. Mr. Oppenheim’s testimony on page 13,
27 lines 3-12 then pointed out that there were imperiled fish species other than salmon “likely to be
28 in the vicinity of the proposed North Delta Diversions,” citing pages from SWRCB-102 (DWR’s
Final Environmental Impact Report/Statement). Mr. Oppenheim explained further that “[m]any
of these species are not listed, but are public trust resources.” PCFFA-202 at 13:10-11. The
purpose of Mr. Oppenheim’s testimony is to explain why flow criteria more protective than those
recommended by Dr. Rosenfield are necessary to protect public trust resources.

Mr. Oppenheim’s testimony on page 3, lines 3-12 that the Hearing Board has stricken is

1 thus specifically responsive to the testimony of Dr. Rosenfield. Accordingly, it is proper rebuttal
2 testimony, and should not have been stricken.

3 Mr. Oppenheim testified on page 15, lines 22-23 and page 16, lines 1-4 as follows:

4 The FEIR/S, NMFS Biological Opinion, and ITP contemplate ongoing fish
5 presence monitoring. The NMFS Biological Opinion states that locations for
6 monitoring for unlimited pulse protection are unknown. (Exhibit SWRCB-106, p.
7 731-732.) The ITP refers to a monitoring station at Knights Landing, upstream of
8 the Feather and American Rivers (SWRCB 107, p. 191.) While the ITP has
9 vague references to funding “subsequent fish and water quality monitoring
10 stations” (SWRCB-107), no specifics are provided.

11 Mr. Oppenheim’s testimony regarding the monitoring required by the National Marine
12 Fisheries Service avers that its Biological Opinion “states that locations for monitoring for
13 unlimited pulse protections are unknown” (citing SWRCB-106) and that this agency’s Incidental
14 Take Permit has vague references to funding “subsequent fish and water quality monitoring
15 stations” (referring to SWRCB-107), but “no specifics are provided.” Mr. Oppenheim’s
16 testimony regarding the deficiencies in the monitoring required by the Biological Opinion and
17 ITP are intended to respond to the testimony of DWR witness Marin Greenwood, which Mr.
18 Oppenheim summarizes earlier in his Rebuttal Testimony, on page 6, lines 14-16. As Mr.
19 Oppenheim explained, “Mr. Greenwood’s explanation for why CWF H3+ operation would be
20 less impactful is based on the assumption that ‘actual [North Delta Diversion] pumping levels
21 . . . can [and will] be adjusted’ based on fish presence.” But as Mr. Oppenheim explains in the
22 subsequent portion of his testimony that the Ruling has stricken, the monitoring for “fish
23 presence” provided under the Biological Opinion and under the Incidental Take Permit is
24 “vague” and may be unfunded. Accordingly, Mr. Oppenheim correctly and appropriately
25 observed that the premise of adequate fish monitoring on which Mr. Greenwood’s testimony
26 was based is questionable.

27 Because Mr. Oppenheim’s testimony on page 15, lines 22-23 and page 16, lines 1-4 that
28 the Hearing Board has stricken is thus responsive to Mr. Greenwood’s testimony, it is proper
rebuttal testimony and should not have been stricken.

1 **B. THE STRICKEN PORTIONS OF THE TESTIMONY OF THOMAS STOKELY**
2 **WERE PROPER REBUTTAL TESTIMONY WHICH SHOULD BE REINSTATED**

3 The Ruling states on page 2 that substantial portions of the Rebuttal Testimony of
4 Thomas Stokely which appears in LAND-290 should be stricken, including page 3, lines 7-8,
5 12-16, 17-19 and 23-26, page 4, lines 1-7 and 19, page 5, lines 3 and 24-25, page 6, lines 17-
6 18 and 23-25, page 7, lines 5-26, page 8, lines 17-28, page 9, lines 1-14, page 11, lines 26-28
7 and page 12, lines 1-2. The Ruling strikes three key portions of Mr. Stokely's Rebuttal
8 Testimony: (1) that the San Luis Act limited water exports to serve only 500,000 acres for the
9 entire San Luis Unit (pages 3-5), (2) that Westlands does not own a permanent contractual
10 right to Central Valley Project Water of 1,150,000 acre feet per year under the Ninth Circuit
11 Court of Appeals ruling in 2016 clarifying that Westlands has no entitlement to automatic
12 renewal of its interim contracts (pages 6-7) and (3) that Westlands has no right to delivery of
13 any particular percentage of its water contract with the Bureau of Reclamation under the Third
14 District Court of Appeal's ruling in 2006 reviewing D-1641 (pages 8-9 and 11-12).

15 Mr. Stokely's testimony on each of these three points is directly responsive to the Part 2
16 Testimony of Westlands' witness Jose Gutierrez (WWD-15 and WWD-17). Therefore, as
17 explained below, each of the stricken portions of Mr. Stokely's testimony was proper rebuttal
18 testimony, and should be reinstated.

19 Mr. Stokely's Rebuttal Testimony that the San Luis Act limits water exports to serve only
20 500,000 acres for the entire San Luis Unit responds to Mr. Gutierrez's testimony at page 3 that
21 "Westlands' service area . . . encompasses approximately 600,000 acres" and its "demand for
22 irrigation water . . . has been satisfied primarily through water provided . . . from the Central
23 Valley Project ('CVP') under contracts with the United States Bureau of Reclamation." WWD-
24 15 at 3:4-10.

25 Mr. Stokely's Rebuttal Testimony that Westlands does not own a permanent contractual
26 right to CVP water of 1,150,000 acre feet per year is responsive to Mr. Gutierrez's testimony
27 that Westlands' "demand for irrigation water . . . has been about 1.4 million acre feet per year"
28 which "has been satisfied primarily through water provided to Westlands . . . under contracts

1 with . . . Reclamation.” WWD-15 at 3:8-11.

2 Mr. Stokely’s Rebuttal Testimony that Westlands has no right to delivery of any
3 particular percentage of its water contract with Reclamation is likewise responsive to Mr.
4 Gutierrez’s testimony that Westlands’ demand for irrigation water “has been about 1.4 million
5 acre feet per year under terms and conditions of contracts between the United States and
6 water agencies or, with respect to settlement contracts, i]ndividuals and other entities.” WWD-
7 15 at 3:8-15.

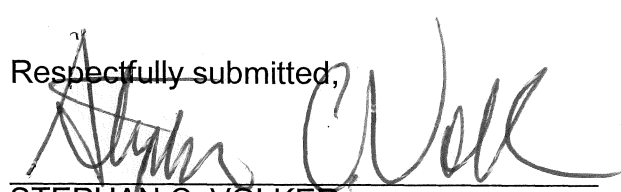
8 Thus, Mr. Stokely’s testimony is responsive to testimony presented by Westlands’
9 witness Mr. Gutierrez. Because Mr. Stokely’s testimony is thus proper rebuttal testimony, it
10 should not have been stricken.

11 **III. CONCLUSION**

12 As shown above, the portions of the testimonies of Noah Oppenheim (PCFFA-202) and
13 Thomas Stokely (LAND-290) that were stricken were responsive to the Part 2 testimony of
14 other witnesses. Therefore, they are proper rebuttal testimony, and should not have been
15 stricken. Accordingly, this Board should reconsider its Ruling, and on reconsideration, reinstate
16 the portions of these two witnesses’ testimony that was stricken.

17
18 Dated: August 1, 2018

Respectfully submitted,


STEPHAN C. VOLKER
Attorney for Protestants
PACIFIC COAST FEDERATION OF FISHERMEN’S
ASSOCIATIONS and INSTITUTE FOR FISHERIES
RESOURCES