

CALIFORNIA STATE
WATER RESOURCES CONTROL BOARD
PRE-HEARING CONFERENCE

In the Matter of:

California Water Fix
Pre-Hearing Conference/

JOE SERNA, JR. BUILDING
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
COASTAL HEARING ROOM
1001 I STREET, SECOND FLOOR
SACRAMENTO, CALIFORNIA

THURSDAY, JANUARY 28, 2016

9:00 A.M.

Reported by:

PETER PETTY

APPEARANCES

CALIFORNIA WATER RESOURCES BOARD

Department of Water Rights

Board Members Present

Tam Doduc, Hearing Officer
Felicia Marcus, Chair
Dorene D'Adamo

Staff Present

Diane Riddle, Environmental Program Manager
Dana Heinrich, Staff Attorney
Jean McCue

Petitioner

CA Dept. of Water Resources

Tripp Mizell, Office of Chief Counsel
Ken Bogdan, Staff Counsel

US Dept. of the Interior

Amy Aufdemberge, Office of the Regional Solicitor
Michelle Banonis, Program Manager for California Water Fix,
Bureau of Reclamation; Special Assistant to Mid-Pacific
Regional Director

Interested Parties

State Water Contractors

Thomas Berliner
Stefanie Morris
Paul Weiland, Coalition for a Sustainable Delta

City of Antioch

Matthew Emrick, Special Counsel, Water Counsel,
City of Antioch

APPEARANCES

Save the California Delta Alliance

Michael Brodsky

CA Sport Fishing Alliance (CSPA)

Michael B. Jackson

Friends of the River/Sierra Club California and
Planning and Conservation League

E. Robert "Bob" Wright

Friant Water Authority & Members

Lauren Caster

Local Agencies of the North Delta

Osha Meserve
Soluri Meserve

Pacific Coast Federation of Fishermen's Associations

Stephan Volker

Patrick Porgans and Associates, representing Planetary
Solutionaries

Patrick Porgans

Restore the Delta

Barbara Barrigan-Parilla
Tim Stroshane

Environmental Justice Coalition for Water

Colin Bailey

APPEARANCES

South Delta Water Agency

John Herrick

Solano County

Peter Miljanich

Various City Municipalities

Kevin O'Brien
David Aladjem
Alan Lilly
Martha Lennihan

Bay Institute, NRDC, Golden Gate
Association, et al.

Doug Obegi

California Water Research

Deirdre Des Jardins

Clifton Court, LP

Suzanne Womack

Snug Harbor Resort, LLC

Nicole Suard
Robert Burness

Friends of Stone Lakes National Wildlife Refuge

Robert Burness

Contra Costa County and Contra Costa County Water Agency

Stephen Siptroth

APPEARANCES

SolAgra Corporation

Barry Sgarrella

North Delta C.A.R.E.S.

Anna Swenson

City of Stockton

Tara Mazzanti

San Joaquin Tributaries Authority

Tim O'Laughlin

San Joaquin River Exchange Contractors

Paul Ryan Minasian

East Bay Municipal Utilities District

Jonathan Salmon
Nicolas Cardella

Carmichael Water District

Aaron Ferguson

Placer County Water Agency

Daniel Kelly, Somach, Simmons & Dunn

San Luis & Delta Mendota Water Authority

Jon Rubin

WestlandsWater District

Philip A. Williams

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P R O C E E D I N G S

January 28, 2016

9:00 a.m.

HEARING OFFICER DODUC: Good morning, everyone. Quiet, please. Again, good morning. I'm State Water Board Member and Hearing Officer Tam Doduc. With me here today to my right is Board Chair and Co-Hearing Officer, Felicia Marcus; to the Chair's right is Board Member DeeDee D'Adamo; to my left is our Staff Attorney, Dana Heinrich; Environmental Program Manager, Diane Riddle; and Water Resources Control Engineer, Jean McCue. We have other staff here today to assist.

All right, thank you once again for being here today and for your participation in this effort. Let me tell you upfront that this meeting will be a working meeting and, no, this is not the Wine Convention, that's further down the street. Well, I'm glad to see there's no mass exodus, which means you are here for the right reason, for the right purpose, and are ready to get started. So with that, today we will be discussing procedural matters for hearing concerning the Water Right Petition, the Water Right Change Petition, followed in connection with the California Water Fix Project.

The Petitioners in this matter are the California Department of Water Resources and the U.S. Bureau of Reclamation. Petitioners have requested to add three new

1 points of diversion and/or points of re-diversion of water
2 to specified Water Rights Permits for the State Water
3 Project and the Central Valley Water Project.

4 This Pre-Hearing is being held in accordance with
5 the Notice of Petition and Notice of Public Hearing and
6 Pre-Hearing Conference dated October 30, 2015. Additional
7 information was provided by letter dated January 15, 2016
8 to the hearing participants regarding the Service List and
9 today's Agenda.

10 Again, this is a working meeting for the parties
11 to this hearing and therefore there will not be an
12 opportunity for public comments today.

13 The goal of this pre-hearing conference is to
14 organize and conduct the evidentiary hearing and ensure
15 that the hearing proceeds in an orderly and expeditious
16 manner. I'm going to add a couple of things here, and that
17 is efficiency is extremely important to me as Hearing
18 Officer, but also very important, particularly in this
19 case, is transparency. And that's why some of the
20 discussions we have today will be so important, and so
21 important for you to engage.

22 The Water Rights hearing process has many
23 procedures and many rules, many requirements associated
24 with it, and part of it is due to the evidentiary nature of
25 this process and the restrictions under which the Board

1 must operate in our decision making, including things such
2 as ex parte.

3 So in order to ensure true transparency in this
4 process, all parties must engage and adhere to the rules
5 established with respect to communication, sharing data,
6 providing witnesses, identification, and providing
7 testimony. So again, I want to highlight the importance of
8 not only efficiency, but transparency.

9 And then on top of that, I would also add the
10 issue of integrity. The reason we're focused today on
11 procedures, the reason why we will have lengthy discussion,
12 I'm sure today, as well as issue various rulings, is to
13 ensure the integrity of this process, ensure the integrity
14 of the record, and ultimately ensure the integrity of the
15 Decision that this Board will make. So as we proceed today
16 and as we proceed with the hearing, I encourage you to keep
17 in mind those three principles of efficiency, of
18 transparency, and of integrity as we proceed.

19 So with that, let's begin with some general
20 announcements. First, please look around now and identify
21 the exits closest to you. Should an alarm sound, we are
22 required to evacuate this room immediately. Please take
23 your valuables with you and please take the stairs, not the
24 elevators, down to the first floor and exit to the
25 relocation site across the street in the park. If you

1 cannot use the stairs, you will be directed to a protective
2 vestibule inside a stairwell.

3 The second announcement is that this pre-hearing
4 conference is being Webcast on the Internet and both the
5 audio and video are being recorded. So when you are
6 providing verbal comments today, please come up to the
7 podium, speak into the microphone, and begin by stating
8 your name and affiliation.

9 A Court Reporter is present today -- where is the
10 Court Reporter? Court Reporter? Do we have a Court
11 Reporter? Hold the horses. Where is our Court Reporter?

12 MS. McCUE: I think we can proceed. We have this
13 videotaped. Everyone will need to be certain to speak
14 clearly into the microphone and we can have this
15 transcribed.

16 HEARING OFFICER DODUC: Not an omen of things to
17 come, I hope.

18 All right, with that we will proceed and Ms.
19 McCue will check on the Court Reporter. A transcript will
20 be available once the Court Reporter gets here and once
21 this is completed, then the transcript will be posted on
22 the State Water Board's California Water Fix Petition
23 Hearing Website, or you can make arrangements with the
24 Court Reporting Service.

25 And fair warning, for planning purposes today,

1 today will be a very long day. We will take a five to 10-
2 minute break in the morning and in the afternoon we will
3 take a 30-minute lunch break and expect that we will go
4 into the late afternoon and early evening. So please plan
5 accordingly.

6 And finally and most importantly, please take a
7 moment and make sure your cell phone is turned off or
8 muted, even if you think it is, please check.

9 All right, I know you're all eager to jump right
10 into the discussion topics, but because the Water Right
11 proceeding on which we are embarking is so different from
12 the State Water Board's usual public meetings, I want to
13 first provide some background information.

14 A Water Right hearing is a quasi-judicial
15 proceeding. It's a formal hearing conducted by the State
16 Water Board to develop a record of evidence relevant to the
17 key issues identified in the Hearing Notice. The Board
18 will rely on this record to make our decision. While it is
19 a public meeting, participation in the Water Right hearing
20 is limited to designated parties. There will be
21 opportunities at a specified time for interested persons to
22 provide comments. As currently scheduled, that time will
23 be in April at the beginning of the hearing.

24 Parties are those who intend to offer evidence
25 and to call witnesses to conduct cross examination, make

1 objections and legal argument, and otherwise participate in
2 the evidentiary portion of the hearing. Witnesses called
3 by the designated parties to offer evidence into the record
4 are subject to cross examination by other parties.

5 Interested Persons are those who plan to present
6 policy statements and not be actively involved in the
7 evidentiary portion of the hearing. Unlike witness
8 testimony, policy statements are not evidence and the Board
9 will not rely on policy statements in support of the
10 factual determinations in the Decision. Also, unlike
11 witnesses who testify on behalf of the parties, Interested
12 Persons are not subject to cross examination.

13 Additionally, unlike a general public meeting of
14 the Board, a Water Right hearing is tightly structured in
15 format. Participants are expected to adhere to specific
16 requirements. Those requirements include, but are not
17 limited to deadlines and specifications for written
18 submissions, to time limits, order of participation,
19 distribution and sharing of documents, and other matters
20 that we will be discussing today.

21 As Hearing Officers, Chairman Marcus and I will
22 act much like Judges to ensure that the hearing is
23 conducted in orderly fashion. Board Member D'Adamo is also
24 present here today, thank you, and other Board Members may
25 attend subsequent hearings from time to time.

1 Following the hearing, Board Members will provide
2 guidance to the hearing team in preparing the Draft Order
3 to be considered by all members of the State Water Board at
4 a public Board Meeting. The public will also have an
5 opportunity to comment on the Draft Order before the Board
6 Meeting.

7 For the State Water Board to approve a Water
8 Right Change Petition, the Petitioners must establish, and
9 the Board must find that the proposed change will not
10 injure any other legal user of the water or unreasonably
11 affect fish and wildlife. In addition, a special provision
12 contained in the Delta Reform Act of 2009 requires the
13 Board to include appropriate Delta flow criteria as a
14 condition of any approval of a Water Right Change Petition
15 for the California Water Fix Project. The Board will also
16 consider whether the project is in the public interest.

17 So with that very very brief background that
18 barely scratches the surface of Water Rights 101, we will
19 now turn to the scope and the procedures for today's pre-
20 hearing conference. I will state again that this pre-
21 hearing conference is focused on procedural matters and
22 will not be used to hear arguments on or determine the
23 merits of any hearing issues. Only parties participating
24 in the evidentiary portion of the hearing will be afforded
25 the opportunity to speak today, and to speak only on the

1 specific procedural issues for discussion.

2 Interested Persons who are planning to present
3 policy statements and who will not be participating in the
4 evidentiary portion of the hearing are not required to
5 attend today.

6 All parties or their representatives to the
7 hearing, again, are required to be here, including those
8 who intend to participate only in Part II of the hearing.
9 Failure to attend this pre-hearing conference may result in
10 exclusion from participation in the hearing. Instead of
11 doing a roll call, since there are so many parties, in
12 order to confirm your attendance at the pre-hearing
13 conference today, parties must sign in with staff; if you
14 have not done so, please make sure you do.

15 I understand that some parties may be planning to
16 leave this pre-hearing conference early due to other
17 commitments -- although I cannot imagine anything more
18 riveting -- I would like to emphasize that it is important
19 for all of the parties to attend the entire pre-hearing
20 conference. That said, we cannot enforce or force any of
21 the parties to stay. Any parties who leave early should be
22 aware, however, that we will consider them to have waived
23 any objections to any procedural decisions that are made
24 without their input.

25 We will not announce any decision regarding the

1 procedural matters and of the pre-hearing conference.

2 Following the pre-hearing conference, Chair Marcus and I
3 may at our discretion modify the hearing procedures, or
4 issues set forth in the Notice and in our January 15th
5 letter in whole or in part. Unless subsequently modified
6 in writing, the procedures currently specified in the
7 October 30th Hearing Notice will remain in force and
8 effect. Some Notices of Intent may need to be amended to
9 conform to the Hearing Notice and any modifications
10 resulting from today's discussion. Parties will be
11 provided the opportunity and a due date after any written
12 ruling following this pre-hearing conference.

13 I've covered a lot of information, so thank you
14 for your patience and your attention. We're almost there
15 to the discussion portion of the hearing.

16 Before we do that, though, I have a specific
17 request for representatives of North Delta C.A.R.E.S.
18 North Delta C.A.R.E.S. has indicated its intent to present
19 several hundred policy statements and also to participate
20 in the evidentiary hearing. To help facilitate your
21 participation, State Water Board staff need to discuss with
22 North Delta C.A.R.E.S.' representatives the logistics
23 involved for this large number of policy statements and
24 witnesses.

25 Additionally, North Delta C.A.R.E.S. needs to be

1 advised that you are required to, and in fact you are
2 delinquent, in identifying and proposing time for the
3 testimony of your witnesses. We welcome your participation
4 in this proceeding, but in fairness to all participants,
5 North Delta C.A.R.E.S. must comply with all the rules and
6 requirements of a party in a Water Rights proceeding. Our
7 staff is available to provide assistance and I urge you to
8 please work with them.

9 Samantha Olson has been trying to contact the
10 representatives of North Delta C.A.R.E.S., and she is
11 sitting in the back.

12 Now I will turn to the issues for discussion
13 today. But first, I really want to express my thanks to
14 the parties who followed the Board's strong encouragement
15 and submitted written comments with suggestions for the

16 Pre-Hearing Conference Agenda Topics, as we
17 requested in our January 15th letter. We've read your
18 letter and based on those comments, and based on the Pre-
19 Hearing Conference Agenda, today's discussion will be
20 organized into two general topic areas: first, the timing
21 of the hearing and, second, hearing logistics.

22 The first topic concerns the timing of the
23 hearing relative to other regulatory processes, including
24 CEQA, the Endangered Species Act Compliance Process, the
25 Section 401 Water Quality Certification, and the Bay Delta

1 Plan Update.

2 The second topic includes the Order of
3 Proceeding, the Grouping of Parties and Witnesses, Issues
4 Concerning the Scope of Part I of the Hearing, Settlements,
5 Time Limits for Direct Testimony and Cross Examination, and
6 other issues pertaining to Hearing Logistics.

7 For each of those topics, we will hear first from
8 the parties who submitted written comments specific to that
9 topic. I will bring the parties up to the podium, grouped
10 on either side of an issue as ascertained from your
11 letters. I will then allow time for other parties, should
12 they wish, to state for the record their concurrence or
13 objections on that issue. This format will allow for a
14 more focused discussion of the issues and therefore better
15 illuminate the factors to ensure procedural integrity and
16 efficiency for the subsequent hearing.

17 I may limit the amount of time for each party to
18 comment on a particular issue, depending on the issue and
19 how many parties wish to comment. Additional time will be
20 afforded if necessary on a case-by-case basis. I encourage
21 parties when speaking to avoid repeating the details
22 already presented by other parties and to simply indicate
23 agreement.

24 Right? With that, we're ready to proceed and
25 let's move on to the very first topic.

1 The first topic is the timing of this hearing in
2 relationship to other processes. And as I mentioned, that
3 includes CEQA, ESA, Clean Water Act §401, Water Quality
4 Certification, and the Bay Delta Water Quality Control Plan
5 Update. The Department of Water Resources has requested an
6 expedited hearing schedule because, according to them, the
7 likelihood of a lengthy hearing -- I cannot imagine --
8 also, pursuant to DWR's request, State Water Board staff
9 proposes to process the Clean Water Act §401 Application
10 for Water Quality Certification in a proceeding separate
11 from the Water Right Change Petition. Several parties have
12 commented on whether it is appropriate to begin the hearing
13 before various other regulatory processes have been
14 completed; in particular, we have received written comments
15 from a number of parties regarding the timing of the Water
16 Fix Hearing relative to the CEQA process and Phase II of
17 the Update to the Water Quality Control Plan for the San
18 Francisco Bay, Sacramento-San Joaquin Delta Estuary, or the
19 Bay Delta Plan.

20 We also received comments concerning whether a
21 decision on DWR's Application for Water Quality
22 Certification should precede the State Water Board's
23 decision on the Water Right Change Petition. Like I said,
24 we've received numerous comments on this topic and would
25 like to hear and decide on this issue in advance of the

1 hearing.

2 For today, though, now I should say, before we
3 start hearing comments, I want to say a few words about
4 CEQA, in particular. As I stated in our January 15th
5 letter, as a general rule, a responsible agency under CEQA
6 such as the Board in this case, must presume that the
7 environmental document prepared by the CEQA lead agency is
8 adequate for the purposes of CEQA.

9 In addition, it is standard practice for the
10 State Water Board to begin a Water Rights Hearing before a
11 final CEQA document has been prepared. That said, the
12 issue that has been raised by some of the parties is not
13 just about CEQA compliance; a number of parties are using
14 their comment letters, that the Draft CEQA document
15 prepared by the Department of Water Resources does not
16 contain enough information concerning how the Water Fix
17 Project will be operated, and the potential impacts of the
18 project on other legal users of water.

19 As a consequence, these parties have argued that
20 they cannot participate meaningfully in Part I of the
21 Hearing, and the Hearing should be postponed until an
22 adequate CEQA document has been prepared. This issue
23 concerns the adequacy of available information about the
24 project that is relevant to one of the key hearing issues,
25 and that is namely whether the project will cause injury to

1 other legal users of water. For this reason, we are
2 interested in hearing a response on this issue from the
3 Petitioners and other project proponents.

4 With that, I will ask the Petitioners, Department
5 of Water Resources, Bureau of Reclamation, would their
6 representatives please come up?

7 Since you will be here a while, why don't you
8 take one of the seats up there -- fair warning. Actually,
9 would you mind taking the back seat? That way, I don't
10 have to crane my neck to see you.

11 Did I not say to mute cell phones? Strike one,
12 Ms. Riddle -- oh, Ms. McCue, okay. Staff, we have to set
13 the example here.

14 All right, thank you representatives from DWR and
15 the Bureau for coming up. I will now ask you to please
16 explain your request for an expedited water right and 401
17 Certification processes. I also want you to provide an
18 update on your CEQA-NEPA and ESA CSA compliance processes.
19 And then finally, I want you to respond to the argument
20 that the Draft CEQA document is not adequate for the
21 purposes of beginning Part I of this Hearing.

22 Department, please go first.

23 MR. MIZELL: Well, thank you very much. Good
24 morning Chair Marcus, Board Members Doduc and D'Adamo. On
25 behalf of the projects, thank you for the opportunity to

1 discuss --

2 HEARING OFFICER DODUC: Please identify yourself
3 first, name --

4 MR. MIZELL: I'm Tripp Mizell, I'm with the
5 Office of Chief Counsel for DWR.

6 On behalf of the projects, thank you for the
7 opportunity to discuss the procedural matters that are
8 before you today, and in anticipation of the Cal Water Fix
9 Hearing. This is an important pre-hearing conference and,
10 as you can see, we're here and hope to answer all of your
11 questions today.

12 As you know, for many years we've developed and
13 refined the project that is now known as the California
14 Water Fix, and we submitted to you last fall the Petition
15 that initiated this hearing. The purpose of today is to
16 provide you the further information requested in your
17 January 15th letter, and answer any questions.

18 So without getting into the substantive matters
19 of the issue, we hope to answer your questions and provide
20 you our insights on how to proceed in the most orderly and
21 efficient matter, as requested.

22 HEARING OFFICER DODUC: Thank you. But for now,
23 I would ask you to just focus on the three specific
24 questions that I just raised.

25 MR. MIZELL: Absolutely. So those three

1 questions I'm going to turn the microphone over to Ken
2 Bogdan, and he can give you an update on those issues.

3 MR. BOGDAN: Hi. My name is Ken Bogdan, I'm an
4 attorney for Department of Water Resources, and so let me
5 see if I can take these one at a time.

6 So the first question was related to the request
7 for an expedited hearing in relation to the other permits?

8 HEARING OFFICER DODUC: Yes, please, through
9 other proceedings such as the update of the Water Quality
10 Control Plan and other proceedings.

11 MR. BOGDAN: Right, so consistent with the
12 processing of the Water Right Application that DWR and U.S.
13 Bureau of Reclamation has submitted, we have requested that
14 the Water Board proceed in processing that under the
15 direction as provided by the Delta Reform Act, and related
16 to considering appropriate flow criteria.

17 This is certainly consistent with existing law
18 and so we are looking to continue on that process, with the
19 acknowledgment that there is a parallel process going on
20 related to the Update of the Water Quality Control Plan
21 that we don't necessarily have an anticipated end for. And
22 so in order to continue on in the planning portions of the
23 California Water Fix Project, we feel it's necessary to
24 have the Water Board have a decision related to the project
25 and acknowledging that there are considerations that may

1 need to be folded in once there is a completion of the
2 Water Quality Control Plan Update.

3 As far as --

4 HEARING OFFICER DODUC: Actually, I'm sorry,
5 before you move on that, I have a question. I'm not sure I
6 understand -- you made a reference to the Delta Reform Act
7 of 2009, the requirement that flow criteria be considered.
8 How does that lead to your request to expedite the hearing
9 process?

10 MR. BOGDAN: It doesn't necessarily lead to that;
11 my response was based on the fact that you have a
12 requirement to be considering flow issues that possibly go
13 beyond the existing Water Quality Control Plan as part of
14 our process, and so delaying a decision on the California
15 Water Fix in order to finalize the elements of the Water
16 Quality Control Plan Update Process that might relate to
17 the California Water Fix, that you would already have this
18 requirement to be considering it within our process. So
19 that's how I thought it was relevant.

20 HEARING OFFICER DODUC: But there is nothing in
21 the Delta Reform Act of 2009 that implies this process
22 should be expedited, or that states this process should be
23 expedited.

24 MR. BOGDAN: Right. Expedited in terms of not
25 waiting for the Water Quality Control Plan Update Process.

1 So from that standpoint, because we don't know the complete
2 calendar for the ultimate decisions related to the Water
3 Quality Control Plan Update, we felt it important to bring
4 our process in terms of the Water Right decision making.

5 But maybe I'm not exactly getting what your
6 question is.

7 HEARING OFFICER DODUC: Okay, that's fine.
8 Please go ahead and move on to the next question regarding
9 the 401 certification.

10 CHAIR MARCUS: I want to ask a question on that
11 just to try and illuminate and understand what you're
12 saying. Obviously, there are a number of commenters who
13 perceived your Petition as saying that we should base this
14 decision on our existing D-1641. And the Delta Reform Act
15 requires us to consider appropriate flow criteria,
16 including our 2010 Flow Criteria Report and the ongoing
17 science and work that we're doing in the Water Quality
18 Control planning process, at least is how I see it. And
19 what I'm hearing you say, and what I assumed when I read
20 your Petition, is you were saying yes, you agree that
21 updated flow criteria should be put on this in the context
22 of this process, not rely on 1641. And then what you're
23 saying now is, I think, why not get started? Is that what
24 the argument is?

25 MR. BOGDAN: Yes. You may want to elaborate a

1 little bit more.

2 MR. MIZELL: Yeah, Chair Marcus, that is what
3 we're saying. Right now the Board has before it the
4 existing Water Quality Control Plan and update process and
5 the Delta Reform Act that can be informant in this hearing.
6 To delay this project until the end of the Water Quality
7 Control Plan Update process is unnecessary because the
8 Water Quality Control Plan Update necessarily will affect
9 the permits of the Department and Reclamation by virtue of
10 the Phase III update process. This project and the Water
11 Rights Hearing is not meant to supplant Phase III for the
12 purposes of the two projects. And therefore we can proceed
13 prior to the end of the Water Quality Control Plan knowing
14 that in the future we will be subject to whatever the
15 Update produces.

16 And I think under the Delta Reform Act, we have
17 the ability to consider something beyond D-1641, but what
18 we recognize in our Petition, that today for Water Quality
19 Control planning purposes, not for Delta Reform Act
20 purposes, the standards are set forth in D-1641 for us.

21 HEARING OFFICER DODUC: Board Member D'Adamo?

22 MS. D'Adamo: Yes, and just to follow-up on that,
23 you don't just have the ability to consider additional
24 information as a result of the Delta Reform Act, you're
25 required to consider appropriate flow criteria.

1 MR. MIZELL: This hearing is required to consider
2 appropriate flow criteria.

3 MS. D'ADAMO: And that is what you will be doing.

4 MR. MIZELL: That is correct.

5 MS. D'ADAMO: All right.

6 MR. MIZELL: And I believe we mentioned that in
7 our Petition, as well.

8 HEARING OFFICER DODUC: Thank you. Please move
9 on to the 401 Certification request now.

10 MR. BOGDAN: So we support the staff's proposal
11 to have a separate process for 401 Certification. Probably
12 the most important element related to that is being able to
13 receive the Executive Director's 401 Certification Decision
14 prior to receiving the final Water Right Decision from the
15 Water Board's standpoint.

16 HEARING OFFICER DODUC: Why is that?

17 MR. BOGDAN: Because this would allow us to move
18 forward under the Section 404 of the Clean Water Act and
19 the Army Corps' permitting process. Of course, you know
20 that the application for a discharge of dredge or fill
21 material in Waters of the U.S. requires obtaining a Section
22 404 Permit, and as part of that they require the 401
23 Certification. We will have completed, or expect to have
24 completed, all of the elements of Section 404, except for
25 401 Certification likely towards the end of the CEQA-NEPA

1 process, because the Biological Opinion will be issued, as
2 well as Reclamation issuing a decision and signing their
3 Record of Decision for the NEPA process.

4 And so we would be waiting to complete the Corps'
5 process. That delay would also then delay the additional
6 coordination that happens related to the EPA's permit
7 review process that happens at the end of the 404 Permit
8 Decision.

9 Also, we would be waiting to develop the various
10 mitigation plans that are tentative until we get a final
11 decision from the Army Corps, and it could delay other
12 issues like implementing the programmatic agreement under
13 that the Corps is the lead agency under Section 106 of the
14 National Historic Preservation Act.

15 HEARING OFFICER DODUC: Right. Now please update
16 us on the status of your CEQA NEPA, ESA compliance process.

17 MR. BOGDAN: Yeah, the CEQA -- I'll defer to
18 Bureau of Reclamation on the NEPA side, as well as the
19 Federal Endangered Species Act side. I'll speak on CEQA
20 and compliance with the State Endangered Species Act.

21 So for the California Environmental Quality Act,
22 we issued a Draft EIR in December of 2013. We issued a
23 recirculated Draft EIR in July of 2015 with a comment
24 period that ended this past October. We have been
25 coordinating with the consultants to identify any resource

1 issues that need to be updated or addressed as part of
2 those comments, clarifications, etc., as well as completing
3 responses to all of those comments on both the 2013 and
4 2015 draft documents.

5 We expect that this summer possibly by the end of
6 June to have a Final EIR ready to be issued that will then
7 be dependent on timing in coordination with Bureau of
8 Reclamation's NEPA process, as well as the Ancillary
9 Environmental Compliance issues associated with Section 7
10 of the Endangered Species Act.

11 So then from the standpoint of the California
12 Endangered Species Act, again, that's a coordinated process
13 with Section 7 of the Endangered Species Act because
14 they're a jointly listed species under both the State and
15 Federal laws, so we're working with the Department of Fish
16 and Wildlife in coordination with that Section 7 process to
17 make sure that we're addressing those jointly listed
18 species to the satisfaction of the Department of Fish and
19 Wildlife. And then, as part of the process, we're applying
20 to the Department of Fish and Wildlife for an incidental
21 take permit under Section 2081(b) of the Fish and Game
22 Code, California Fish and Game Code. We expect to submit
23 that application this spring possibly by April, depending
24 on the timing of the Biological Assessment. So, again,
25 it's one of those things where we don't want to get ahead

1 of the other coordinated processes, so we don't want to
2 submit an application on the 2081 then find out that the BA
3 changed slightly, that might affect a jointly listed
4 species. So we're trying to do this sequentially in order
5 to make sure that we're coordinating.

6 We expect that the Department of Fish and
7 Wildlife will possibly be able to make a decision on the
8 permit consistent with the timing of when a Biological
9 Opinion is issued, and I will defer to Reclamation in
10 discussing that process.

11 We would not expect the Department of Fish and
12 Wildlife to issue their permit until we have completed the
13 CEQA process, which would be the issuance of a Notice of
14 Determination.

15 HEARING OFFICER DODUC: Thank you. And finally,
16 please address the concern raised that the Draft CEQA
17 document is not adequate for the purposes of beginning Part
18 I.

19 MR. BOGDAN: The Draft EIR is actually of course
20 two different documents, the 2013 document which focused on
21 a broad range of alternatives related to then the proposed
22 project which was the Bay Delta Conservation Plan; that had
23 a myriad of studies associated with it related to the
24 diversion, as well as the construction of the facilities.
25 It also discussed broad concepts related to a 50-year

1 Conservation Plan with very broad goals related to recovery
2 of species. The Department of Water Resources determined
3 last year that three additional alternatives would be
4 appropriate to study and focused on ones that did not have
5 such a broad 50-year goal in terms of addressing recovery
6 of species and instead focused more on the infrastructure
7 elements. We reviewed the existing documentation, updated
8 that where we had additionally modeling that would support
9 our conclusions related to significance of impacts and
10 adequate of mitigation, and we issued that document as I
11 mentioned July of 2015.

12 In the Final, we expect to have supplemental
13 information, but no information changing the conclusions
14 related to what is in the Recirculated Draft in July. If
15 it in fact changed some of the conclusions related to a new
16 significant impact, or a substantially more severe
17 significant impact, then that may trigger the need for us
18 to do additional outreach in terms of CEQA. But with all
19 of the information that we're currently compiling in this
20 Final Document, and of course we're not ready to release it
21 yet, it's still in its early stages of drafting, we're not
22 expecting to have any information that would change the
23 conclusions as presented in the recirculated draft.

24 HEARING OFFICER DODUC: Thank you. That was
25 helpful. And why I appreciate that you're not expecting to

1 have major changes that would lead to changing the
2 conclusion, of concern to us in our proceeding is the
3 determination of injury. And so, because studies are still
4 being developed, alternatives are still being explored, and
5 while you may not expect the conclusion to be changed,
6 might not the results of those studies and alternative
7 assessments influence the determination with respect to
8 impact on user? Which is a more discreet issue than the
9 ultimate conclusion that you've discussed.

10 MR. BOGDAN: Well, there's a couple things.
11 We're not actually -- we're confirming some of the
12 analyses, there is I think not as much additional modeling
13 or studies going on as maybe I implied. The areas where
14 there may be additional information, some of that has
15 already been released, actually, related to the Biological
16 Assessment, the working draft that we posted a couple weeks
17 ago. So there have been requests related to the modeling
18 to support that, which was done in parallel to our
19 recirculated draft. So we expect to, well, we have that
20 information available right now and there is certainly the
21 development of testimony that will be a part of our
22 submittal on the evidence to support the hearing process.

23 So there will be ability for other parties --
24 there already is right now -- the ability for other parties
25 to review information on the record, both in terms of the

1 July document, possible updates, but I don't know if you'd
2 even call them updates, but additional information,
3 elaboration on some of those resources used related to the
4 Biological Assessment. And then if -- and we haven't
5 gotten there yet because we're still working on the
6 testimony and evidentiary submittals, but there may be
7 additional elaboration on some of that information there.

8 HEARING OFFICER DODUC: Thank you. With that, I
9 will now turn to the Bureau. Same questions for you.

10 MS. AUFDEMBERGE: Yeah, I'd just like to make a
11 point of clarification. My name is Amy Aufdemberge. I'm
12 with United States Department of Interior, Office of the
13 Solicitor, Regional Solicitor. And I will be representing
14 the Department in these proceedings and we will be
15 participating as the Department. While Reclamation jointly
16 filed a petition with DWR, I just wanted to clarify that
17 both Bureau of Reclamation and Fish and Wildlife Service
18 will be singularly represented through the Regional
19 Solicitor's Office.

20 I guess with that, getting to your questions.
21 First regarding the expedited hearing, I think we would
22 support WDR's request for an expedited hearing. To an
23 extent, that means that the hearing does not have to be
24 deferred for the Water Quality Control planning process. I
25 think we concur in WDR's statements in those regards.

1 With me today is Michelle Banonis. She is the
2 Assistant --

3 HEARING OFFICER DODUC: I would actually get
4 closer to the microphone.

5 MS. AUFDEMBERGE: With me today is Michelle
6 Banonis. She is the Special Assistant to the Regional
7 Director for Reclamation and she is here to speak to your
8 question about the update of the CEQA NEPA ESA processes.

9 HEARING OFFICER DODUC: Before she does, you did
10 not comment on the 401 Certification; I assume you also
11 concur with the Department?

12 MS. AUFDEMBERGER: Yeah, we don't have much
13 involved in that. But, yes.

14 MS. BANONIS: Thank you, Chair. I appreciate it.
15 As Amy mentioned, my name is Michelle Banonis, I'm the
16 Bureau of Reclamation's Program Manager for the California
17 Water Fix, as well as a Special Assistant to the Mid-
18 Pacific Regional Director. I'm going to start in a
19 slightly different place, perhaps, then Ken Bogdan did in
20 explaining some of the environmental compliance thus far.
21 I'd actually like to start with talking a little bit about
22 our Endangered Species Act compliance.

23 So Reclamation is the Federal lead agency for the
24 Federal Endangered Species Act compliance under §7, along
25 with DWR as a project applicant. We've been coordinating

1 extensively with U.S. Fish and Wildlife Service and
2 National Marine Fishery Service on the development of a
3 Biological Assessment. A working Draft Biological
4 Assessment was provided to the public for public
5 consumption and provided on the California Water Fix
6 webpage on January 15th, just a couple of weeks ago.

7 With that being said, we're working with the
8 Services to determine a time when consultation can
9 officially begin. Right now we've been sort of in an
10 informal approach talking through potential concerns,
11 issues with the Services.

12 I'm going to move to NEPA now because it all ties
13 back in together and I'll explain it. So kind of building
14 off what Ken Bogdan had mentioned, we've been engaged in a
15 joint NEPA CEQA process, so our timing has been parallel to
16 that of the state in the development of the EIR/EIS. Of
17 course, that being said, at the end of the process when a
18 Final EIR/EIS is developed this year, we have a 30-day what
19 we call a cooling off period, for NEPA before we typically
20 issue a Record of Decision. So that being said, also as a
21 matter of course, Reclamation would also want to have in
22 hand a Biological Opinion as a result of the consultation
23 process with the Services before we issue our Record of
24 Decision. So we would have the EIR, hopefully we would
25 have the Biological Opinion, and then we would issue the

1 Record of Decision. So I hope that provides some clarity.

2 But I wanted to make a note of that.

3 HEARING OFFICER DODUC: Thank you. Do you wish
4 to comment on anything else?

5 MS. BANONIS: I do not. Thank you.

6 MS. RIDDLE: I had one question, if I might.
7 Could you explain how the Delta Science Program review of
8 the ESA, of the Biological Opinion fits into the timing and
9 an estimate of how long that will take, and how that might
10 affect the schedule for completion of the process?

11 MS. BANONIS: It ties in I think more with the
12 formal consultation process once the Biological Assessment
13 is conveyed to the Services. So the Services would be
14 seeking peer review from that agency and those
15 representatives on the Biological Opinion itself, and the
16 development therein. So right now I don't have a really
17 good timeframe for you as to what that might entail, but I
18 do know that that's a process that NMF and Fish and
19 Wildlife Service are working through with the panel to try
20 to establish a timeline, establish the mechanism for the
21 peer review of the Biological Opinion before the Biological
22 Opinion is issued.

23 HEARING OFFICER DODUC: More questions?

24 CHAIR MARCUS: Yeah. And I'm sure we're going to
25 hear from an awful lot of people with legal arguments and

1 efficiency arguments, common sense kind of arguments. And
2 you've mentioned your reasons for wanting to go quickly and
3 being able to do things in parallel, but, you know, not to
4 put you on the spot as counsel, etc., I mean, we'll think
5 about all those legal issues, but you read the comments
6 that people submitted and they made some very logical
7 arguments about how they've put in comments, comments about
8 the adequacy of the alternatives, whether their issue has
9 been covered. A number of the issues that will be
10 resolved, at least on behalf of the Departments, will be
11 resolved in the Final EIR in terms of your perception of
12 what is adequate, obviously. There will undoubtedly be
13 litigation along a separate track as there frequently is,
14 and as there most assuredly will be in this case. And the
15 argument has been that that will be done by Phase II. So
16 there will be a conversation about when we start Phase II,
17 and there have been comments about how much time people
18 need after that to be able to incorporate that particularly
19 with respect to impacts on Fish & Wildlife in Phase II.
20 But folks have made some specific arguments in this Phase I
21 about legal users of water, and undoubtedly we'll talk
22 about what that means because that's been raised -- we
23 don't have to do it this particular moment now -- that
24 expressed their concerns, and until they know whether
25 you've answered their questions, and I think saying you

1 don't think your conclusions will change substantially does
2 not warm anybody's heart or give them comfort if they had a
3 concern, as we've had concerns in our comments about
4 information we need in order to make a decision.

5 How do you respond to that -- and we focused on
6 that in the Fish and Wildlife context -- what do you both
7 say to the folks who are the Water Rights holders, or other
8 legal users of water, we'll talk about what that means a
9 little bit later, and their arguments that they don't feel
10 they can adequately participate in Phase I without seeing
11 what your answers there are because you haven't answered
12 their questions? And I'm not putting words in your mouth,
13 I'm trying to tell you what I heard you say, and then you
14 can elaborate because this is your chance to elaborate at
15 first instance, but, I mean, what do you say to that? You
16 say that you'll put more information in your testimony that
17 will illuminate that you've been thinking more about these
18 things and give them an update on your thinking on a lot of
19 things, but for today that's sort of saying "trust us." So
20 what do you say to the folks, you'll hear from them, no
21 doubt, in the next few hours, what do you say to say why
22 Phase I can go forward in parallel while we're waiting for
23 these documents for Phase II? Sorry, I didn't say that as
24 concisely as I wanted to.

25 MR. BOGDAN: That's okay. I got it, I think.

1 Thank you.

2 CHAIR MARCUS: I mean, it's a logical question,
3 right?

4 MR. BOGDAN: Sure. And to start, again, I feel
5 that we have enough information that is accessible to the
6 public related to effects to beneficial users. Of course,
7 this is a unique process in terms of the ability of those
8 who have interests in possible impacts of a project being
9 analyzed in CEQA to do that in a forum that isn't really
10 focused on the adequacy -- and using air quotes -- adequacy
11 of a CEQA document as much as it's the adequacy of the
12 underlying analysis related to the effects to legal users.
13 And that's why I say we feel that we have enough, but it's
14 not just about CEQA here, right? It's about the underlying
15 information. So it's not just a matter of "trust us," it's
16 we're confident that there is enough on the record right
17 now, but we do feel that where there are pointed elements
18 that need to be addressed that aren't necessarily
19 traditional CEQA elements, but they are more in relation to
20 a Water Right Hearing and the idea of effect to legal user,
21 which is a traditional CEQA resource impact that you would
22 normally see, that we feel that there we may need to
23 elaborate related to the submittals based on testimony and
24 evidence. So we do feel that we've addressed it within the
25 confines of both a CEQA document, as well as a Water Right

1 Hearing, and that folks don't necessarily need to see a
2 "here's how we responded to your comment" because if there
3 were any particular issues we thought were outstanding, we
4 will make sure that they're addressed within the
5 evidentiary submittals.

6 HEARING OFFICER DODUC: Thank you. Thanks to the
7 Chair for that clarifying question. Please do work on your
8 conciseness.

9 CHAIR MARCUS: Yeah, I know. With that, I will
10 now ask other parties who would like to voice their
11 concurrence with, or provide additional information in
12 support of the Petitioner's comments. And again, I'm only
13 seeking for now comments from parties who would like to
14 voice their concurrence with, or provide additional
15 information in support of what the Petitioner has just
16 said. Please come up to the microphone and identify
17 yourself before you provide your comment. I welcome
18 additional information for the Board to consider in this
19 matter, but I ask that you do not simply repeat comments
20 that have been already made. With that, would anyone wish
21 to comment in support of the Petitioner's position?
22 Please.

23 You know what, Petitioner? Please stay in case
24 questions come up. I did warn you that you will be here a
25 while.

1 MR. BERLINER: Good morning, Board Members,
2 Chairman Marcus, staff. My name is Tom Berliner. I'm here
3 on behalf of the State Water Contractors along with
4 Stephanie Morris. Generally speaking, we support the
5 position articulated by the project proponents, DWR, and
6 the Bureau. You asked a number of questions which,
7 frankly, from our perspective are largely legal issues.
8 You seem to have asked them in the policy context, but for
9 instance you raised the issue about legal users of water;
10 that's a legal definition. You asked about whether a CEQA
11 document has to be completed before the hearing commences;
12 that's a legal issue. In fact, I think there's a case
13 right on point on that. Just so that you've got it, it's
14 Poet vs. The State Air Resources Board (sic), and it's, I
15 believe, a 2013 case where the Court made clear that unless
16 the Board's actions related to the CEQA document would
17 preclude it from taking action, making changes, requiring
18 mitigation, etc., it is not necessary to have a CEQA
19 document ready, completed, final until such time as the
20 Board takes that final action. In the case of that case,
21 the Air Board prematurely took action before their CEQA
22 document was completed and the Court found they had
23 essentially boxed themselves in and couldn't amend their
24 subsequent CEQA document. You're not in that same
25 position.

1 You also asked about the interplay between the
2 CEQA document in this proceeding. As Mr. Bogdan said, the
3 issues are different. And the issues that have been raised
4 by the folks that have submitted comment letters on this
5 question, as a Water Rights Petitioners, the Bureau and the
6 Department have an obligation to fulfill the mandates under
7 the Water Code. There's nothing new here, they have to
8 meet all those obligations. So if there's a deficiency
9 regarding impacts to legal users of water, deficiencies
10 regarding impacts on Fish and Wildlife, they're going to be
11 deficient. And you're not going to issue the permit.

12 You're going to require them to either provide more proof
13 or, if they can't, you're going to deny it; that's not a
14 CEQA issue, it's a basic Water Code statutory requirement.

15 So for folks that are coming and saying, "Wait,
16 we don't have adequate information," nobody has adequate
17 information at the start of a Water Rights proceeding,
18 that's the whole point of the proceeding. If their
19 testimony is inadequate, they have the burden of proof. If
20 their testimony is inadequate, they'll fail. If their
21 testimony is adequate and you find that other parties have
22 raised legitimate points, you're going to require them to
23 do certain things and they'll have to decide whether they
24 want the permit. It's not a CEQA issue, it's a Water Code
25 issue.

1 The CEQA issue is going to help you formulate
2 your overall endgame decision with issues that are above
3 and beyond the double requirements that are under the 1700
4 Sections of the Water Code. So you're going to deal with
5 all the rest of those issues as you move along.

6 So while you have a legal issue in front of you
7 from a policy perspective, this hearing is designed to get
8 out the information required by the Water Code. If it's
9 not met legally, you'll deny it; if it's not met on a
10 policy basis, you'll be entering into other considerations
11 about the kinds of requirements that you're going to impose
12 on the Petitioners as part of their application process.

13 So, you know, you've noticed over 30 days for this
14 proceeding. I recall that the Bay Delta hearings were 57
15 days, so we'll see if we get done in 30 days, it's clearly
16 monumental, but the whole point of moving forward with 30
17 days of hearing is to get this information out so you can
18 make your decision. If you don't have enough information,
19 you're not going to make the decision.

20 You asked about expediting. My sense is sort of
21 circular, which is if the Water Board didn't feel it was
22 ready to move, the Water Board wouldn't have issued a
23 Notice. Lots of Applicants require expedited or delayed
24 proceedings and in my experience the Water Board moves when
25 it's ready to move. There are no additional pieces of

1 information that the Water Board needs today, before this
2 hearing starts, in order to make a decision because the
3 record has yet to be developed. So the fact that you have
4 little to no information simply speaks to what every
5 Applicant comes to this Board with, with any kind of a
6 petition. They have the burden; if they don't carry it,
7 they're done.

8 So I don't think you're going to get peace by
9 doing CEQA first, we know there's going to be litigation.
10 There's going to be litigation both on CEQA and the Board's
11 Order, there's no doubt about it. The Comment Letters have
12 made it very clear they intend to litigate. So the
13 documents are going to have to be adequate, as Mr. Bogdan
14 pointed out. If additional information comes up during the
15 course of these hearings, they're going to have a CEQA duty
16 to address those issues. So I don't think that CEQA is an
17 issue.

18 Regarding the 401 Certification, having been
19 through 401 Certification proceedings before, I don't
20 really understand why you need a separate proceeding. I
21 understand there's a separate timeline the Department needs
22 in order to move forward with their 404 Permits, but you're
23 going to be getting a tremendous amount of information
24 here. There's no point in repeating a process under 401.
25 If you don't get enough information here to issue a 401, I

1 don't what else could possibly be missing; somebody hasn't
2 carried their burden at that point. So to do a separate
3 proceeding, I think you won't get anything out of it. In
4 that regard, I think it was the Sac Valley Water Users who
5 urged that the Permit for 401 be issued simultaneously and
6 I think we concur with that. It keeps the ball rolling.

7 If you have the ability to issue the 401 before
8 you make a final decision on the Water Rights, great, you
9 can issue it. But I think it's the same record. So I
10 don't think you're going to need anything additional on
11 that.

12 Let me make sure that I -- oh, well, regarding
13 the Water Quality Control Plan, it's not a legal
14 requirement that you update the Water Quality Control Plan
15 in conjunction with this Petition. As DWR pointed out,
16 they're going to be subject to any Water Quality Control
17 Plan Updates just like everybody else. To some degree, how
18 much water as a result of this project is their risk? If
19 the Water Quality Control Plan requires certain conditions
20 that limit their ability to divert, they're going to be
21 limited. So they take their chances as far as moving
22 forward before the Water Quality Control Plan, but we know
23 that's going to take eons to get done. They're going to be
24 subject to it. The flow requirements are separate and
25 apart from the Water Quality Control Plan as set forth in

1 the Delta Reform Act, so those have to be dealt with here,
2 and your prior 2010 report made clear you're far from
3 reaching any kind of answer on the flow requirements.

4 So you've got in front of you a flow requirement
5 obligation, not a Bay Delta Water Quality Control Plan
6 obligation at this point. The project is going to be
7 subject to the Water Quality Control Plan regardless of the
8 decision you make here. So they are separate processes,
9 they ought to stay separate. The Water Quality Control
10 Plan can lag behind this because it's just as a matter of
11 timing and practicality, it's going to take a long time.

12 I did notice that there were some suggestions
13 that we delay this hearing until after the CEQA document is
14 done; I think you're just giving people more bites at the
15 apple. Delay doesn't really do anything, it's not going to
16 forestall litigation, it's not going to preclude the major
17 substance of the testimony that comes in, those that are
18 opposed are going to remain opposed regardless of what the
19 CEQA document says, and it doesn't change the burden of the
20 Petitioners. And that's probably the most important part.
21 They've got the same burden regardless of when that CEQA
22 document comes in because it's for a different purpose.

23 HEARING OFFICER DODUC: Thank you, Mr. Berliner.

24 MR. BERLINER: Thanks.

25 HEARING OFFICER DODUC: That was very helpful.

1 And I have to actually warn people, I was much lenient with
2 Mr. Berliner's time, 1) because I expect actually there
3 will be many many more speakers speaking in opposition than
4 in support, and also your comments were very relevant and
5 much appreciated.

6 With that, are there any other speakers actually
7 for, just for the purposes of planning and timing, please
8 raise your hand if you want to speak in support of the
9 Petitioner's request. I see one hand, so please come up.
10 Identify yourself first, please, and then provide your
11 brief statement if you have something new to add, otherwise
12 just please state your concurrence.

13 MR. WEILAND: Thank you. My name is Paul
14 Weiland. I'm representing the Coalition for a Sustainable
15 Delta in this matter. And I just have two brief points.
16 One is I concur with the points made by the Department of
17 Water Resources, the Bureau, and the State Water
18 Contractors. And the other point is, with regard to the
19 issue of adequacy of information, I think that if you
20 consider the amount of information, the extent of analysis
21 that has gone into this process, it's of historic
22 magnitude, frankly. And if the Board doesn't have before
23 it sufficient information with regard to this project, it's
24 hard for me to imagine that it would with regard to any
25 project.

1 HEARING OFFICER DODUC: Thank you very much. All
2 right, now I will ask for other parties to come up who
3 would like to voice their concerns with this proposal. And
4 I will start with the parties who have already provided
5 written comments stating those concerns. Again, I will ask
6 you to please summarize your comments. Let's go ahead and
7 start with five minutes' limit to begin with, and then
8 we'll pursue the discussion as appropriate. But I will be
9 calling you up and, again, these are parties who have
10 submitted written letters expressing concerns about the
11 timing and the process that were requested by Petitioners
12 and proposed by staff.

13 I will begin with the City Antioch and follow the
14 City of Antioch by Save the California Delta Alliance.

15 MR. EMRICK: It's Matthew Emrick, Special
16 Counsel, Water Counsel for City of Antioch. Our comments
17 were, of course, that one of the problems with both the
18 Petition and the CEQA document is it doesn't actually
19 adequately describe the project. So we're being asked as a
20 Protestant to analyze the impacts of the project on our
21 Water Rights. And I think in our comments and in our
22 Protest, we set forth that we just don't have that
23 information.

24 We have Dr. Susan Paulson working with us to try
25 to help the City analyze those impacts and she's expressed

1 to us that she just doesn't have that information. We
2 don't have the operating criteria for some of the adaptive
3 management. In the Petition, DWR listed 22 Biological
4 Studies that have yet to be completed that will be the
5 basis of the Biological baseline for the project. And we
6 feel that it's inappropriately shifting the burden to the
7 Protestants to show that there is harm to them with an
8 inadequate project description, which in our case we
9 believe is an impossibility. We can't show or know or
10 determine what all the impacts will be without a proper,
11 complete project description.

12 HEARING OFFICER DODUC: Thank you. Thank you
13 very much for that concise summary, as well as for your
14 very well written letter.

15 Save the California Delta Alliance? Would the
16 representative like to speak? And then after this
17 gentleman will be a representative from the California
18 Sport Fishing Protection Alliance and the CSPA parties.

19 MR. BRODSKY: Thank you, Madam Chair. Michael
20 Brodsky on behalf of Save the California Delta Alliance.
21 Just a quick note on semantics. DWR and project proponents
22 have used the phrase "there's no reason to delay." I think
23 those of us who are opposed to DWR's proposal to proceed at
24 this time aren't trying to delay anything, we're saying
25 "don't inappropriately expedite, don't inappropriately jump

1 ahead." So I think that their request is somewhat unusual,
2 asking for an unusual amount of expediting in the face of
3 inadequate information.

4 I agree with the City of Antioch's comments. I
5 mean, not only do we not have a Final EIR or an adequate
6 CEQA document, we don't have a Record of Decision. As a
7 matter of law, there are still a number of alternatives
8 under consideration and DWR and Reclamation have to
9 acknowledge that it's possible that something other than
10 Alternative 4A as it is proposed in the Petition will
11 ultimately be what's decided on, and ultimately what will
12 have to be protested by those who are opposed to the
13 project. A failure to acknowledge that would mean they've
14 already made a decision; they've already eliminated all
15 other alternatives under consideration before issuing a
16 Record of Decision.

17 I'd also like to comment briefly that in the
18 Board's written correspondence and comments, the Board has
19 said several times that you must presume the adequacy of
20 the lead agency's environmental documents. And you cite
21 California Code of Regulations, Title 14, §15096(e). It's
22 important to note that that Regulation applies only to
23 Final Certified Environmental Impact Reports, it has no
24 bearing at all on a decision to use a Draft Environmental
25 Impact Report. As a matter of fact, the point of a Draft

1 Environmental Impact Report is to circulate it to the
2 public and to affected stakeholders so that they can point
3 out errors, omissions, inadequacies, other alternatives,
4 and then for the Lead Agency to consider those comments and
5 to incorporate and respond to them and modify the EIR as
6 appropriate in the Final document. And that's why the Code
7 of Regulations and the Legislature have provided that
8 responsible agencies should give deference to Final
9 Environmental Impact Reports. But there's nothing at all
10 in the law or in CEQA that says you give any deference at
11 all to a Draft Environmental Impact Report.

12 So the Board has recognized that -- and other
13 speakers have recognized there's sort of two issues, is the
14 Draft EIR adequate under CEQA? And/or does it contain
15 information adequate for use by the Board for decision
16 making? The staff has proposed entering it into the record
17 as evidence, so therefore the point of it is to rely on the
18 information in there as telling us something that's
19 accurate about the Water Fix Project.

20 But we know that the information is inaccurate.
21 The United States Environmental Protection Agency in their
22 October 30, 2015 letter gave it a rating of 3, Inadequate.
23 In the United States Environmental Protection Agency's 2014
24 Letter -- incidentally, all of the comments in the 2014
25 letter stand as to the most recent recirculated EIR --

1 pointed out a raft of impacts that would actually occur
2 that the EIR did not address.

3 The Delta Independent Science Board found the
4 Draft EIR to be inadequate, "Inadequate to inform weighty
5 decisions of public policy." The Delta ISB --

6 HEARING OFFICER DODUC: Thank you. We are aware
7 of that and you are running out of time, so please make
8 your remaining point that we would like --

9 MR. BRODSKY: Okay. So what I've suggested, I've
10 made a procedural suggestion as to how the Board can
11 determine the flow criteria for Water Fix in combination
12 with the Water Quality Control Plan, Update of the 2006
13 Water Quality Control Plan. A number of speakers and
14 commenters have suggested that you do that, and I'm just
15 going to quote from one of the Board's documents which
16 says, "Under appropriate circumstances, a discrete
17 significant policy issue may be segregated from the
18 adjudicative proceeding and decided using suitable
19 procedures for policy setting. For example, regulations,
20 amendments to a Water Quality Control Plan, or a State
21 Policy for Water Quality Control." And the Board cited
22 State Water Resources Control Board --

23 HEARING OFFICER DODUC: Thank you. Thank you for
24 making those comments, for noting that. Let me assure
25 everyone that we are well aware that in our judgment the

1 Water Quality Control Plan Update and the development to
2 flows under the Water Quality Control Plan Update is
3 separate and distinct from the Water Right Change Petition
4 Proceeding; however, obviously considerations of flows will
5 be part of that, as well as part of the Water Quality
6 Control Plan Update. It's a very complex and also very
7 significant matter, so I appreciate you pointing that out.

8 MR. BRODSKY: Thank you.

9 HEARING OFFICER DODUC: With that, I will ask
10 CSPA, Mr. Jackson. And then after the CSPA parties, there
11 will be a representative from Friends of the River/Sierra
12 Club California, or Planning Conservation League, who
13 submitted their joint letter. Mr. Jackson.

14 MR. JACKSON: Thank you for the opportunity. I'd
15 like to first of all agree with everything Mr. Brodsky just
16 said and agree with everything you're likely to hear from
17 this microphone as we go forward. You talked about
18 efficiency and transparency, so I think I'll address those
19 things.

20 What you heard --

21 HEARING OFFICER DODUC: Integrity, Mr. Jackson.

22 MR. JACKSON: What?

23 HEARING OFFICER DODUC: And integrity.

24 MR. JACKSON: Well, actually integrity will
25 depend upon your rulings on efficiency and transparency.

1 But what's been proposed by the Applicants is that you
2 expedite your decision, and yet they're telling you that
3 you can't get a Record of Decision out of the Federal
4 Government in regard to the Endangered Species Act because
5 they need to go through their process. You can't get a
6 decision on a 2081 CESA thing from the Department of Fish
7 and Game because they need to go through the process. And
8 part of the process they're talking about is they need to
9 finish environmental review.

10 In one case, we have a Draft BA which indicates
11 that every single species that you're going to be
12 considering in the second part of this hearing is
13 significantly adversely affected. And I guess they're in
14 search of some sort of mitigation for that. You've got a
15 pile of material which is not yet final in terms of an
16 environmental review, I haven't read every one of the
17 50,000 pages in the two documents, but a lot of it, and
18 what you're going to find in that material is that there
19 are significant environmental impacts on every single
20 species you're going to consider -- in Part II.

21 So for Part I, where someone like CSPA that has a
22 little piece of land at Collinsville and riparian rights
23 attached to it because it's at the confluence of the San
24 Joaquin and Sacramento River, we really need to know what
25 the water quality is going to be to determine how to use

1 our little piece of land.

2 The major inadequacies pointed out throughout the
3 document is, since BDCP started out as a fish document,
4 that the Water Quality Sections are very very weak. So I
5 guess I find it unusual to find out why we need to expedite
6 your process, while all of these other governmental
7 agencies are finishing theirs before they make a decision,
8 and they're asking you for a decision.

9 So in regard to transparency, what that could
10 look like to Senegal jaded old guy in front of you is that
11 they want to get this decision made before you find out the
12 water quality impact that's going to change for water users
13 between the old point of diversion and the new point of
14 diversion, and what that's going to do to Agriculture. And
15 it doesn't seem to me that we gain much by then authorizing
16 a project and conditioning it in a way that it can't be
17 used to the extent that the financing depends on; that's
18 just not in the public interest to blow huge amounts of
19 money that ratepayers may or may not understand in order to
20 expedite a decision that we suspect is not going to be
21 legal because it's going to harm all of those people in
22 between the old point of diversion and the new point of
23 diversion.

24 HEARING OFFICER DODUC: Mr. Jackson, you're
25 treading into argument territory here, so we will ask you

1 to try to move on, you've made that point.

2 MR. JACKSON: I understand, but you're the one
3 who brought up transparency.

4 HEARING OFFICER DODUC: You've made that point.
5 Let's move on.

6 MR. JACKSON: I'll just quit and wait for the
7 inevitable crash.

8 HEARING OFFICER DODUC: Thank you, Mr. Jackson.
9 Friends of the River/Sierra Club California and Planning
10 and Conservation League, to be followed next by Friant
11 Water Authority.

12 MR. WRIGHT: Good morning. I'm Bob Wright and I
13 am representing in my remarks this morning Friends of the
14 River/Sierra Club California, and the Planning and
15 Conservation League. I'm going to compress my remarks
16 based on what's already been said.

17 First, with respect to the inadequacy of
18 information issue, that's really kind of an undeniable fact
19 because the EPA under its duties under the Clean Air Act is
20 determined that the Draft Environmental Water Fix documents
21 to date are inadequate, they gave them their inadequate
22 rating, but they also said that they expected that pending
23 actions by you, the State Water Resources Control Board,
24 will supply the missing pieces necessary to determine the
25 environmental impacts of the entire project. And that's

1 exactly what we're asking that you do, you do what the EPA
2 was counting on you doing and all of us are counting on you
3 doing is getting that missing information. And the way you
4 do that is in an Environmental Impact Report, be it a new
5 draft, a subsequent EIR, or the Final EIR. And that's what
6 we're asking that you're doing. Right now, what the
7 Petitioners are seeking is with respect to CEQA compliance,
8 not before, not now, not ever, that's not what CEQA is
9 about.

10 I only have two more points I wanted to address
11 after hearing what's already been said. The next point is
12 the prejudice here to the protesters. This Board knows a
13 fair amount about water quality, and this Board has had
14 some excellent comments in the past on the deficiencies in
15 the Water Fix documents. Here's what you have right now in
16 the record: although the documents do admit some
17 significant adverse environmental impacts on certain
18 things, with respect to Delta water supply, water quality,
19 and fish habitat, both the Executive Summary and the
20 Appendix at the back don't admit one single significant
21 adverse impact, with two exceptions. In the Appendix they
22 admit that it's a significant adverse environmental impact
23 that the tunnel operations would have on electrical
24 conductivity concentrations. That's admitted in the
25 Appendix. They also admit -- that's WQ11 -- at WQ32, they

1 admit significant adverse impacts in terms of the effects,
2 I'm not going to pronounce the word, I'm going to call it
3 blue/green algae, which I can pronounce, as being a
4 significant adverse impact. Those two are admitted to be
5 significant and adverse in the Appendix; that disappears.
6 Those two bits of truth in the 48,000 pages of
7 Environmental documents, disappear in the Executive
8 Summary. And so one thing I would request that the Board
9 do since you have the Petitioners here in front of you, is
10 when you turn back to the Petitioners, you might ask them,
11 I would request that you do ask them, which is it? Are
12 those two impacts significant like it says in your
13 Appendix? Or are they not?

14 HEARING OFFICER DODUC: You are again treading
15 into arguments territory. Please make your final point.

16 MR. WRIGHT: Yeah, well, but those seem to be
17 facts. The third thing is we've raised the issue of the
18 environmental documents, and this is procedural, that under
19 CEQA it's necessary for responsible agencies, not just lead
20 agencies, to develop and consider a range of reasonable
21 alternatives. That hasn't been done. And if you look at
22 the environmental documents, and we cited this in our
23 letter, the agencies dismiss the portfolio approach, that
24 portfolio-based approach submitted by NRDC several years
25 ago, saying that such things as water recycling and

1 conservation to improve water supply availability in areas
2 that use water diverted from the Delta are beyond the scope
3 of the BDCP. We all know those things are not beyond the
4 scope of the Delta Reform Act, they are not beyond the
5 scope of the State Water Resources Control Board,
6 compliance with CEQA's requirement to develop a range of
7 reasonable alternatives is not an option, it is mandatory,
8 we request that you comply with these things and have these
9 things done before commencing any part of the evidentiary
10 hearing. Thank you.

11 HEARING OFFICER DODUC: Thank you. Friant Water
12 Authority to be followed by representatives of Local
13 Agencies of the North Delta, et al.

14 MR. CASTER: Thank you. My name is Lauren Caster
15 appearing on behalf of the Friant Water Authority and its
16 participating members. Our comments are in writing, the
17 only point that I would like to make, in addition, is that
18 as was noted in the recirculated Draft EIR/EIS, Alternative
19 4(a) is tentatively selected and is subject to change, so
20 you're proposing -- the Board is proposing to proceed on it
21 with a hearing on what may or may not be the final selected
22 alternative. The parties, the Protestants are asked to
23 participate and object to and present evidence with respect
24 to an alternative that may or may not be selected. That
25 places the Protestants under a great difficulty and we

1 think it would be prudent to wait until the Petitioners
2 choose an alternative before we go forward with the
3 hearing. Thank you.

4 HEARING OFFICER DODUC: Thank you very much.
5 Local Agencies of the North Delta followed by the Pacific
6 Coast Federation of Fishermen's Associations and Institute
7 for Fishery Resources.

8 MS. MESERVE: Good morning and thank you for
9 hearing our comments this morning. My name is Osha Meserve
10 and I'm here on behalf of Local Agencies of the North
11 Delta, a coalition of about 118,000 acres of farmland in
12 the North Delta, as well as Bogle, Lang and Elliot Farming
13 Operations and Islands, Inc., as well. I did put comments
14 in writing and I'll just add a few things to what's already
15 been said.

16 It seems like the story we're hearing from the
17 Petitioners is that it would be most expedient for them to
18 be able to proceed with the other permits they would like
19 to also get if the Water Board could hurry up its process.
20 And while I can understand that position, it is creating a
21 great burden and prejudice unlawfully on the Protestants,
22 and those thousands of people and organizations and
23 environmental interests that would be injured by this
24 project. And so it's really turning the process on its
25 head.

1 And I would say, in particular, the definition --
2 before we even get to the CEQA issue, the definition of the
3 project itself is really maybe the most concerning, is, you
4 know, what is this project? How will it be operated? When
5 we look to what the Petitioners are saying, they're saying,
6 "Well, it'll be adaptively operated and we'll do it later
7 and we'll do a good job of that." We haven't seen evidence
8 that that's occurring here, so it's really that that's
9 occurred with respect to the existing facilities that are
10 operated by these same applicants.

11 So it's really not appropriate to look to the
12 future for something being better. What we need to do now
13 is go forward, and since they want the ability to divert
14 half the flow of the Sacramento River, we need them to put
15 forth a complete application and analysis.

16 Now, I understand that the CEQA adequacy is a
17 different question than the Water Rights issue here,
18 however, the Applicants have pointed basically only to the
19 CEQA documents as the evidence that there won't be injury,
20 and that's on pages 19 through 21 of their application. So
21 if they themselves are saying, "Look at the CEQA
22 documents," then we're saying, "Okay, we've been looking at
23 these 48,000 pages of documents for several years now and,
24 you know, there's very big flaws with them." So I'm not
25 here to argue a CEQA case with you, but the Applicants have

1 made the CEQA documents be the evidence that they're
2 relying on. And so now we're hearing from the Water Board,
3 "Our deadline is March 1st to put forth our entire case
4 about how our Water Rights have been injured." We can't do
5 that because we don't have a complete description of what
6 the project is and what the impacts, as at least the
7 Applicants see them, in order to make that analysis.

8 And then I don't think it was mentioned here, but
9 at the Delta Protection Commission Meeting last week, DWR
10 reported, or others reported, that this Final EIR might
11 come out in June. So why would we be forced to try to show
12 the injury, you know, we don't have \$250 million to spend
13 on modeling the project that we don't even really know what
14 they want to do. So there's a really big unfairness and
15 prejudice issue which, you know, may lend itself to a legal
16 issue later, but it's about having the process that you're
17 talking about in terms of it being fair and reasonable.
18 And we just don't think that that can happen.

19 Another important thing is that the modeling that
20 has been put forth so far is for 15 years into the future.
21 Obviously if this facility is permitted and built, it will
22 be there for who knows how -- I mean, as long as it can
23 operate. These other pumps were put in over 50 or more
24 years ago, right?

25 So we would need, in order to look at injury, in

1 addition, it hasn't been mentioned, the timeframe; it's
2 important that we would see the long range, and it's really
3 the burden of the Petitioners to show that there's no
4 injury to legal users of water, and then we can respond to
5 that as Protestants. And with the 48,000 pages of
6 documents, I would also point out that we've been pointed
7 to, most of that is spent looking at other alternatives and
8 they've come up with a completely different alternative
9 now.

10 So, you know, again not a CEQA case here, but
11 this is what we're being allowed to look at. And then with
12 the Water Quality Control Plan timing, I think again the
13 record shows that these particular Applicants have not been
14 able to operate their project in compliance with these
15 plans. So some kind of agreement, you're hearing today
16 that, "Oh, yeah, whatever that comes up with, we'll comply
17 with it," we just don't think that's reasonable and it's
18 not common sense. So while certainly the Applicants are
19 entitled to have their Water Rights Petition heard, they
20 need to present a complete application, and they need to
21 have the evidence supporting it. And if it's not the EIR,
22 then they should present what that evidence is. And then,
23 when they have presented that evidence, then we will be
24 ready and we're, you know, participating and ready to show
25 what the injury is if there is, in fact, injury. Thank

1 you.

2 HEARING OFFICER DODUC: Thank you very much.
3 Pacific Coast Federation representatives followed by Mr.
4 Patrick Porgans.

5 MR. VOLKER: Good morning, Madam Chairman. My
6 name is Stephan Volker. I'm here on behalf of the Pacific
7 Coast Federation of Fishermen's Associations and the
8 Institute for Fisheries Resources. PCFFA represents 750
9 commercial sportsmen and sports fishermen whose livelihood
10 hangs by a thread because of this Board's failure to follow
11 the law for over 30 years. You may recall, those of you
12 who have been involved with this for the last several
13 decades that in 1995 this Board adopted a Water Quality
14 Control Plan that purported to assure the doubling of
15 Salmon populations; that has not happened. To the
16 contrary, Salmon have continued their perilous decline to
17 near extinction. Several Salmon species have been listed
18 under the Federal Endangered Species Act on this Board's
19 watch. I won't detail the specifics, but in addition, many
20 local fisheries have declined sharply because the 1995 Bay
21 Delta Water Quality Plan did not do its job. Under Water
22 Code 13050(j), as you know, a Water Quality Control Plan
23 must have three components: it must identify beneficial
24 uses to be protected, it must identify water quality
25 objectives sufficient to assure their protection, and

1 finally it must adopt a program of implementation to
2 achieve those objectives. None of those things have been
3 done.

4 The Federal Clean Water Act is the basic
5 authority allowing this Board to independently regulate
6 water quality in the State. Under Section 303(c) of that
7 Federal Statute, EPA has the duty every three years to
8 review the adequacy of this Board's Water Quality Plan for
9 the Bay Delta. In 1993 --

10 HEARING OFFICER DODUC: Thank you for that
11 background information, but -- which is useful, but I will
12 ask you to link it now to the hearing on the issue before
13 us.

14 MR. VOLKER: The issue before you was whether you
15 can proceed to make water rights allocation decisions in
16 the absence of an adequate Water Quality Control Plan. The
17 answer is absolutely you cannot do that.

18 The same answer obtains under all the other
19 statutory schemes that apply. For example, under CEQA,
20 under Guideline Section 15050 and 15096, the entire
21 section, this Board cannot proceed to approve or even to
22 consider this project absent having an adequate Final EIR,
23 which is based on an adequate review. As you know, both
24 EPA and the Delta Independent Science Board have both
25 concluded that the Draft EIR in which this Board purports

1 to now take action are inadequate and that this Board needs
2 to comply with CEQA first before proceeding with further
3 consideration of this project. The same is true under the
4 Endangered Species Act, both State and Federal. We have a
5 number of species now listed because of the declining water
6 quality in the Bay Delta. The only way to address that is
7 through the Biological Opinion process, which has not been
8 completed, and must be completed in order that this Board
9 has in front of it the identification of the reasonable and
10 prudent alternatives which would protect species whose
11 absolute protection is required under State and Federal
12 law.

13 The bottom line here is that the Petitioners have
14 asked this Board to place the Water Rights Allocation cart
15 before the Water Quality Protection horse, that's unlawful
16 under all applicable laws as we've pointed out in both our
17 comment letter on the Draft EIR and in our submissions to
18 this Board with respect to the so-called Water Fix
19 adjudicatory proceeding.

20 In summing up, I would urge this Board to take a
21 step back from the cliff that you're about to step over.
22 The most fundamental principle of CEQA is look before you
23 leap. The Petitioners have asked you to leap before you
24 look, and have basically said "let's get this Water Rights
25 Allocation car on the road because we can fire up the

1 engine," i.e., they can do the engineering, get the tunnels
2 built, and away we go. They're failing to advise this
3 Board that you have to have the environmental steering and
4 the environmental brakes in place before you dare put that
5 car on the road. So I urge you to just stop right now,
6 take a step back, follow the law; your lawyers can tell you
7 what it is. Thank you.

8 HEARING OFFICER DODUC: Thank you. Mr. Porgans,
9 to be followed by Restore the Delta and EJ Coalition for
10 Water and Environmental Water Caucus Party.

11 MR. PORGANS: Good morning, Chair, members of the
12 Board. My name is Patrick Porgans, I'm with Porgans and
13 Associates, and I'm representing Planetary Solutionaries
14 here today. I'm a de facto public trustee. I mean, I'm
15 here because you're not doing your job, DWR is not doing
16 their job, the Bureau is not doing their job. Now, I have
17 40 years in this, I'm concerned about the tenor of the
18 discussion that we have here before us. We're being put in
19 the defensive position to try to justify this so-called
20 California Water Fix. Let's get it straight: this is not a
21 California Water Fix, this is a State Water Project Fix,
22 that's what we're talking about here. And if they took the
23 comments into consideration that I submitted, and of course
24 you know I've been here for 40 years, and I've been
25 involved in every Water Rights decision that's been made on

1 those projects, so I know what I'm talking about, and I'm
2 speaking from the record; if you proceed in the manner that
3 you're proceeding, you are going to create chaos that you
4 can't even imagine. This is the Delta. Procedurally, we
5 don't need to expedite anything, they've been working on
6 that for 50 years. This last minute change in that report
7 that they submitted going over to the Fix as opposed to the
8 Delta Plan, that by itself was egregious.

9 I'm saying to you today that I support what
10 Antioch said, and I'm putting myself out on a limb, what
11 Mr. Wright said with the Friends of the Earth because, you
12 know, I'm not affiliated with Environmentalists; I'm saying
13 to you today that based on what I've witnessed, and you've
14 got to give me a minute here because I'm real upset, based
15 on what I witnessed, I'm letting you know that the
16 proceedings are not required to be expedited, we need to
17 have all the pieces in place before we move forward because
18 you're going to be in a reactive position. You're going to
19 be reacting to whatever it is that comes out as it comes
20 out. And if we look at the past history, the record which
21 is contained down there in your second floor, all my
22 protests over the years on these Water Rights issues,
23 you'll know that the assurances that the DWR and the Bureau
24 have provided in the past are full of a litany of broken
25 promises.

1 So I suggest respectfully that this Board,
2 because I'm going to tell you now, if you don't make some
3 changes here, I'm stating publicly that I will not receive
4 a fair hearing from this Board. You gave up your autonomy
5 back in 1992 when you aborted D1630 by that former Governor
6 Wilson's, you know, whatever -- influence. So I'm saying
7 to you I respectfully suggest think this one out, okay?
8 This is the Delta. This belongs to all of us. This isn't
9 DWR's Delta; it only represents five percent of the water
10 for the state. It's an insignificant project. You've got
11 to start realizing. Oh, thank you so much.

12 HEARING OFFICER DODUC: Thank you, Mr. Porgans.
13 And on a personal note, thank you for including in your
14 written letters, your comments are referenced to Draft
15 Decision 1630, you know very well my history on that issue.

16 Restore the Delta, EJ Coalition for Water, and
17 Environmental Water Caucus. Is there a representative who
18 wishes to speak? And followed by South Delta Water Agency,
19 et al.

20 MS. BARRIGAN-PARILLA: Good morning. Barbara
21 Barrigan-Parilla with Restore the Delta. The Delta Water
22 Quality Plan Update will determine flows for the project,
23 therefore, if you allow permitting of the project before an
24 updated Water Quality Control Plan, the pressure on this
25 Board from water exporters to fill this new Water Right,

1 and subsequently the project with water will be relentless.

2 The Board and subsequent Boards will not be in a
3 position to allow the tunnels to become a \$17 billion asset
4 without water, a stranded asset. This places Delta Water
5 Rights holders in a position of ongoing and unending injury
6 and does not serve the public interest. Consequently, the
7 co-equal goals under the Delta Reform Act of protecting the
8 Delta as a place then cannot be met, so procedurally we
9 have the cart before the horse if we allow the permitting
10 process to go forward. Thank you.

11 HEARING OFFICER DODUC: Thank you.

12 MR. STROSHANE: I'm going to cede the rest of her
13 time to me. I'm Tim Stroshane with Restore the Delta. I'm
14 also speaking on behalf of the Environmental Water Caucus
15 today. I wanted to pick up -- first of all, I wanted to
16 say I agree with many of the preceding speakers,
17 particularly Friends of the River and CSPA, et al., and
18 PCFFA, and Mr. Volker.

19 The thing I wanted to pick up on is Board Member
20 Doduc's mention of the two processes, the Water Quality
21 Control Plan and this Petition-related process being very
22 different separate animals. And we understand that, as
23 well, but I want to point out that if you are doing flow
24 criteria that you would need to do anyway for a Water
25 Quality Control Plan, it serves the public better to do it

1 in the context of a Water Quality Control Plan and not in
2 the context of a Water Rights adjudicative proceeding
3 because we're concerned that, because of the ex parte rules
4 that you described earlier, that if you conduct the two
5 types of proceedings simultaneously, and we intend to
6 participate in the Water Quality Control Plan proceeding to
7 the utmost, if we can, it sounds to me like we would be
8 unable to speak about the tunnels, it would be a project
9 that could not be named as we discussed it in the context
10 of flow criteria for the Water Quality Control Plan.

11 So it's for that reason that in our letter we
12 urge that you suspend the petition process, suspend the
13 proceeding so that speech can occur, free speech about
14 everything related to the Water Quality Control Plan can be
15 conducted in an open and fair Water Quality Control Plan
16 legislative-type of proceeding.

17 So that's our concern and I thank you for the
18 opportunity to comment.

19 HEARING OFFICER DODUC: Thank you, Mr. Stroshane.
20 I think you just gave me the quote of the day so far, the
21 project that must not be named. Mr. Bailey, I guess you're
22 going to use up the remaining time, I guess if there's any
23 remaining time for this party.

24 MR. BAILEY: Yeah. With respect -- Colin Bailey
25 on behalf of the Environmental Justice Coalition for Water,

1 or EJCW. I believe we do stand separately and alone on
2 this point, and I may not take up the five minutes, but I
3 do wish to speak to the issue.

4 We concur with all the statements preceding us,
5 with the exception of Mike Jackson quitting and waiting for
6 the crash. The equity point that I would like to raise
7 here in the context of the sequence is that if we were to
8 proceed as proposed by the proponents, it places a
9 considerable burden, especially on low resource groups like
10 ours to participate fully because it would either require
11 that we argue about injury and impacts without certainty,
12 or with our own science which is very challenging for us to
13 do, or show that the record can't preclude the injury to
14 which we are speaking. And this comes from a bit of
15 experience, having been lead counsel in a Public Utilities
16 Commission proceeding where they did inverse the sequence.
17 We were required in that proceeding, then, to submit
18 testimony in the conditional; in other words, if this were
19 to be the impact, then the following impacts to our client
20 would come down. And it led to an extraordinarily tortured
21 analysis and we were subject to motions to strike whenever
22 we ventured into too concrete a territory. So in effect we
23 were required to put on an evidentiary proceeding twice,
24 and that was just an extraordinary burden in that instance
25 and it would be so here. And I would just point, I would

1 want to check the transcript from earlier, but I did hear
2 what sounded to me like a concession, if not an admission
3 from counsel for DWR, it was a rather oblique reference,
4 but it was something to the nature of we agree that there
5 would need to be additional analysis of impacts in the CEQA
6 review process for, I think the phrase was something like
7 "uncommon water rights user assertions." I can only assume
8 that that was kind of an oblique reference to some of the
9 issues that the Environmental Justice Coalition for water
10 has put forward, and I would point the Board's attention to
11 that part of the transcript to see if that is, in fact, the
12 case. Thank you.

13 HEARING OFFICER DODUC: Thank you, Mr. Bailey.
14 And actually I do stand corrected, you did submit a
15 separate letter on behalf of the Environmental Justice
16 Coalition for Water.

17 Mr. Herrick, then followed by Solano County.

18 MR. HERRICK: Thank you. I'm Erin Brockovich and
19 I'm glad to be in front of the Flint City Council! I just
20 thought I'd liven it up a little.

21 HEARING OFFICER DODUC: Have you been to the wine
22 convention already, Mr. Herrick?

23 MR. HERRICK: I'm a teetotaler. Anyway, John
24 Herrick for South Delta and other parties. I think we can
25 agree that, you know, words have meaning, the rules of

1 logic and reasoning don't change, and we have to be honest
2 to say that the presentation by the Petitioners today does
3 not provide any justifiable reason for expediting the
4 process. There were lots of statements made that it would
5 be helpful we are doing these other things, we think we can
6 get this done, but there's no reason to do this on an
7 expedited process.

8 I agree with all the "anti" speakers so far. Let
9 me see if I can bring that in a little bit of practical
10 application here so you understand our concerns. We have
11 to submit our original testimony by, I don't know, it was
12 March 1st. The problem with that is we are relying on our
13 ability to analyze what somebody has already analyzed
14 supposedly; while the preferred alternative in the new
15 document is 4(a), 4(a) has no modeling associated with it.
16 The Bureau and DWR took the modeling for 4 from the prior
17 document, placed it in the new document, and then labeled
18 it 4(a). So there's no analysis of the impacts of the
19 preferred alternative.

20 Now, you might hear somebody later today from the
21 Petitioner's side say, "Oh, that's not true, and we will
22 clear that up as soon as we get people under oath, whether
23 it's through a deposition or in testimony," but that's what
24 happened.

25 Secondly, as you know, we really don't know the

1 operating procedures for the projects, so we don't know the
2 impacts that will result from that. Now, anybody who reads
3 the comprehensively written, let's say, two documents
4 totaling whatever tens of thousands of pages that was, you
5 cannot go away from that and say, "Well, they admit and
6 show adverse impacts to fisheries, the water quality in the
7 Delta, and everybody else." So the starting point for our
8 testimony is, well, they've already told us that they're
9 going to harm us.

10 Now, you're also considering Phase II of the Bay
11 Delta Water Rights Decision and going to develop some sort
12 of, I think, if this is the right word, interim flows to
13 put in there, to put in their petition as a condition.
14 Nobody knows what those flows are now, so nobody knows what
15 the analysis of those flows is on other parties, so nobody
16 knows what to say about whether or not that's going to harm
17 somebody.

18 Now, we also don't know how the Bureau and DWR
19 will operate under those new flows that are going to be
20 developed sometime in the middle of the hearing, and so we
21 don't know the impacts resulting from the operation to meet
22 those flows. So I just want to impress upon you that it's
23 impossible for anybody, much less somebody with money,
24 which is not our agency, to prepare comments on the harm
25 when there isn't any analysis of how they will be

1 operating.

2 Now, I'm going to agree specifically with Mr.
3 Volker; the notion that you would have a portion of the Bay
4 Delta Water Quality Development activities, the quasi-
5 legislative, somehow partially in the middle of your quasi-
6 adjudicative thing I think is not only legally wrong as he
7 stated, but isn't that what Racanelli (ph) was about?
8 Don't put the two together. Now, I know you're not going
9 to make the final decisions on the Water Quality Control
10 Plan, but you're combining those processes, I don't even
11 know how to address that. I mean, when does that come in?
12 And how do I present evidence for Phase I when Phase II is
13 developing flow criteria which changes the operations,
14 which affects the impacts of the project?

15 So the practical side of it, I hope you
16 understand, is you've created a process right now that's
17 impossible for people like me to present valid evidence, or
18 effective evidence.

19 Now, there are all sorts of other procedural
20 issues I think you'll get to later, or under the
21 timeliness, I don't want to go too far ahead of that, but I
22 just want to remind you this is a fundamental change in the
23 Delta system and, as I said in my notes, we're going to be
24 trying to do depositions and everything, so to find out and
25 show you that the modeling doesn't show us what the impacts

1 are, and blah, blah, blah. You know? How many parties are
2 there? Two hundred or something? I don't know. The
3 notion that we could prepare for a hearing in a couple
4 months with all the unknowns is impossible. Now, that's
5 not me saying "I want to delay this," but I have to be able
6 to do the right job, or the correct job, or adequate job,
7 and there's just no way to do that in this short timeframe.

8 So with that said, again, I agree with I think
9 everything that the "anti" parties before me said. And
10 thank you very much for the opportunity.

11 HEARING OFFICER DODUC: Thank you, Mr. Herrick.
12 Solano County followed by the Sacramento Valley Water
13 Users, who I think is being represented by Mr. O'Brien.

14 MR. MILJANICH: Okay, good morning, Chair,
15 members of the Board, and others. Peter Miljanich, I'm a
16 Deputy County Counsel with the County of Solano, and we'll
17 almost exclusively stand on our written comments and the
18 comments of others who are opposed to this request to
19 expedite the process.

20 I'll just reiterate that, from the County's
21 position, we believe that the integrity and the
22 transparency of the Board's decision on these weighty
23 issues are paramount and should not be sacrificed in the
24 interests of efficiency; although considerations of
25 efficiency are important, they don't justify moving forward

1 in the way proposed by the Petitioners in light of the sort
2 of state of the record and the information available to the
3 Protestants and other parties at this time. Thank you.

4 HEARING OFFICER DODUC: Thank you very much.
5 Sacramento Valley Water Users followed by the Bay
6 Institute, NRDC, Golden Gate Association, Defenders of
7 Wildlife, and Friends of the San Francisco Estuary, who all
8 submitted a joint letter.

9 MR. O'BRIEN: Good morning. Kevin O'Brien for
10 the Sacramento Valley Water Users. Mr. Lilly will also be
11 making some comments. We submitted a letter, as you know,
12 that was both on behalf of BSVWU and joined by a number of
13 other parties.

14 In the letter, we did make the request that the
15 Board continue the hearing and the various deadlines until
16 after the Final EIR/EIS was completed, and potentially
17 until after the Biological Opinions were issued.

18 Having listened to the discussion this morning,
19 we'd like to propose an alternative approach that I think
20 might address at least some of the concerns you've heard
21 this morning. And Mr. Herrick addressed this issue, which
22 is also a concern to us, and it really flows from the fact
23 that we have a simultaneous deadline for the submission of
24 direct testimony.

25 We as the Protestants, our job in this hearing is

1 to listen to the testimony presented by the Petitioners and
2 if we believe there's injury that will be suffered as a
3 result of the project as described by the Petitioners, to
4 then put on our own evidence as to the nature and extent of
5 that injury. And we'll be doing that to a large extent
6 through modeling testimony.

7 The problem we have though here, and a number of
8 speakers have alluded to this, is we don't know how this
9 project will be operated at this point. And we also don't
10 know what additional features of the project might be added
11 through the CEQA process in terms of mitigation measures,
12 potentially in terms of additional facilities, we also
13 don't know what additional modeling has been done for the
14 project, although we do know that additional modeling has
15 been done because the draft Biological Assessment makes
16 that clear.

17 So from the standpoint of a Protestant, it's very
18 difficult at this point, and I think you've heard this from
19 a lot of folks, to present something on March 1st that is
20 really based on a full understanding of what this project
21 is. That's the problem.

22 So the proposal we'd like to make is to stagger
23 the deadlines for submission of testimony so that the
24 project proponents, DWR and the Bureau and other project
25 proponents, submit their testimony by March 1st, and we can

1 then commence the hearing at some point thereafter, perhaps
2 on a current schedule, but that the other parties, the
3 Protestants, have additional time after the EIR/EIS is
4 finalized, before they have to actually submit their
5 testimony. It's a phasing concept, I think it makes
6 rationale sense, I think it adds to the fairness of the
7 hearing process, and I submit it for your consideration.
8 Thank you. And I'll let Mr. Lilly address some other
9 issues.

10 HEARING OFFICER DODUC: Thank you, Mr. O'Brien.
11 Mr. Lilly?

12 MR. LILLY: Good morning, Chair, or Ms. Doduc and
13 Members of the Board. My name is Alan Lilly and I
14 represent Cities of Folsom and Roseville, Sacramento
15 Suburban Water District, San Juan Water District, and Yuba
16 County Water Agency, which are members of the Sac Valley
17 Water Users.

18 I certainly agree with what Mr. O'Brien and,
19 frankly, many of the other speakers have said about the
20 problem is we don't know what the project is, we don't know
21 critical details. And I just want to point out, this is
22 not just kind of an abstract concern, the fundamental
23 problem is the Petition did not comply with the State
24 Board's Regulation. And we did raise this issue in our
25 Protest. There is a Regulation 794 which I'll just read

1 it, it basically says what must be in a Petition, and
2 number one is basically the historical amounts of water
3 that have been diverted, consumptively used or stored under
4 the Water Right, and then number two is the amounts of
5 water proposed for transfer or exchange, number six is when
6 stored water is involved, which certainly is involved here,
7 if the stream flow regime will be changed, which it
8 certainly will, the existing and proposed diversion release
9 and return flow schedules. And then number nine, near and
10 dear to all of our clients, information identifying any
11 effects of the proposed changes on other known users of
12 water, including identification in quantitative terms, of
13 any projected changes in water quantity/water quality,
14 timing of diversion or use, consumptive use, reduction
15 return flows, etc.

16 So the problem we have here is that the Petition,
17 which was 30 pages long and certainly did not go into any
18 of this detail, didn't comply with the Regulation. If we'd
19 had that information back last July, then as Mr. O'Brien
20 said we could be doing our analysis and we'd be prepared to
21 submit that.

22 Now it appears, based on the comments this
23 morning from DWR and Reclamation, that we're going to get
24 some of this information on March 1st. They have asked for
25 13 hours to summarize their exhibits and testimony. That

1 certainly makes me think there is going to be a lot of
2 detail in their exhibits and testimony if it's going to
3 take 13 hours to provide a summary. And hopefully there
4 will be, hopefully they will basically cure the problems
5 and the deficiencies in their Petition. And then we will
6 have an opportunity to do our analysis, but obviously it
7 will take some time.

8 So I wholeheartedly support Mr. O'Brien's
9 suggestion that you split Part I of this proposed hearing
10 into a Part 1A and Part 1B, and certainly the Board did
11 that back in the D-1641 proceedings. Part 1A with a March
12 1 deadline and the April 7th start date would be for the
13 Petitioners and parties that support the Petitioners to
14 present their exhibits and testimony. We will have our
15 technical people working hard starting on March 2nd, or
16 actually whenever we get it on March 1st, to do the
17 analysis and to prepare the response. But obviously we
18 can't submit that information on March 1st if we don't get
19 it until March 1st.

20 The alternative would be for us to provide this
21 all in rebuttal, but frankly that really would make for a
22 much less efficient process and more time consuming process
23 for this Board. So we think splitting into Parts 1A and 1B
24 really will be most efficient and most fair for the
25 parties.

1 The other comment, I did want to comment on the
2 401 Certification process because Ms. Doduc has raised that
3 question, which is very important as well. We don't know
4 how detailed or how many different issues the 401 Cert is
5 going to cover, probably nobody knows at this point. But
6 typically, we certainly know from the FERC relicensing
7 experience that 401 Certifications can and often do cover
8 minimum flow issues and related issues regarding project
9 operations, which for this project could include operations
10 throughout the Central Valley and, most significantly,
11 would significantly overlap with the Water Right hearing
12 process that we're starting today.

13 So I think, I just don't see how you can have
14 your staff go on a parallel process to prepare a 401 Cert
15 for these flow and water quality issues that the Board is
16 also going to consider in this process. And I certainly
17 don't see how you could have your staff issue a Final 401
18 Cert before this Board issues its Water Quality Decision.
19 There's just too much overlap and, of course, the Board has
20 to be the final decision maker at the Administrative level.

21 So I think it's very important, and we did put
22 this comment in the Sac Valley Water Users' comments, we
23 cite the Regulations, the Board certainly has the authority
24 to do 401 Cert processes by itself, you know, itself rather
25 than through staff when appropriate, and certainly here

1 that makes sense to fold that into the Water Right process
2 since there's so much overlap. So thank you very much.
3 Right on time.

4 HEARING OFFICER DODUC: Perfect, thank you. I do
5 want to hear from Mr. Obegi and other speakers, but sort of
6 a heads up to the Petitioners, after we hear from any other
7 speakers, I will circle back to you and among the things
8 that I will be asking you to comment on is this proposal
9 with respect to a staggered process.

10 So with that, Ms. Lennihan. Quickly, please.

11 MS. LENNIHAN: Thank you. I will be very quick.
12 I'm Martha Lennihan on behalf of the City of Sacramento.
13 And I just wanted to say that the members of the Sac Valley
14 Water Users Group who are here want to endorse the comments
15 of Mr. O'Brien and Mr. Lilly, and thank you for your
16 consideration of our procedural proposal.

17 HEARING OFFICER DODUC: Thank you for making the
18 proposal.

19 All right, Mr. Obegi, I assume you're
20 representing Bay Institute, NRDC, Golden Gate Association,
21 et al.

22 MR. OBEGI: Good morning, thank you. We did
23 submit written comments back last year on behalf of those
24 five parties, as well as raised several procedural issues
25 in our Protest and filing that was served earlier this year

1 on behalf of Defenders of Wildlife, NRDC, and the Bay
2 Institute.

3 I want to focus primarily on two issues, the
4 Water Quality Control Plan Update and CEQA issues. First,
5 on the Water Quality Control Plan Update, just to reiterate
6 what we said in our letter, it's that the Board should not,
7 cannot take its final action on this permitting decision
8 before reaching a final decision on the Water Quality
9 Control Plan Update. That's not to say that they cannot be
10 proceeding in parallel, but ultimately we know that the
11 existing Water Quality Standards are inadequate to protect
12 the public trust and to meet designated beneficial uses,
13 and there is a requirement to do so. And the Board's
14 consideration of what constitutes unreasonable impacts to
15 fish and wildlife cannot be limited to Decision 1641, but
16 really implicates the Board's obligations under the public
17 trust and reasonable use doctrine, and the Board's prior
18 decisions make that abundantly clear, as we highlight in
19 our letter.

20 Secondly, I have a real question for the Board on
21 what is the scope of the appropriate flow criteria under
22 the Delta Reform Act, and I think this is an issue that may
23 require briefing by the parties. As you know, under
24 Decision 1641, the Bureau and Reclamation are obligated to
25 meet all the Delta Flow criteria under D-1641. When the

1 Board is considering what our appropriate flow criteria, in
2 conjunction with this change in point of diversion, I think
3 you will wrestle with the question which is ultimately why
4 we think the Water Quality Control Plan should go first,
5 which is namely are those appropriate flow criteria, only
6 those flows that are the obligation of the two projects
7 with additional flows necessary to protect beneficial uses
8 coming from other sources? Or is that the scope of all of
9 the flows that are necessary to protect fish and wildlife
10 from unreasonable injury, and then assignment of
11 responsibility would come at a separate date. And I think
12 that is an important legal question that you're going to
13 have to wrestle with and ultimately why we think that the
14 Board should be focused on updating the Water Quality
15 Control Plan, both Part II and Part III, to wrestle with
16 those issues.

17 CHAIR MARCUS: Can I just ask a quick question?
18 So are you saying that we can't in a Water Rights
19 proceeding put conditions, say flow conditions, in this
20 case the Delta Reform Act specifically tells us to consider
21 flow criteria, but obviously we do that anyway in a Water
22 Rights proceeding because we're trying to figure that out,
23 but are you not saying that we can't do that not only
24 before we have finalized the Update to the Water Quality
25 Control Plan, that everything depends on that full process

1 before we can do that? Or, too, what I just heard you say,
2 is that we can't even do it in any interim or any way until
3 we've done full Part III allocation of that Water Quality
4 Control Plan?

5 MR. OBEGI: I don't think that's what we intend.
6 What we have said is that we believe you have to complete
7 the Update of the Water Quality Control Plan Phase II prior
8 to making a decision on this Water Rights Petition. And
9 that's been what the Board has said previously, as well as
10 some of the language from the Delta Reform Act and
11 elsewhere, and that's in our written comments.

12 Secondly is this separate question about what
13 constitutes appropriate flow criteria, and that is a
14 question that I don't think has been addressed yet, and it
15 really goes to the scope of what are those conditions: are
16 these just the appropriate flow criteria if -- sorry -- the
17 conditions on the Water Rights of these two projects,
18 assuming that outflow and other needs may be met from other
19 parties in the watershed? Or is this, as is the case with
20 Decision 1641, looking at the fact that these two parties,
21 the two Petitioners, are responsible for meeting all flow
22 obligations in the Delta currently? Does that make more
23 sense?

24 MS. D'ADAMO: Well, if I understand you
25 correctly, you're saying that if others would be assigned

1 responsibility, then we'd have to have the completion of
2 the Water Quality Control Plan in order to do that.

3 MR. OBEGI: Possibly. I think these are very
4 complicated legal issues that the Board needs to wrestle
5 with before really proceeding down into the scope of
6 particularly Part II, which is really, since we are only
7 parties to Part II, is the primary focus for us.

8 If I may turn now to the CEQA issues, a couple
9 thoughts, one, as we've noted in our comments we believe
10 that we need at least 90 days upon completion of the CEQA
11 and ESA process to be able to formulate our testimony, to
12 have time to review that; we believe there will be
13 substantial changes based on what's been presented to date
14 in the CEQA analysis. And as the prior speaker said, we
15 believe that a sequenced hearing testimony schedule is
16 appropriate not just for Part I, but for Part II, because
17 it really does go to the heart of additional information,
18 as Mr. Bogdan indicated will be provided in the testimony
19 that goes beyond the scope of what's in writing in the CEQA
20 document. (Timer sounds)

21 HEARING OFFICER DODUC: Go ahead and take a few
22 more minutes since we interrupted you with questions.

23 MR. OBEGI: Thank you; I appreciate that.
24 Secondly, the Board had requested additional modeling
25 analysis in the CEQA document. Where there's a typo in our

1 Protest, we refer to Appendix "B", it's actually Appendix
2 "C." The modeling in Appendix C was never analyzed under
3 CEQA and, to the extent the Board wants to use that
4 modeling to look at potential significant impacts, we need
5 to have that document recirculated and revised, and that
6 analysis done, and I think that is important to do before
7 we get to the stage.

8 You know, I am very sympathetic to the parties in
9 Part I who are caught in this conundrum of the possibility
10 of the project changes, and some of the modeling and
11 analysis changes, and that's true both from changes between
12 the draft and final, as well as potential conditions that
13 you may, this Board may impose as a result of Part II. As
14 I've read the Biological Assessment, the Draft Biological
15 Assessment, there are already major changes to what is
16 proposed in the CEQA document. And I'll list three of them
17 for you now. One is that the proponents proposed to not do
18 a Section 7 consultation on upstream operations and the
19 effects of climate change on reservoir storage. That's a
20 major difference, particularly since the project shows that
21 there are significant and unavoidable impacts under the No-
22 Action Alternative from upstream conditions for Winter-run
23 Chinook Salmon. Secondly, the project proposes that it
24 would meet its spring outflow requirements through
25 voluntary acquisitions from other parties and that it would

1 not affect reservoir operations. That seems unlikely to
2 occur and it's not clear that they actually would be able
3 to meet the outflow requirements in the permits solely
4 through conditional speculative water transfers.

5 HEARING OFFICER DODUC: You are turning into
6 argument territory.

7 MR. OBEGI: Sorry. The third one, very briefly,
8 is that the Biological Assessment states that after one dry
9 or critically dry year, the projects would be submitting a
10 temporary urgency change and would be proposing to operate
11 differently than the analysis that's in the CEQA NEPA
12 document, and that I think undermines all of our ability to
13 analyze and use the CEQA document as the analysis of
14 potential impacts.

15 HEARING OFFICER DODUC: Thank you.

16 MR. OBEGI: Thank you.

17 HEARING OFFICER DODUC: Actually, do you have any
18 comments on the 401 Certification?

19 MR. OBEGI: We do not.

20 HEARING OFFICER DODUC: Ms. D'Adamo.

21 MS. D'ADAMO: Yes. It sounds like you would
22 concur with the previous speakers that are suggesting
23 staging, but perhaps also with respect to Part II.

24 MR. OBEGI: Absolutely.

25 MS. D'ADAMO: Do you have any recommended

1 timelines?

2 MR. OBEGI: We requested 90 days after the CEQA
3 NEPA and ESA documents. I think that if they are going to
4 be submitting their testimony at the same time, we would
5 request that amount of time because, you know, we're
6 looking at tens of thousands of pages of documents and,
7 given that they're proposing 13 hours of testimony in Part
8 I, we expect there will be very weighty issues to deal with
9 in Part II.

10 HEARING OFFICER DODUC: Thank you. And for the
11 record, just because they request 13 hours does not mean
12 they will get 13 hours.

13 Let's do a time check. I know I promised you a
14 morning break, but we're on a roll, and so if my colleagues
15 concur -- actually, what I would propose is, that actually
16 completes the list of pre-identified speakers based on the
17 comment letters that were submitted. I want to see a show
18 of hands, are there any other speakers who wish to speak
19 and voice concerns with the current proposed timing and
20 proceeding? I'm seeing six hands, so let's take a short
21 five-minute break, and then we will reconvene with that.
22 And when I say five minutes, people, I mean five minutes.

23 (Break at 11:12 a.m.)

24 (Reconvene at 11:18 a.m.)

25 HEARING OFFICER DODUC: Before the break, I

1 noticed, I believe it was five or six hands in terms of
2 people who would want to add to the concerns with respect
3 to the proposed timing and the proposed process that has
4 been requested by the Petitioners and proposed by staff.
5 Please come up to the podium.

6 All right, come up, please again be as brief as
7 possible, state your concurrence, provide any new
8 information you would like us to consider, but please do
9 not repeat previous statements.

10 MS. DES JARDINS: Thank you. My name is Deirdre
11 Des Jardins. I'm with California Water Research. I have
12 an extensive background in computer modeling and scientific
13 research at Los Alamos Labs and Ames Research Center.

14 My concern in this proceeding is about the
15 computer models and the selected data from the computer
16 models that has been presented by the State.

17 I wanted to concur with the proposal to segment
18 the proceedings, in particular the selected information
19 disclosed by the State is not adequate for anybody to
20 review or validate the models that are being used to
21 support the case, and I wanted to ask that the Board not
22 only segment it, but ask that the State make available on a
23 server the entire model runs, all of the modeling data, all
24 of the input data, so that people can look at it.

25 The second thing is with respect to the Delta

1 Reform Act, it provided for funding for analysis of the
2 flows criteria, be paid for by the Petitioners, and it's
3 essential that there be an independent review of these
4 models. I believe in the Reform Act it's under the Flow
5 Proceeding, and so I would concur with Mr. Obegi's
6 assertion that Phase II needs to be completed, and not only
7 that Phase II needs to be completed, but that the Board
8 should ask for funding to commission an adequate
9 independent review of these models, as was done about a
10 decade ago for CalSim-II, but there have been many
11 substantial changes that I saw since that time and other
12 modeling presented by the State.

13 It needs to be accurate for a Water Rights
14 Hearing. There's different requirements. CEQA doesn't
15 really have requirements, but the 794 requirements that
16 were referred to, these models need to be accurate with
17 respect to those criteria for the Petition. And I think in
18 the interest of efficiency, it would be bad if the hearing
19 proceeded and information came out that the models weren't
20 accurate, or adequate information wasn't disclosed because
21 then all 200 parties would have to restart.

22 HEARING OFFICER DODUC: Thank you.

23 MS. WOMACK: Good morning. My name is Suzanne
24 Womack and I'm normally teaching in a second grade
25 classroom right now, so I'm out of my element and I

1 apologize, but the reason I'm here is I'm here with my
2 father. We own what remains of Clifton Court. There used
3 to be 3,000 acres, we have 635 acres left. And we're very
4 concerned that we can't get a straight answer. As far as
5 the timing, 4A? We've tried to figure out, apparently
6 they're going to take 550 acres, "Oh, but don't tell us
7 that, we're not sure." We're not sure how our injuries are
8 going to be. We bought our land in 1961, our families had
9 it for that long. Had we known this, all the problems,
10 we've been involved in the original state, the peripheral
11 canal, oh, gosh, the names change all the time, but the
12 thing is always the same. We've been injured for 50 years.
13 The State has been a bully; the Feds have been a bully --
14 50 years of injuries. We don't know how we're going to be
15 injured because 4A, nobody can tell us, we've asked Alan
16 Davis, DWR Land Agent -- oh, don't quote me, you know, we'd
17 like to know -- and I went to the July hearing/meeting
18 where they introduced the rebranding from the BDCP to the
19 California Water Fix. I went directly to the table and I
20 asked for documents. I'm a document person, I need to see,
21 I went through all the documents. I saw no changes to my
22 ranch, and yet they were going to take all of it, now
23 they're going to leave a little bowling strip --

24 HEARING OFFICER DODUC: Thank you. I appreciate
25 it. Please? I understand your concerns and your comment,

1 and as it relates to the preceding or the discussions that
2 we're having today, my understanding is that your concern
3 is that you do not have an adequate understanding of the
4 project, of what's being proposed, in order to determine
5 what the specific impact would be on you.

6 MS. WOMACK: Absolutely.

7 HEARING OFFICER DODUC: Thank you. Was there
8 another point?

9 MS. WOMACK: Thank you so much. Pardon me?

10 HEARING OFFICER DODUC: Is there another point?

11 MS. WOMACK: No, they can all wait for later on.
12 Thank you so much.

13 HEARING OFFICER DODUC: Let me confirm, you
14 represent North Delta C.A.R.E.S.?

15 MS. WOMACK: No, no, no, Clifton Court Ltd.
16 Partnership. It is our family farm. We're just the little
17 people there, but we've been badly affected all these
18 years, so... Thank you so much.

19 HEARING OFFICER DODUC: Thank you for making the
20 time to be here today and thank you for being a teacher.

21 MS. WOMACK: Thank you.

22 MS. SUARD: Good morning. My name is Nicole
23 Suard, I usually go by "Nikki." I am an attorney, but I am
24 more of a water person. I think my perspective is a little
25 bit unique in that my business is at Snug Harbor on

1 Steamboat Slough. And I am protesting the timing of just
2 one hour for me to provide testimony of what's already
3 happening. I don't need to talk about what might happen if
4 Water Board approves a water heist or not, I'm talking
5 about what happened this year and what's been happening the
6 last five to eight years. And I'm also really questioning
7 the integrity of the data that are provided to us, those of
8 us that want to understand the facts. Every time I go to
9 look at what Day Flow says, or what Water Boards,
10 Department of Water Resources reports, I'm going to give
11 you one example as my testimony and it gets very
12 complicated --

13 HEARING OFFICER DODUC: Thank you. But again,
14 we're not accepting testimony arguments today, but let me
15 reiterate, I understand and hear what you're saying and it
16 revolves again back to the issue of not having adequate
17 information upon which to then make the arguments and
18 proceed with the hearing as currently proposed.

19 MS. SUARD: Yes. I'd like to add to what the
20 previous speaker had said, that all of the baseline data
21 should be provided to -- available to all of us, and then
22 when that baseline data gets changed over and over again as
23 it does, that Errata sheets have to be issued and people
24 who access that data need to be provided notice that the
25 data has changed again. This all relates to water flow,

1 everything has to do with the water flow. So I'm
2 requesting that the Board require that, and we're
3 requesting adequate time for those of us that have actual
4 on the water testimony.

5 And I also support the other objections to the
6 hearing procedure. And I'd like to point out that I
7 believe hearings like this without a Court Reporter are
8 subject to challenge, too.

9 HEARING OFFICER DODUC: We do have a Court
10 Reporter. But thank you. And if you are able to stay, our
11 next topic of conversation will be the logistics, including
12 time limits.

13 MS. SUARD: Thank you. I will.

14 HEARING OFFICER DODUC: Thank you.

15 MR. BURNES: My name is Robert Burnes. I
16 represent the Friends of the Stone Lakes National Wildlife
17 Refuge. We are a Protester in this process. We submitted
18 a letter through our attorney, Osha Meserve, who is also a
19 partner in our protest and she has previously spoken.

20 I would like to address you on a particular
21 concern that I don't think has been addressed yet. As you
22 probably know, Stone Lakes Area is sort of Ground Zero for
23 the construction of the Water Fix, and I won't get into the
24 details of that, but we're particularly concerned about the
25 impact on terrestrial species that use the refuge and the

1 surrounding lands to forage. We are only protesting Part
2 II of the hearings and our concern primarily relates to
3 Part II, although we share some of the concerns and agree
4 with a lot of the testimony that has been presented about
5 the timing of the hearing.

6 In particular, I would like to request that the
7 Water Board give consideration in the timing of Part II to
8 ensure that there is reasonable time after the completion
9 of the CESA, Federal and State ESA processes, the issuance
10 of all the necessary documents and Permits, before the
11 hearings begin because it is important for our organization
12 to understand and assimilate the issues associated with
13 take in order to make our arguments about harm with respect
14 to the terrestrial species. Thank you.

15 HEARING OFFICER DODUC: Thank you very much.
16 Next, please.

17 MR. SIPTROTH: Good morning. I'm Stephen
18 Siptroth, Deputy County Counsel for Contra Costa County,
19 and I'm here representing that County, as well as the
20 Contra Costa County Water Agency.

21 Luckily, many wise people have made some very
22 good points at this stage of the hearing this morning --

23 HEARING OFFICER DODUC: And you will not repeat
24 them.

25 MR. SIPTROTH: I will not repeat them, but I will

1 concur with them. The Sacramento Valley Water Agencies,
2 our representatives have made some very prudent points
3 about the staging of the hearing and we join in that
4 request.

5 We also join in the request of the Bay Institute
6 regarding staging in Part II of the hearing.

7 And we'd like to join in the points made by the
8 local agencies of the North Delta, that Part I of this
9 hearing should commence after the Certification of an
10 Environmental Document.

11 This Board sits in the capacity of a responsible
12 agency and as a responsible agency you have to consider the
13 environmental document before you. You have the authority
14 under the CEQA Guidelines to challenge the environmental
15 document in court if you find it to be inadequate, or to
16 prepare a supplemental environmental document. And that's
17 at Title 14 of the California Code of Regulations 15062(e).

18 So we would ask that the hearing not proceed
19 until after an environmental document is prepared so that
20 you're not out in front of that environmental review
21 process.

22 We also agree with the representative of the
23 South Delta Water Agency, that at this time we feel that
24 there's inadequate information before this Board,
25 particularly with regard to modeling. Contra Costa County

1 and the Water Agency have requested full model runs, or
2 evidence that full model runs were performed for
3 alternative 4A, and we have not been provided that.

4 Regarding those model runs, if you redirect to
5 DWR and the Bureau of Reclamation, if you could ask whether
6 those model runs exist, that would be helpful to us so that
7 we know whether or not we should put forth another request
8 for that information.

9 Finally, we would like to join with Solano County
10 regarding the timing of the 401 Application, and Solano
11 County's argument is found at Section 2 of their letter, on
12 page 2 of that letter. Thank you for your time.

13 HEARING OFFICER DODUC: Thank you. Next, please.

14 MR. SGARRELLA: Good morning. Barry Sgarrella.
15 I'm the Chief Executive Officer of SolAgra Corporation.
16 I'm here today representing SolAgra and our joint venture
17 partner, IDE Technologies.

18 I have a completely different issue to discuss.
19 I was surprised that I was the only one raising the issue,
20 but at this point these hearings shouldn't be proceeding at
21 all due to the failure of the proponents to consider all
22 viable alternatives to the currently submitted process.
23 SolAgra has submitted documents in response to the EIR, the
24 RDEIR, and in both cases we submitted detailed information
25 on a viable alternative that is in fact technically

1 superior, I would also say socially superior meaning that
2 it has much less displacement of people within the Delta,
3 the taking of their land.

4 So far the process has contemplated 11
5 alternatives. When we looked at the original proposals
6 there was a snowstorm of alternatives, but the bottom line
7 was that those alternatives were nothing more than
8 different methods and different pathways through the Delta
9 to accomplish the construction of these large tunnels to
10 move the water.

11 I have a home on Twichell Isle in the West Delta,
12 and I'm very familiar with those areas, and of course
13 Sherman Island is right in the same area. There's a far
14 superior alternative that cost less --

15 HEARING OFFICER DODUC: I must caution you that
16 you're now bringing up arguments. I get your point that
17 your opinion is the document submitted so far is flawed and
18 it's inappropriate to proceed with the current document and
19 the current analysis as --

20 MR. SGARRELLA: -- yes, right --

21 HEARING OFFICER DODUC: The point you wish to
22 make with respect to the proceedings here?

23 MR. SGARRELLA: Yeah, the point that I am making
24 is that the document is flawed, the procedure is flawed,
25 and I don't believe that the process should proceed until

1 they have complied with the requirements of CEQA, NEPA,
2 etc. to evaluate all reasonable alternatives. My comments
3 about this alternative specifically is that it's been --

4 HEARING OFFICER DODUC: Which I do not need to
5 hear at the moment. Thank you very much.

6 MR. SGARRELLA: Thank you.

7 HEARING OFFICER DODUC: Next speaker, please.

8 MS. DALY: Good morning and thank you. My name
9 is Barbara Daly --

10 HEARING OFFICER DODUC: Barbara Daly! North
11 Delta C.A.R.E.S.!

12 MS. DALY: North Delta C.A.R.E.S. has arrived.

13 HEARING OFFICER DODUC: You are famous.

14 MS. DALY: Well, thank you! And so are you! I
15 speak today on behalf of North Delta C.A.R.E.S., thank you
16 very much, that stands for Community Area Residents for
17 Environmental Stability. And I live in the primary zone of
18 the Delta and the secondary zone, directly across from one
19 of the proposed intake diversion facilities. I'm not a
20 lawyer and therefore I am tardy in the process, and I ask
21 for you to please excuse me and give me your benefit of
22 consideration because this is the first time I've done
23 something like this, there are a lot of lawyers in this
24 room, and I bow to them, but I'm sorry, I can't afford a
25 lawyer.

1 HEARING OFFICER DODUC: Never ever bow to
2 lawyers, never! You may bow to engineers, but not lawyers.

3 MS. DALY: I wish I could afford a lawyer, I do
4 have great respect for what they can do to help us in this
5 process, honestly. But I live on a pension and I live
6 right across from where one of the intakes is going to be
7 proposedly built.

8 One element that I would like to bring up that
9 keeps being left out of this in the discussion is the
10 people of the primary zone and the communities that are
11 involved in it. This is really a very intellectual
12 process, but this aspect of humanity and the people keep
13 being left out of the process. And North Delta C.A.R.E.S.
14 has made extensive comments on the EIR/EIS, the Revised
15 EIR/EIS, and we find ourselves in this loss of economic
16 stability in our economic drivers, even now, the
17 agriculture, the recreation, and the tourism are being
18 highly affected and will be totally in our opinion
19 destroyed by these three water diversions. This will
20 ripple out to the other areas. Okay, but I would like to
21 go to process --

22 HEARING OFFICER DODUC: I appreciate your
23 position and your concerns. Let me ask you now to refocus
24 your comments on how we might best address procedural
25 matters to ensure your engagement, especially with respect

1 to the timing of these proceedings, and I will point out,
2 if you have not met her already, Samantha Olson of our
3 staff wants to be your best friend in terms of working
4 through the various logistics of your participation.

5 MS. DALY: Yes, I have met her, thank you very
6 much. She's been really helpful and we've had numerous
7 conversations on the phone, but I'm still stumbling through
8 it. And one of the things that has really kind of caught
9 me is the process step of the Petitioners using reference
10 to their EIR/EIS, Revised EIR/EIS, and the answers to their
11 questions on their Petition for adding these diversions.

12 And I concur with the other people, if that's
13 what they're referring to, then that needs to be in a Final
14 Draft or Final form, has to be approved. And also, the
15 process of doing this in layers I think is really going to
16 be very very helpful for all of us, and so I think how that
17 was brought up was really important. So probably my five
18 minutes is up. But Anna is also here with me and she would
19 like to add more to what I say. Thank you.

20 HEARING OFFICER DODUC: All right. Well, thank
21 you. We're looking forward to seeing more of you.

22 MS. SWENSON: Hello. And thank you for this
23 opportunity today. My name is Anna Swenson and I'm from
24 North Delta C.A.R.E.S. I represent farmers, and residents,
25 and recreation users, and children, and homeowners in the

1 Delta, the primary and the secondary zone.

2 And what I would like to tell you is that I
3 didn't' actually become aware of this hearing until
4 December 17th, even though I'm really on top of it and I
5 read my emails, and I'm very involved in this process, and
6 so at that point I began to notify our members that this
7 process was happening and if they didn't file by the
8 January date that they would lose their rights to
9 participate in these hearings. And I want to tell you that
10 I'm disturbed that none of the Water Right owners or any of
11 the residents in the primary or secondary zone were
12 notified, even via email, or letter, or anything like that
13 that this process is happening. To this day, as I was
14 walking in, I got another email from a very active farmer
15 who had no idea that this process is happening and he's
16 wanting to know how he can participate and what he can do,
17 and so I just want to let you know that basically unless I
18 directly notified them, the people of the Delta have
19 absolutely no idea that this hearing process is happening.
20 And I think that that is a miscarriage of justice, I think
21 that that violates our public trust. I think that the
22 people of the Delta need to be consulted and given an
23 opportunity to preserve their legal rights to participate
24 in this hearing. I know that it's troublesome and
25 bothersome to have people lining up in a maybe ineffective

1 or in an emotional way to let you know how they feel about
2 the project, but that's part of public process, and that's
3 what's due. And that has not happened, people do not know
4 that this process is happening. I feel like I'm Paul
5 Revere running through the Delta telling people about
6 what's happening.

7 And so putting it on your website is a great
8 avenue, but we have to use more than one avenue to
9 communicate with people in the Delta. Internet access is
10 limited in the Delta. Mail sometimes is the most
11 productive way to contact people, public notices, if
12 there's anything I or my organization can do to get out
13 word, I always try to do that. And I run a non-profit, I'm
14 not paid for what I do, and I'm just doing this because I
15 feel like the people of the Delta have a right to
16 participate in this process and they have a right to be
17 able to come here and speak to you about the impacts
18 because we're the ones who are going to be directly
19 impacted. I live in Clarksburg, which is the bullseye of
20 the project. I have five children that attend the school
21 that's directly across. I'm disturbed that our school
22 wasn't aware of the project or the impacts of it until we
23 notified them. I'm concerned about our church and our
24 libraries, and you can expand that beyond Clarksburg to all
25 of the communities. And I just want you to know that there

1 is just a blanket lack of knowledge about this hearing, the
2 procedures, what's happening, what the diversion permits
3 are. I've tried to grind it down into a very concise way
4 that is in, no offense to the lawyers, but a non-lawyer
5 speak because they don't really understand what's
6 happening.

7 And I think if you go forward with this process
8 without coming back and notifying the public about what's
9 happening, I think you're going to have backlash, I think
10 you're going to have thousands of people lining up saying,
11 "I wasn't given the opportunity to participate, I didn't
12 know what was happening, now all of a sudden this permit
13 has been denied or granted and I wasn't allowed to
14 participate."

15 So I appreciate your time today and I'm working
16 with her with my 472 policy statements, and I just found
17 out that we can add more, so I have at least 100 more that
18 have been added. So I look forward to a great day with you
19 guys. Thank you.

20 HEARING OFFICER DODUC: Great, well, thank you
21 very much. And you've hit a very very hot and important
22 button for us, which is ensuring the engagement, the
23 transparency that people that are affected will have an
24 opportunity to provide input and to comment on Draft
25 decisions and whatnot that this Board makes. So again, I

1 encourage you and your colleague to please work with Ms.
2 Olson and with other staff, and we will do our very best to
3 ensure that you are thoroughly engaged as appropriate as we
4 move forward, your voice and that of other citizens in the
5 Delta is extremely important. But I want to impress upon
6 you that this is a quasi-judicial proceeding and therefore
7 there are rules, there are procedures, there are deadlines,
8 there are constraints that, as an engineer, I myself
9 sometimes hate, but they are there for legal reasons and we
10 must adhere by them. So again, thank you for your effort
11 and I look forward to your participation.

12 MS. SWENSON: Thank you.

13 HEARING OFFICER DODUC: Next, please.

14 MS. MAZZANTI: Tara Mazzanti, Deputy City
15 Attorney.

16 HEARING OFFICER DODUC: I can't hear you.

17 MS. MAZZANTI: Tara Mazzanti, Deputy City
18 Attorney -

19 HEARING OFFICER DODUC: Did we kill that
20 microphone or do you need to get closer?

21 MS. MAZZANTI: I may need to get closer. Is that
22 better?

23 HEARING OFFICER DODUC: Thank you.

24 MS. MAZZANTI: I think it's my height. The City
25 has submitted its Protest, the City of Stockton, and the

1 Deputy City Attorney, and we have submitted the Protest and
2 although we do not want to contribute to any delay in the
3 hearing process, we do fully support those comments
4 concerning the timing of the hearing. We feel that since
5 our primary water source is the Sacramento, San Joaquin
6 Delta, obviously we're concerned with the impacts of the
7 project, both the water quality and supply, so with that we
8 feel it would be best to have a full evaluation of the
9 final environmental review document so that we could better
10 prepare our case.

11 We also, as far as the 401 Application, we do
12 concur with those comments, as well, that both should be
13 brought together.

14 HEARING OFFICER DODUC: Thank you very much. MR.
15 O'Laughlin, would you mind waiting until the next speaker
16 talks because you know I always like to save you for last.
17 Thank you for your indulgence, Mr. O'Laughlin.

18 MR. CARDELLA: My name is Nicholas Cardella. I'm
19 here on behalf of the South Valley Water Association and
20 its member agencies. I have one brief comment and I'll try
21 and keep it as short as I can.

22 Forty-five minutes, as far as I could tell, not
23 one reason was offered as to why from an administrative
24 perspective it makes more sense to expedite these
25 proceedings than not to. The Petitioners' position is

1 literally this: why not get started? Don't worry about it,
2 if we don't have adequate data, you'll dismiss the
3 Petition." That may well be, but it doesn't explain why
4 these proceedings would benefit from being expedited.
5 Remember, Petitioners requested expedited proceedings and
6 the burden is on them to justify that request. Now, ask
7 yourself, if the Board grants Petitioners' request, in the
8 absence of even one reason as to why it makes sense to do
9 so, how can interested parties be expected to have
10 confidence in the Board to dismiss Petitioner's Petition
11 when it fails to meet its burden on the substantive issues
12 of legal injury and environmental issues? Thank you.

13 HEARING OFFICER DODUC: Thank you. Mr.
14 O'Laughlin, I did not set you up, but see if you can follow
15 that.

16 MR. O'LAUGHLIN: Thank you. Tim O'Laughlin
17 representing the San Joaquin Tributaries Authority. The
18 question as I understand it that you posed is the ordering
19 of the proceedings and whether or not we need to expedite
20 it. And I know this will sound kind of starting the new
21 year off on kind of a whacky way, but I actually agree with
22 Mr. Herrick and Mr. Obegi. And I know you'll find that
23 somewhat shocking, given our previous histories.

24 So here is the issue, and we put it in our paper.
25 And we put it in our comments in regards to Phase I in

1 regards to the Water Quality Control Plan. What is the
2 intersection of the Water Quality Control Plan and the
3 Water Fix? And it's kind of the chicken and the egg; which
4 one is going to go first? And how are you going to handle
5 it?

6 And to date, DWR and the Bureau have failed
7 miserably in addressing this very point. And so here's the
8 question: under 85086 it says that appropriate Delta flow
9 criteria should accompany the Change Petition, okay? Now,
10 I don't want to get in a fight about what appropriate delta
11 flow criteria are, but let's just all recognize that it
12 exists. So some people say that means the Water Quality
13 Control Plan has to go first. Some people may argue that
14 that are appropriate Permit terms and conditions on the
15 Change Petition. Other people would say that, arguing in
16 the abstract, that that is a criterion that exists and
17 we'll deal with it later. But I think what's important for
18 everybody here to understand is, what is that process? And
19 how are we going to proceed with that process?

20 So Board Chair Felicia Marcus asked earlier, in
21 what form is that going to take place? So in the context
22 of developing an appropriate Delta flow criterion, if the
23 projects go forward with the Change Petition, one could
24 surmise that you could say to them, hypothetically, "We
25 need X amount of flow at I Street Bridge under these types

1 of conditions." Okay? For the permit condition. Now, the
2 Water Quality, you can't in this process here change the
3 Water Quality Control Plan because you haven't noticed the
4 change to the Water Quality Control Plan in this process.
5 If you want to proceed forward with the Water Quality
6 Control Plan first, and proceed forward, I understand that;
7 but what we're hearing from the Petitioners right now is
8 that they're using D-1641 as the appropriate flow criteria
9 and the baseline for the approval of the project.

10 Now, I know this Board fairly well. My
11 assumption is you're not there at all. My understanding is
12 that your previous actions based on what you've done since
13 2009, your recent Board workshop where you set forth what
14 your goals and criteria were, was is that you're going to
15 set flow objectives and criteria in the Water Quality
16 Control Plan. Okay? Well, now let's say you set
17 appropriate flow criteria in the Water Quality Control Plan
18 that's different than D-1641, that's different than what we
19 -- I don't know what you're doing, we got a new document
20 coming out on Phase I by the end of winter, we hope, so
21 what's that going to look like? And once we get that, what
22 does their environmental document look like? And whose
23 responsibility is it to meet those flow criteria will be
24 very important in determining legal injury to a water user.

25 So what we have to do here, and I'm looking at

1 Ms. Differing (ph), is figure out from a legal process what
2 this looks like as we move forward and getting this done.
3 So I agree with Mr. Obegi, I think this is a prerequisite
4 issue that needs to be briefed by the parties, that needs
5 to have a ruling by this body, by the Hearing Officer,
6 because if we don't do it right, everything else becomes
7 moot. Because the basis of going forward will be
8 incorrect. So we've got to get it right. So that's my
9 point, I don't need to argue the legal theory about it or
10 anything, but it seems like it's a preliminary element that
11 we all agree upon, that needs to get resolved before we
12 start the process. Any questions?

13 HEARING OFFICER DODUC: Thank you, Mr.
14 O'Laughlin.

15 MR. O'LAUGHLIN: Thank you.

16 HEARING OFFICER DOCUC: All right, not seeing any
17 other speakers, I will now ask the Petitioners if you would
18 like to provide any further comments, in particular
19 addressing the suggestion regarding staggering the
20 submissions and any other questions that my colleagues or
21 staff would like to ask. But with that, please.

22 MR. MIZELL: Thank you. Again, Tripp Mizell,
23 Department of Water Resources. I think I should just state
24 up front that I think a lot of the comments that we've
25 heard today have strayed into the substantive and legal

1 territory and, despite the fact that we're talking about
2 process here, I'm going to try my best to keep to
3 procedural answers, while recognizing that there are a lot
4 of fundamental questions being asked that are not
5 procedural in nature.

6 If the Board believes that it needs information
7 on these threshold legal questions, as Tim put it, we would
8 provide briefing on that, but we're not equipped today to
9 answer substantive and threshold legal questions that are
10 highly complex, particularly in this situation.

11 So I'd like to make a few clarifications because
12 I've heard our statements in the Petition and our
13 statements here today recast in a different light, and I'd
14 like to make it very clear what we said.

15 First off, if we did a miserable job earlier this
16 morning discussing what we believe the Board can and can't
17 consider with regards to the flow criteria, I might suggest
18 somebody did a miserable job listening. But we had a
19 conversation indicating that our Petition is not requesting
20 that the Board limit itself to D-1641 as the basis for its
21 flow criteria, that's not the test of our Petition, that
22 was not within the statements we made earlier today in
23 response to questions by the Board.

24 Additionally, the notice question, I think this
25 is something that I need to address right up front. When

1 we filed the Petition, we provided ample notice to both
2 every legal user of water in the Delta; in addition, we
3 provided publication notice to virtually the entire State
4 of California. In addition to that, we posted on our
5 website, as did the State Water Board. I think we've done
6 an exceptionally thorough job of notifying the public of
7 what's going on here today, and we have worked with Board
8 staff to ensure that we've provided the back-up for those
9 publications and mailings.

10 CHAIR MARCUS: Just to be clear, so you sent
11 emails directly to all legal users of water in the Delta?

12 MR. MIZELL: We sent U.S. postcards to every
13 legal user in the Delta.

14 MS. RIDDLE: And staff sent an email out to all
15 of our various distribution lists of interested parties in
16 the Delta for hearings for petitions.

17 MR. MIZELL: So I think we've been quite
18 comprehensive in that respect.

19 We are also not asking the Board to make a final
20 determination prior to the Final Environmental Document.
21 In fact, we precisely state in our Petition that we request
22 that you not make a final determination prior to receiving
23 the Final Environmental Document.

24 And lastly, I'd like to talk about the
25 characterization of our expedited request. We are not

1 asking for a shortened timeframe on this hearing. I would
2 hardly say that 34 days for Part I and an unknown amount of
3 time for Part II would be considered expedited under many
4 circumstance; in fact, I think earlier today you heard that
5 D-1641 took 50-some-odd days. We're likely to exceed that
6 here. I don't think it's, well, I think it's maybe
7 disingenuous to characterize that amount of hearing time as
8 being expedited.

9 What we did request is that the Board proceed
10 expeditiously to consider our Petition and not wait until
11 the Water Quality Control Plan concludes. That is the
12 extent of what we are hoping to move fast on. We think
13 that the process allows for it, we think the law allows for
14 it, and it would be in the best interest of the project.

15 So rather than get into legal rebuttal at this
16 point in time, I would probably like to talk about the
17 staggered testimony approach.

18 If the intent is fairness, I would put before you
19 that having one party lay out their entire case-in-chief
20 prior to hearing what the other party has to say, or
21 simultaneously having everybody submit their testimony,
22 would be the opposite of fairness. That's requiring us to
23 essentially set forth all of our facts and then allowing
24 the other side to have lots of time to pick them apart.
25 That's what the hearing is for, that's not what the

1 submission of the case-in-chief is for. It's generally not
2 the Board's practice, and I don't think it's appropriate
3 here at this important hearing.

4 If the Board is determined to proceed with a
5 staggered testimony submission approach, I would hope that
6 they would allow for additional detail to be developed on
7 what that approach truly consists of and allow us to fully
8 consider it, and come back to you with our full comments.
9 And this is the first we've heard of a staggered approach,
10 and I would hope that that's not the last we'll talk about
11 it if that's the direction the State Board wants to go.

12 I would also like to turn the microphone over to
13 Ken again so that he can discuss the detail that does exist
14 today and how that is sufficient for beginning this
15 process. Thank you.

16 HEARING OFFICER DODUC: Thank you.

17 MR. BOGDAN: Thank you. Ken Bogdan, Attorney,
18 Department of Water Resources. So a couple things I wanted
19 to mention just in terms of, first, maybe the 401
20 Certification request. We are of course very aware that if
21 the Executive Director were to be taking this separately,
22 that he -- and it was identified in your Notice -- would be
23 considering all information on the record through the Water
24 Board's hearing process and, in fact, possibly considering
25 information outside the hearing process. So we are not

1 asking for a 401 Certification decision prior to the
2 hearing, the relevant information being submitted at the
3 hearing, we're just asking for it prior to the final Water
4 Right Decision. So I wanted to make sure that's clear and
5 that's reflected actually in your Notice.

6 On the second point, I just wanted to make sure
7 there's clarity related to the project description. In our
8 application, we have a project description, it's further
9 discussed as Alternative 4A, that's what the hearing is
10 focused on. We of course have not approved a project
11 related to Alternative 4A, but in order to make sure that
12 we're proceeding in a manner that creates some efficiencies
13 along the way, we started a number of permit processes in
14 anticipation of a Final Decision, and if that Final
15 Decision is changed, just like if we get additional
16 information through any of these processes, we have to
17 consider that and decide how to proceed with the different
18 processes that we've engaged in. And I did want to
19 mention, we do have an operations criterion that's been
20 presented in both the recirculated draft for Alternative
21 4A, as well as the Biological Assessment. Actually, the
22 Biological Assessment that was released two weeks ago goes
23 into even more detail related to the operational
24 constraints related to that, and in fact then informs the
25 modeling that needs to be done in terms of discussing water

1 supply and water quality impacts, and all of the fishery
2 impacts that are related to these operations.

3 So that is all in the record, so I just wanted to
4 make sure that was clear.

5 MS. D'ADAMO: I have a question about modeling.

6 MR. BOGDAN: Sure.

7 MS. D'ADAM: So the most recent, the Draft BA
8 includes information on modeling, but not the modeling
9 itself?

10 MR. BOGDAN: It includes the summary results.
11 The modeling itself is quite a lot of information, so we've
12 already received requests for the modeling information that
13 supports the summary information that's presented and fed
14 into, so there's the CalSIM model that feeds into the Water
15 Quality Model, the DSM2, and that's about the extent I know
16 models. So that information is in there to support the
17 effects analysis of the BA and so that information is
18 available, and we've already received requests for the
19 underlying data, which we're working on organizing and
20 trying to make available.

21 MS. D'ADAMO: Know when it would be available?

22 MR. BOGDAN: I don't at this time.

23 MS. BANONIS: I can speak to that a little bit.

24 So for example, I believe Contra Costa County and Water
25 Agency had made a request for the data. I believe it was

1 perhaps last week. Reclamation, at least for the
2 Biological Assessment piece, is kind of the keeper of that
3 information because it was under our contract that the
4 Biological Assessment was prepared. So we've given the go
5 ahead to go ahead and release that information, so right
6 now they're just organizing it and getting in a logical
7 fashion. So I would imagine in the next week that data
8 will be available for the requester.

9 HEARING OFFICER DODUC: Thank you. Other
10 questions for DWR? Ms. Heinrich?

11 MS. HEINRICH: This is a point of clarification
12 for Mr. Bogdan on the 401. So my understanding was that
13 the Department was asking for a Decision as soon as
14 possible, and while we indicated in our Hearing Notice that
15 the Board or the Executive Director may rely on information
16 in the Hearing Record, I thought I just heard you say that
17 you're not now anticipating a Decision on the 401, or would
18 not be asking for that until the Hearing Record closes. Is
19 that --

20 MR. BOGDAN: No. So I was acknowledging the
21 language in there and saying that we anticipated that when
22 the Executive Director thought he had sufficient
23 information related to both parts of the hearing, that he
24 would then make his decision. And we are looking for that
25 prior to the close of the record if appropriate.

1 MS. HEINRICH: Thanks.

2 HEARING OFFICER DODUC: If there are no other
3 questions for DWR, would the Bureau like to provide any
4 comments? Or the Department, for that matter?

5 MS. AUFDEMBERGE: I don't have much to add, other
6 than maybe to try to speak to the staggered question. It
7 does seem to pose some procedural issues. If the complaint
8 is there's not enough information to adequately protest,
9 then if we have a staggered situation of we've read our
10 testimony, then will there be amended protest procedures?
11 It just seems to me like the call for lack of information
12 is kind of a snowball that could keep rolling, who gets
13 more time to respond to the latest and greatest
14 information.

15 CHAIR MARCUS: At least what I heard was not a
16 protest, it was to prepare the testimony because the
17 answers here today were that the information will be
18 provided, you know, by the presentation and the submission
19 by the Petitioners. I mean, it's not a contest, it's not
20 like we're playing a game. So, you know, I understand the
21 request to have a chance to comment on it, and we'll have
22 to look at legal proceedings of what we've done in the past
23 and all that, I'm not saying, but it's not illogical when
24 it's not fully described and fully submitted to expect
25 folks to make their case on what the injury is. So that's

1 the argument. It's not whether they protest or not, again,
2 it's about submitting their initial testimony on the same
3 data as the Petitioners.

4 HEARING OFFICER DODUC: I see people starting to
5 line up. Do not get excited, we're past noon. I will give
6 Mr. Aladjem, I believe you're with the Sac Valley User
7 Group, I will give you the courtesy of making a brief
8 comment since we are discussing your proposal.

9 MR. ALADJEM: Thank you, Chair Doduc. I simply
10 wanted to be ready in case the Board or other parties had
11 any questions, since Mr. O'Brien is out of the room.

12 HEARING OFFICER DODUC: Thank you very much.
13 Anything else? Please.

14 MS. D'ADAMO: I'm curious to hear what you have
15 to say about what the Department's response regarding
16 fairness of putting their cards on the table, so to speak.

17 MR. ALADJEM: Thank you, Member D'Adamo. The
18 Department said in essence that it would be unfair to have
19 a staggered approach because the way the Board structures
20 its hearings is to have all parties put their evidence on
21 the table. As Mr. O'Brien said and Mr. Lilly said,
22 however, our experts are telling us we cannot understand
23 what the project is. So it puts us, as several parties
24 have said, at a very great disadvantage. What we could do
25 is we could put in what we think the project is and analyze

1 that, and then I would expect the Petitioners would tell us
2 that we're wrong, and that in fact the project is
3 different, and that we would have to offer a great deal of
4 information on rebuttal. We don't believe that's an
5 effective or efficient or transparent way to run this
6 hearing, and that's why we made our staggered proposal.

7 HEARING OFFICER DODUC: Thank you. All right,
8 Riddle?

9 MS. RIDDLE: I did have one other question. Can
10 I get clarification on does the Bureau have an anticipated
11 date for completion of the ESA process? Is there a date in
12 mind? And I ask this question because we're trying to
13 schedule the parts of this hearing and give people some
14 heads up on their scheduling, and it's difficult if we're
15 just talking rough timeframes and not really understanding
16 exactly how the Delta Science Program Review process fits
17 into things. So it would be nice to get clarification
18 either today or at a later date with actual solid blocks of
19 time upon which you think those processes are going to be
20 complete.

21 MS. BANONIS: I think it would be helpful if I
22 might be able to get back with you on that because, of
23 course, it's talking about the ESA process, I mean, there's
24 our Biological Assessment process, but of course there's
25 the formal consultation process that still needs to be

1 engaged in, with DEMPS (ph) and Fish and Wildlife Service.
2 So I would want to circle back with them to try to get you
3 a better anticipated timeframe than maybe I would provide
4 because they're the ones essentially issuing the Biological
5 Opinion. So if I could get back with you on that, I would
6 greatly appreciate that.

7 MS. RIDDLE: That would be great, actually if it
8 was a joint response with the Federal Fish Agencies and the
9 Department of Fish and Wildlife Service regarding the
10 Incidental Take Permit so that we can have a clearer idea
11 for our planning purposes and all of the other parties here
12 that have a number of other things that they're working on,
13 so that we can give them an idea when we really think we're
14 going to move forward with Part II of the hearing.

15 MS. BANONIS: Certainly. I can do that.

16 HEARING OFFICER DODUC: Thank you. That
17 completes our discussion of Topic 1. Before we break for
18 lunch, however, I need to note that there are seven parties
19 who have not checked in, Brett Baker, Daniel Wilson, Earth
20 Justice represented by Trent Orr, the Environmental Council
21 of Sacramento represented by Brenda Rose, Ronald Perkes,
22 and Theresa Kelly, representing themselves, Save Our
23 Sandhill Cranes, represented by Mike Savino, and the Water
24 Forum represented by Tom Gohring. Those parties need to
25 check in if they're here. With that, Ms. Riddle?

1 MS. RIDDLE: There might be other parties
2 representing some of those, and if that's the case, if you
3 could check in for whoever you may be representing, as
4 well.

5 HEARING OFFICER DODUC: I'm sorry, what was that?
6 Mr. Jackson, what is it that you wish to add?

7 MR. JACKSON: Michael Jackson on behalf of the
8 CALSPA parties. I'd just like to point out that the
9 staggered thing, which came up after I spoke --

10 HEARING OFFICER DODUC: I appreciate that, and --

11 MR. JACKSON: -- was -- and this will be very
12 short -- is the way for the last 400 years in England and
13 America people have done trials. So if this is quasi-
14 judicial, the person with the burden of proof puts on their
15 evidence first.

16 HEARING OFFICER DODUC: Thank you, Mr. Jackson.

17 MR. JACKSON: Thank you.

18 HEARING OFFICER DODUC: Because you all have been
19 so efficient, I will grant you an extra seven minutes for
20 lunch. We will reconvene at 12:45 on the dot, people.
21 Thank you.

22 (Off the record at 12:09 p.m.)

23 (Reconvene at 12:45 p.m.)

24 HEARING OFFICER DODUC: Welcome back, everyone.
25 It is 12:45 on the dot and so we're going to resume. Our

1 Court Reporter is here, thank you.

2 All right, we will now move on to the second
3 topic, which is Hearing Logistics. This is a large topic
4 with many issues. And I want to again thank the parties
5 who provided written comments and suggestions to streamline
6 the hearing process.

7 With the number of parties involved in this
8 proceeding, it is critical that parties with common
9 interests work together, so the first issue we will tackle
10 under this topic is Coordination and Consolidation. We're
11 very pleased that numerous parties either propose to
12 present a consolidated case-in-chief, or have coordinated
13 with other parties and propose to present direct testimony
14 from the same witness, or a group of witnesses, as part of
15 their case-in-chief. In order to promote efficient
16 consolidation of arguments, testimony, cross-examination,
17 and rebuttal, additional time for parties that consolidate
18 all or portions of their cases may be appropriate.

19 In written comments, several parties, including
20 Petitioners, State Water Contractors, and the Coalition for
21 a Sustainable Delta, have requested that parties be allowed
22 to submit proposed consolidated groups at a second pre-
23 hearing conference a week after the submittal of testimony
24 and exhibits. We would like to hear this issue discussed
25 later on today, but I will say at the start that, while we

1 are open to some adjustments after testimony is submitted,
2 we need to get a handle on groupings now because this will
3 inform our decision on increasing the time limits for
4 various portions of the hearings, as so many of you have
5 requested.

6 We do not need to hear from those parties who
7 have submitted a single Notice of Intent to Appear, unless
8 you plan to consolidate even more, but we do want to hear
9 today from the parties who submitted separate Notices of
10 Intent to Appear that lists the same witness or group of
11 witnesses.

12 So, in particular, I want to hear from the
13 following parties: Sacramento Valley Water Users; American
14 River Water Agencies; Fred Etheridge from East Bay
15 Municipal Utility District; Kevin O'Brien or Scott Shapiro
16 from Contra Costa Water District; Mr. O'Laughlin from the
17 San Joaquin Tributaries Authority; Jennifer Buckman from
18 Friant Water Authority; Paul Minasian, San Joaquin River
19 Exchange Contractors; and South Valley Water Association,
20 Alex Peltzer.

21 With that, I would ask those parties to please
22 come up and be prepared to discuss how you will coordinate
23 your witnesses. Is your microphone on, Mr. O'Brien?

24 MR. O'BRIEN: It is not, but it is now. Thank
25 you.

1 CHAIR MARCUS: I think you can call her Chair in
2 this meeting --

3 MR. O'BRIEN: Chair. I didn't want to offend the
4 real Chair.

5 CHAIR MARCUS: It's confusing, people are having
6 indeterminate Chairs, but she's the Chair.

7 HEARING OFFICER DODUC: The Chair is always the
8 Chair.

9 MR. O'BRIEN: Thank you. So I'm here
10 representing our Sacramento Valley Water Users group of
11 clients and also our North Delta group of clients, and also
12 Contra Costa Water District.

13 I think the idea of consolidation is an excellent
14 idea, I know many of the parties suggested that. I guess
15 the one main point I'd like to make is I think the folks
16 who could do that most efficiently are the parties
17 themselves. Since we have a good idea I think at this
18 point as to what the general outlines of our testimony are
19 going to be and how they fit together with other parts of
20 this proceeding, I think the idea of the Board requesting
21 proposals for consolidated presentations from the parties
22 by some date certain makes a lot of sense.

23 I don't know if we need to have another pre-
24 hearing conference or not, but I think you would learn a
25 lot, I think, if you asked the parties to get together

1 because I think a lot of the parties are already working
2 together on consolidation. Just one example, you probably
3 noticed from the Notices of Intent to Appear, there's a
4 large number of parties that are going to be putting on
5 modeling testimony from MBK Engineers sort of jointly, so
6 that would be a piece that I think a large group of parties
7 could sort of all stand behind and probably would propose
8 to put that on fairly early in the process.

9 HEARING OFFICER DODUC: So before you move on,
10 Mr. O'Brien, on that note let me pull out that particular
11 issue. Mr. Walter Bourez, one of my favorite witnesses,
12 from MBK Engineers, is being called by East Bay Municipal
13 Water Utility District for a proposed 20 minutes, is being
14 called by San Joaquin River Exchange Contractors for a
15 proposed one hour, is being called by the Friant Water
16 Authority for three hours, and by South Valley Water
17 Association for six. So those four entities, I want to
18 hear from you how you are going to be sharing Mr. Bourez.

19 MR. O'BRIEN: I wouldn't say that all the details
20 of that have been worked out, but I think the concept is
21 that all of those entities would put Mr. Bourez and his MBK
22 colleagues on at one time, for one panel. And so all those
23 various time estimates, I think, would get consolidated
24 into one panel. Now, we would probably ask for some
25 flexibility in terms of the amount of time that we would

1 take since it would be on behalf of multiple Protestants.

2 But the concept would be, for example, we might propose to
3 put the MBK modeling witnesses on for let's say a two-hour
4 presentation, or a three-hour presentation, and that would
5 be on behalf of multiple parties, and then that would be at
6 the end of that subject matter in the hearing.

7 HEARING OFFICER DODUC: Okay --

8 MR. O'BRIEN: Similarly, just by way of example,
9 the Sacramento Valley Water Users will be presenting
10 additional consolidated testimony relating to their issues
11 and concerns, and then subgroups of that larger group, for
12 example, the American River entities, which Mr. Lilly will
13 be discussing here in a minute, will have some American
14 River specific testimony, and I suspect the same may be
15 true of the Feather River Water Users, etc. So the concept
16 is we sort of go from more general to more specific, but we
17 do it in a way that doesn't duplicate testimony across.
18 And I think we could explain that in writing in a way that
19 made sense to you and the staff, and probably could really
20 achieve some economies. And my guess is other parties in
21 the proceeding have thought about similar concepts.

22 HEARING OFFICER DODUC: Thank you. Mr. Lilly?

23 MR. LILLY: Yes, thank you. I certainly echo
24 what Mr. O'Brien has said. And I'll just point out, the
25 Sacramento Valley Water Users is 42 different entities, so

1 if we did not do this, in theory we would have 42 hours.

2 And I'm sure --

3 HEARING OFFICER DODUC: I assure you not.

4 MR. LILLY: Well, the notice said an hour per
5 party, but I could assure you with consolidation we will be
6 significantly lower than that in terms of numbers of hours.
7 So it's in your interest and our interest to do that and
8 that's what we plan to do.

9 I do agree with Mr. O'Brien, I think the best
10 process on this is sometime after March 1st when we've
11 actually submitted the exhibits and testimony, you can set
12 the deadline, let the parties that want to have
13 consolidated presentations submit proposals for how they
14 plan to do that, names, numbers of minutes or hours, and so
15 forth, and then of course the Board can decide, you know,
16 whether or not to agree with that proposal. But I can
17 assure you, we can sort out better how to consolidate these
18 panels, at least in the first instance, than you can
19 because obviously we've been working with all of these
20 witnesses. And then you can make the final decision. I
21 don't know that you need another pre-hearing conference, I
22 think you can get the proposals and then make a decision.

23 The point I wanted to emphasize for the American
24 River Water Agencies, which includes my four municipal
25 clients and others, and I think some of the attorneys may

1 speak for them, is it is the layering concept that Mr.
2 O'Brien talked about. Sac Valley Water Users includes
3 basically everybody in the Sacramento Valley, and certainly
4 Mr. Bourez will offer testimony for that large of a group.

5 But then we have specific issues and concerns
6 about the potential injury to legal users of water in the
7 American River Watershed, and we would like to have a
8 different panel for that, it would be different witnesses
9 and so forth.

10 And then the third layer going to most detailed
11 is there still will need to be some time for each
12 individual agency, usually it's General Manager, to
13 summarize his or her testimony about the specific injuries
14 to that legal user of water. So there will be several
15 layers, but I can assure you, we want to make this as
16 efficient as we can, and I can assure you we will make a
17 very cohesive and rationale proposal for doing so.

18 HEARING OFFICER DODUC: Thank you, Mr. Lilly,
19 you've made many assurances which I will hold you to,
20 assuredly.

21 MR. LILLY: I'm sure you will, and that is fine.

22 HEARING OFFICER DODUC: Next, please. Ms.
23 Lennihan.

24 MS. LENNIHAN: Martha Lennihan for the City of
25 Sacramento. Just briefly following on Mr. O'Brien and Mr.

1 Lilly, for the individual agencies, we will also have some
2 additional expert testimony on water quality and other
3 issues, and so it is extremely important that we be allowed
4 the opportunity while we're consolidating and being as
5 efficient as possible, we do need the opportunity to
6 present our own panels. Thank you.

7 HEARING OFFICER DODUC: Thank you. Next, please.

8 MR. CASTER: Lauren Caster, Counsel for Friant
9 Water Authority and participating members. Jennifer
10 Buckman could not be here today. So I'm speaking on behalf
11 of Friant.

12 I agree with Mr. O'Brien and, frankly, we were
13 pressed for time in filing our January 5th filings, and so
14 we did not have an opportunity to coordinate beforehand.
15 We fully intend to cooperate with Mr. O'Brien. Friant does
16 not intend to ask Mr. Bourez to provide distinct testimony
17 on behalf of Friant.

18 HEARING OFFICER DODUC: Excellent. Thank you.
19 Mr. Minasian, first time we've heard from you today.

20 MR. MINASIAN: Nice to see you. As you know, I
21 represent the San Joaquin River Exchange Contractors, and
22 so let me add to join in all of the comments of the
23 previous commenters: better we do it than you; yes, the
24 total hours, you do not add them up, we know how to
25 coordinate this. If we have problems, we'll come to you.

1 Let me give you an example, however, how the
2 Exchange Contractors have a consolidation or common
3 interest with other people that may be of interest to you.
4 We do not believe this project can go forward abandoning
5 the levees and the passageways for 50 percent of the water.
6 The best information we have in regard to --

7 HEARING OFFICER DODUC: Not the time for argument
8 right now, Mr. Minasian.

9 MR. MINASIAN: No, I understand, but you do
10 understand that issue, so how do we present it? And you'll
11 see in our Notice of Witnesses, we present it in
12 cooperation with Central Delta, South Delta, and other
13 users. And so there are other issues than harm to upstream
14 users or water right holders. So that's our vision of how
15 the coordination would occur. Obviously, if you don't
16 stage either the issues or the presentations, it's going to
17 be very hard to do it seamlessly.

18 HEARING OFFICER DODUC: Thank you, Mr. Minasian.
19 Next, please.

20 MR. SALMON: Good afternoon, Board Members. My
21 name is Jonathan Salmon, attorney for East Bay MUD. You
22 had asked to hear from us. One of the issues that previous
23 speakers have raised, which is the testimony of Walter
24 Bourez of MBK Engineers, I can speak to that, we're going
25 to rely, and we intend to rely on part of the work that he

1 did in the testimony he'll present in connection with that
2 modeling work that he did in connection with the BDCP
3 modeling. There are many other agencies that to my
4 knowledge intend to rely on that portion of the work and
5 his testimony in connection with that. We do not intend to
6 call him specifically in connection with our case; instead,
7 what we would suggest that it may make sense from an
8 efficiency standpoint for Mr. Bourez's testimony on that
9 issue, at least, to happen relatively early in the hearing
10 so that, then, we and other agencies can build off of that
11 with additional testimony and evidence that we'll present,
12 which will build on Mr. Bourez's testimony.

13 There's one other issue that I want to touch on
14 relative to hearing logistics. That is joint panels. In
15 particular, we have one protest issue which is reverse
16 flows at Freeport, our Freeport Water Project. We and
17 Sacramento County Water Agency have actually designated at
18 least some of the same witnesses on this issue, although
19 we'll each have our own witnesses to speak to agency-
20 specific aspects of this issue. And what we would
21 envision, maybe a good way to go about this, is to have a
22 joint panel on the issue of reverse flows at Freeport,
23 which would consist of the witnesses for both East Bay MUD
24 and Sacramento County Water Agency. Both East Bay MUD and
25 SCWA also have additional agency-specific grounds for

1 protest, other than reverse flows at Freeport, and so East
2 Bay MUD, and I'm sure they, as well, would also appreciate
3 the opportunity to present those issues separately. But on
4 the reverse flows issue, we think a joint panel would make
5 sense. And that issue, that grounds for protest, is
6 actually for us where we would be relying on the testimony
7 presented by Mr. Bourez. So that joint panel, if you do
8 decide that a joint panel is the way to go on that issue,
9 would probably best be sequenced after Mr. Bourez's
10 testimony.

11 HEARING OFFICER DODUC: Thank you. Next, please.

12 MR. FERGUSON: Aaron Ferguson, Counsel for
13 Sacramento County Water Agency. And I just want to echo
14 Mr. Salmon's comments. The intention is to have a joint
15 panel on the reverse flow issue. The agency, as he said,
16 as well wants to be able to present evidence on their own
17 individual issues which are laid out in the protest. The
18 agency will otherwise be coordinating with Sac Valley and
19 the American River Group, as well, and realized the
20 importance of getting Mr. Bourez's testimony in the record,
21 perhaps upfront so that the agency can come on at a more
22 detailed level after he's gone at the broader level. So we
23 support that approach.

24 HEARING OFFICER DODUC: Thank you, appreciate it.
25 Next, please.

1 MR. CARDELLA: Nicholas Cardella for South Valley
2 Water Association. Alex couldn't be here today. I would
3 just generally concur on the comments from my predecessors
4 as to allowing the parties to coordinate amongst
5 themselves. Thank you.

6 HEARING OFFICER DODUC: Mr. O'Laughlin.

7 MR. O'LAUGHLIN: Tim O'Laughlin, San Joaquin
8 River Tributaries Authority. So we're in the Walter Bourez
9 (Sic) group, that's Round 1. We are --

10 HEARING OFFICER DODUC: Walter William Bourez,
11 right?

12 MR. O'LAUGHLIN: Yes, yes. Thank you. So we're
13 going to -- Walter is going to go on first, then you'll
14 notice in our disclosures that we have Dan Steiner and
15 Susan Paulson, and we're coordinating with other parties,
16 so currently on the hydrology side we've talked to the
17 Exchange Contractors and Friant about how Dan might be
18 used, if we need Dan beyond Walter; and then we're talking
19 to Susan Paulson about hydraulics in the Delta, depending
20 on where that goes. So that's open. But we would
21 coordinate with the other parties that are using these
22 witnesses jointly, try to make it as, like Kevin said
23 earlier, start general and then hit some specific issues.

24 HEARING OFFICER DODUC: Thank you, Mr.
25 O'Laughlin. Let me turn now and ask Petitioners, State

1 Water Contractors, and the Coalition for a Sustainable
2 Delta, three of you either suggested or supported in
3 writing the notion of a second pre-hearing conference, but
4 more importantly the idea of grouping or at least doing a
5 self-attempt at grouping. Do you wish to -- I mean, you've
6 heard today some of the support for that recommendation --
7 do you wish to add anything further to your suggestion?
8 You don't have to.

9 MR. MIZELL: This is Tripp Mizell for DWR, and I
10 think what we heard of before crafting our letter has just
11 been reiterated here today, so, yes, we agree that self-
12 grouping is important and appropriate. The only point that
13 I might add is that ultimately if there are recalcitrant
14 parties who feel like they have to go on their own and
15 their testimony significantly overlaps with others, we hope
16 that the Water Board would lend some guidance as to where
17 they might be grouped.

18 HEARING OFFICER DODUC: Thank you. All right, I
19 will now open it up to any other parties who would like to
20 comment on this because this is, in my opinion, a
21 relatively small issue. Let's keep comments to two
22 minutes, please.

23 MR. WEILAND: Yes, Paul Weiland for the Coalition
24 for a Sustainable Delta. Yeah, I think that I support the
25 concept that a number of other folks have mentioned about

1 self-grouping. And once the Board is able to respond or
2 see how the parties have done that, the Board could then
3 determine whether a further conference will be necessary,
4 or whether the Board could simply issue its decision,
5 preferably the latter, of course.

6 HEARING OFFICER DODUC: Thank you. Any other
7 commenters on this issue? Mr. Jackson. I'm having trouble
8 hearing you. Closer, please.

9 MR. JACKSON: It's not on. All right, what we
10 did -

11 HEARING OFFICER DODUC: I don't usually have
12 trouble hearing you, so...

13 MR. JACKSON: I'm getting older and don't have as
14 much energy as I used to.

15 The three groups are going together. We're going
16 to put on the same set of witnesses, so I didn't exactly
17 qualify for this group. We'd like some guidance as to
18 whether that's a disadvantage in that we're limited only to
19 an hour of cross, when if we disassembled ourselves, we'd
20 get three hours of cross. So is that another subject, or
21 is that part of this?

22 HEARING OFFICER DODUC: I did mention earlier in
23 my remarks that additional time may be appropriate for
24 consolidated presentations. So definitely we'll take that
25 under advisement.

1 MR. JACKSON: Okay, otherwise -

2 HEARING OFFICER DODUC: I'm not going to make a
3 commitment to you right now today, Mr. Jackson. But I
4 appreciate --

5 MR. JACKSON: Okay, but is there a process by
6 which we can disassemble ourselves?

7 HEARING OFFICER DODUC: You mean, when you don't
8 like each other's say?

9 MR. JACKSON: Well, no, but the idea is that each
10 of the areas is geographically distinct, and so if we're
11 limited to one hour, we're for instance taking away from
12 the Santa Barbara group, or the Chico group, or the Delta
13 group. And so if there's an opportunity to be more
14 specific in regard to what happens to those of us who were
15 trying to save time, we just don't want to cost our
16 clients.

17 HEARING OFFICER DODUC: So in other words, you
18 would support a proposal to self-organize and propose the
19 grouping and time limits to us?

20 MR. JACKSON: Absolutely.

21 HEARING OFFICER DODUC: Thank you, Mr. Jackson.
22 Any other commenters on this issue? Ms. Riddle, a
23 question?

24 MS. RIDDLE: Yeah. I had a question. I believe
25 some of the commenters are indicating that they want to

1 submit proposals for self-grouping after testimony and
2 exhibits are due and then determine whether another pre-
3 hearing conference is due. If we stick to the schedule of
4 the hearing beginning on April 7th, that doesn't provide
5 very much time for those things to take place, so I just
6 wanted to check on -- it seems like the self-grouping could
7 take place before the exhibits are due, and in fact would
8 be something you'd want to do in order to organize your
9 exhibits and testimony. So I was hoping as far as
10 deadlines go that we could potentially set a date before
11 that time period, unless somebody has a strong objection to
12 that. And then we can determine the need for a pre-hearing
13 conference in mid-March or something.

14 HEARING OFFICER DODUC: Hold on, Mr. Lilly, not
15 yet. Ms. Morris, my apologies for missing you, you are
16 representing the State Water Contractors and you were one
17 of the three proposers of this proposal. So please, go
18 ahead and make your comment.

19 MS. MORRIS: Thank you. Stefanie Morris, State
20 Water Contractors. We were the ones who had suggested, I
21 think, that there be another pre-hearing conference, and I
22 don't think that's necessary. The submittals could really
23 come in, I think, at any time. The thought behind having
24 it after the sort of testimony and exhibits were submitted
25 was it would give people a better idea on cross examination

1 where they're going to be able to consolidate not just on
2 direct, but also on cross examination, and I just would
3 like to note that certain groups have already self-
4 organized. For example, the State Water Contractors, we
5 have people making policy statements through our member
6 agencies, but the State Water Contractors is representing
7 27 contractors, and so we would want to make sure again
8 that we're not getting short of time, so there should be
9 fair and equitable sort of time limits set for parties
10 based on how many people they're representing. Thank you.

11 HEARING OFFICER DODUC: Thank you, Ms. Morris.
12 Now, Mr. Lilly, you may approach the microphone. You were
13 so eager.

14 MR. LILLY: I appreciate the opportunity to
15 respond. And Ms. Riddle raised some good questions. I'll
16 just tell you from our point of view it is a real challenge
17 to put together all of these exhibits and testimony and,
18 you know, if we still have to meet the March 1st deadline,
19 I mean, we've already explained our challenges with that.
20 And it's just really not realistic, I mean, it might be
21 good in theory, but it's just really not realistic to try
22 to make us figure out in advance exactly how we're going to
23 organize which witnesses belong in a panel together and
24 what the order should be. So we have some time between
25 March 1st and April 7th, we may have more time if the Board

1 decides to split Part 1 into more parts.

2 But what I propose is some time, like at least a
3 week, like March 8th, would be our deadline for submitting
4 proposals. And these are not going to be long documents,
5 they'll be letters that are a couple pages long, basically
6 saying here's our proposed panel. And then the Board would
7 have time, it would still give almost a month to make a
8 decision on exactly how to order the panels. I don't think
9 you need another pre-hearing conference, it's basically
10 just processing the proposals for grouping and then making
11 the decision. So I just really, please, don't ask us to
12 try to do this before March 1st, that would just be very
13 difficult.

14 HEARING OFFICER DODUC: All right, thank you.
15 Seeing no other commenter on this particular issue, we will
16 move on to the next one.

17 All right, so now we will discuss an issue raised
18 in comment letters from CSPA parties, EJ Coalition for
19 Water, Restore the Delta, and Environmental Water Caucus.
20 These parties commented that the State Water Board should
21 not limit the scope of Part I of the hearing to potential
22 impacts to legal users of water. They argue that the Water
23 Code does not define the phrase "legal user of water," and
24 that this phrase does not apply to the Water Right Change
25 Petition that is the subject of this hearing. Given the

1 legal nature of this issue, I would like Ms. Heinrich to
2 address this and provide some clarification.

3 MS. HEINRICH: Thank you, Board Member Doduc. So
4 I think that there was some confusion on the part of the
5 parties who made this argument, and for their benefit I
6 wanted to point out that Water Code §1702 does apply to
7 long-term Water Right Change Petitions such as the petition
8 at issue here. And that section provides that before the
9 Board may approve the Change Petition, the Petitioner must
10 establish, and the Board must find that the change will not
11 cause injury to any legal user of the water involved.

12 And that is essentially as codification of the
13 Common Law No Injury Rule; there is case law interpreting
14 and applying that rule.

15 And there is an important distinction in the law
16 between the term "Legal User" and "Legal Uses" of water. A
17 Legal User is someone who is entitled to divert and use
18 water pursuant to a Water Right or a contract, as opposed
19 to Legal Uses, which is a broader term and it encompasses
20 in the stream beneficial uses such as fish and wildlife
21 habitat and recreation.

22 The purpose of Part I of the hearing was to
23 address the question of injury to legal users of water, but
24 that is not to say that we are proposing to exclude
25 testimony regarding effects to legal uses. The issue is

1 whether that information should be presented as part of
2 Part I of the hearing or Part II. And currently the
3 Hearing Notice has notice for Part II, one key issue is
4 whether the changes would unreasonably affect fish and
5 wildlife or recreation, and whether the changes would be in
6 the public interest.

7 So generally speaking there may be some issues
8 that overlap Part I and Part II, but our thought was that
9 issues concerning impacts to human uses would probably be
10 better heard as part of Part I of the hearing, and issues
11 concerning potential impacts to fish and wildlife should be
12 heard as part of Part II, with the caveat that at least one
13 party raised an issue about subsistence fishing, and
14 because that is really more of a derivative effect
15 associated with an impact to fish, that our thinking was
16 that probably should wait until Part II of the hearing.

17 HEARING OFFICER DODUC: Thank you, Ms. Heinrich.
18 So with that, I will start the comment again with the
19 parties who submitted written comments on this matter. I
20 will begin with Mr. Jackson; I see you're up there already,
21 and the CSPA parties, followed by EJ Coalition for Water,
22 Restore the Delta, and the Environmental Water Caucus.

23 MR. JACKSON: The benefit of being active in both
24 parts is that you're able to cross examine witnesses, from
25 our point of view. We do own land in the Delta and it is

1 riparian land, and downstream of the new point of
2 diversion, not affected by the old one, but would be
3 affected by the new one. So we intend to take part in Part
4 I.

5 The other two groups that we're aligned with to
6 put on evidence are interested in beneficial uses of water
7 and, in particular, the question of what happens to the new
8 beneficial uses and the effects on those uses by the
9 project. Since you have talked about doing the Water
10 Quality Control Plan and the 401 Permit, and taking
11 evidence in Part I of the hearing, we feel that it would
12 disadvantage anyone who is interested in those issues to
13 not be able to take part in Part I since hydrology, water
14 quality, all of those are going to have a tremendous amount
15 of expertise, you just saw from the people lined up, on
16 both sides.

17 And we're afraid that the bifurcated nature of
18 the project and bifurcating again the legal users of water
19 from the legal uses of water is a situation in which you
20 are not going to get a complete description of the effects
21 it would have on the commercial fishermen who have food, I
22 mean Salmon or every bit as good of food as almonds, the
23 subsistence fishers whose livelihood in resale of fish is
24 an important part of groups that have been in the Delta a
25 long time, Native Americans, and so we think it would be

1 best that you treat it as a matter of relevance, and we're
2 no longer relevant, ask us to quit asking questions. These
3 things affect each other too much and we just wanted to
4 make that clear.

5 I do understand the legal argument about legal
6 users of water. And on a typical stream where you're
7 moving two miles upstream or two miles downstream, those
8 are a rather discreet set of people.

9 In the Bay Delta Estuary with the California
10 Delta Reform Act, they've all been put together in a dual
11 set of goals that overlaps all of these issues, and so we'd
12 at least like to have a ruling on it, even if you disagree
13 with this, because it's something that we believe gets us
14 off on the wrong step. Thanks.

15 HEARING OFFICER DODUC: Thank you, Mr. Jackson.
16 Since this is a more substantive issue than the last one,
17 let's increase the time to four minutes. Now EJ Coalition
18 for Water, Restore the Delta, and Environmental Water
19 Caucus.

20 MR. BAILEY: Thank you. Again, Colin Bailey for
21 the Environmental Justice Coalition for Water. Thank you,
22 Ms. Heinrich, for your explanation. If I understood
23 correctly, of those interests that EJCW would put forward,
24 it sounds like all the subsistence fishers are proposed for
25 Part I. I would echo Mr. Jackson's comments and urge the

1 Board to keep subsistence fishers in Part I. I would also
2 add a nuance that I think might have been glossed over in
3 Ms. Heinrich's comments that for the group of subsistence
4 fishers who are also California Indian Tribes, who may in
5 fact be downstream of the proposed point of diversion,
6 there may be an argument as to their reserve rights, which
7 would actually flip the subsistence fishing, in our view,
8 would be a subsidiary issue to the reserve right, which
9 would in our view be a Part I issue. So I would just add
10 that nuance to the argument that those remain both in Part
11 I.

12 HEARING OFFICER DODUC: Thank you, Mr. Bailey.
13 Oh, Mr. Stroshane.

14 MR. STROSHANE: I agree with my previous
15 colleagues who are more learned in the area of the law than
16 I am, and I thank Ms. Heinrich for her explanation earlier.
17 Thank you.

18 HEARING OFFICER DODUC: Thank you. Mr. Aladjem,
19 are you representing the Delta Flood Control Group? If so,
20 you may come up.

21 MR. ALADJEM: That is correct, Madam Chair. On
22 behalf of the Delta Flood Control Group, we had submitted a
23 letter raising a question. We would like to be presenting
24 evidence which we believe will be in Part I on Water
25 Quality Effects, but also on Flood Control, as well as

1 evidence on environmental effects. We're seeking
2 clarification in order to move these hearings forward
3 efficiently, should we do that in Part I, Part II, or both?

4 HEARING OFFICER DODUC: We are inclined to allow
5 testimony on flood control impacts, which is a human use
6 impact in Part I; however, I'm hoping to hearing from other
7 parties on this issue, which is why I put it out there.

8 MR. ALADJEM: So just to be very clear, Madam
9 Chair --

10 HEARING OFFICER DODUC: Haven't ruled yet --
11 inclined to.

12 MR. ALADJEM: -- flood control impacts will be
13 dealt with in Part I?

14 HEARING OFFICER DODUC: Inclined to.

15 MR. ALADJEM: And environmental impacts in Part
16 II?

17 HEARING OFFICER DODUC: Inclined to.

18 MR. ALADJEM: Thank you.

19 HEARING OFFICER DODUC: Thank you, Mr. Aladjem.
20 All right, I'll open it out to other parties, and I see
21 that Mr. Minasian is up.

22 MR. MINASIAN: Madam Chairman, could you ask your
23 able staff, Ms. Heinrich, to tell us the thinking of the
24 staff in regard to a fairly discreet issue: take the
25 Grassland Water District, which is served by the Exchange

1 Contractor, it seems to me that could be treated in Phase I
2 in terms of the integrity of the ability of the system to
3 deliver water, or it could be also considered in the second
4 phase. Now, I don't want to be a nitpicker, but if you had
5 a discussion, it would help us all understand your thinking
6 about this.

7 HEARING OFFICER DODUC: Would you like to address
8 that?

9 MS. HEINRICH: I hadn't thought about that
10 before, but I think that that probably would belong in Part
11 I because, really, you're talking about a potential impact
12 to a refuge due to a reduction in their deliveries, which
13 is really more of a water supply issue.

14 HEARING OFFICER DODUC: I think rather, though,
15 trying to make a decision on all potential incidences that
16 may come up today, this will be something that we'll flag
17 for follow-up in our written ruling after this pre-hearing
18 conference and, if appropriate, allow for some additional
19 information and decision making process being involved.

20 MR. MINASIAN: As the presentations are
21 presented, you can help us a lot by giving us -- we're
22 going to be concentrating upon these subjects on this day.
23 Because obviously a lot of this testimony is going to come
24 in through rebuttal, I think, because we can't anticipate
25 exactly how the project is going to operate, or what your

1 flow standards are going to be.

2 HEARING OFFICER DODUC: Thank you, Mr. Minasian.
3 Next, please.

4 MR. VOLKER: Yes, if it please Madam Chair and
5 the Board, on behalf of the Pacific Coast Federation of
6 Fishermen's Associations, who have their livelihoods at
7 stake in this proceeding, we urge the Board to consider
8 their right to conduct cross examination under the
9 constraints proffered by Mr. Jackson, that they would be
10 subject to the usual rules regarding relevance and
11 cumulative testimony, so that they would be afforded the
12 same right as other legal users of the watershed to assist
13 the Board in getting to the truth of the key issues
14 presented. Thank you.

15 HEARING OFFICER DODUC: Thank you. So -

16 CHAIR MARCUS: Can I -- just a clarifying
17 question so I understand what you're both saying. So what
18 you're saying is asking for the ability not to present a
19 case in Part I, but to be able to be a part of the cross
20 examination in Part I because of the nature of what will be
21 presented by the water users and the Petitioners in Part I?

22 MR. VOLKER: That's accurate as to my clients
23 because we do not hold water rights; however, I should note
24 that Mr. Jackson on behalf of CalSPA does hold a water
25 right and would have a right thereunder to present

1 testimony, as I understand he will. But with respect to
2 the commercial fishermen, we are simply asking for the
3 right to cross examine. Thanks.

4 HEARING OFFICER DODUC: Thank you. Not seeing
5 any other commenters on this issue, Ms. Heinrich, any
6 additional comments?

7 MS. HEINRICH: I just, if we are going to address
8 this in a ruling after the pre-hearing conference, I would
9 just urge anyone else who has one of these questions about
10 crossover issues, if you haven't already put it in your
11 written comment letter, to let us know about it now so that
12 we can address it later.

13 HEARING OFFICER DODUC: Please come up.

14 MS. SUARD: Nikki Suard again with Snug Harbor.
15 And I hope this is the right timing because you had said
16 that maybe I should come back up again. I am going to
17 address human impact, and I really appreciate that you guys
18 are actually willing to listen to that. We haven't seen
19 that in a lot of other hearings. And so I assume that's
20 Part I, but I also believe that I have substantial evidence
21 regarding impacts to recreation, impacts to transportation,
22 and therefore the economy. So I assume that's Part II?
23 And I would also like to say that we didn't get a chance
24 for the rebuttal from DWR and I would really like you to
25 ask them to give you a list of who those legal right owners

1 that received notice because there's a lot of people with
2 private drinking water wells and commercial water wells,
3 and they should have all received notice and I don't
4 believe they did.

5 HEARING OFFICER DODUC: Thank you. Next, please.
6 Again, I'll just reiterate that, I'm sorry, not at you, but
7 others that we're now, as Ms. Heinrich requested, just
8 flagging the issue, we're not going to be making a decision
9 as to what goes in Part I or what goes in Part II today.
10 But if you have a scenario, please flag it for us right
11 now.

12 MR. BRODSKY: Yes. Michael Brodsky representing
13 Save the California Delta Alliance. So our members, a
14 large part of our members are homeowners and waterfront
15 homeowners in Discovery Bay with riparian rights. We do
16 have a right to put water to legal use. I did not assert
17 our permits or put a notice of intent to appear in Phase I,
18 but rather our Notice of Intent to Appear was in Phase II
19 with presenting a policy statement in Phase I. But with
20 what I'm hearing today, it would probably be more efficient
21 if we had a right to cross examine in Phase I as to those
22 issues that affect us, so as not to be repetitive, not to
23 have to call those witnesses back in Phase II, and I guess
24 my question is, based on what's being said and discussed
25 today if the Board would consider an Amended Notice of

1 Intent to Appear, or some mechanism where efficiency could
2 be served by those who have put in a Notice of Intent to
3 Appear in Phase II who are in our situation and have
4 riparian rights, can participate to some extent in cross
5 examination within Phase I, so we don't have to, you know,
6 drag that guy back as a hostile witness in Phase II, etc.
7 etc.

8 HEARING OFFICER DODUC: Thank you. We'll note
9 that question. Next, please.

10 MR. WRIGHT: Good afternoon. Bob Wright on
11 behalf of Friends of the River and Sierra Club California.
12 This is more in the nature of a question based on what's
13 been heard. I think one option is what Mr. Brodsky just
14 presented. I should say also, the parties that I'm
15 representing are Part II parties. We relied on the Notice
16 that we looked at and we thought, well, really we're not
17 going to content in this proceeding that we are in fact
18 legal users of water. So I think another option to the
19 request that Mr. Brodsky just made would be, I think we'd
20 feel protected if in your ruling, when you come out with
21 it, you would provide that Part II parties would not be
22 precluded in Part II from going into water issues that go
23 beyond the water issues faced by the legal users of water.
24 Thank you.

25 HEARING OFFICER DODUC: Next, please.

1 MR. MINTON: Jonas Minton with the Planning and
2 Conservation League. We request clarification as well. We
3 are a Part II party. My understanding is that witnesses
4 and evidence will be presented in Part I on substantive
5 matters such as the modeling, and we're trying to
6 understand when we would have the opportunity to cross
7 examine on that evidence. Are they bringing those
8 witnesses back for Part II, and would we re-open it? That
9 does not seem to me to be particularly efficient
10 processing. So we'll appreciate hearing that. Thank you.

11 HEARING OFFICER DODUC: Thank you, Mr. Minton.
12 Anyone else? Mr. Porgans?

13 MR. PORGANS: Yes, Madam Chair, Members of this
14 Board, I need a point of clarification here. I'm in Part
15 I. I'm in Part I. And I'm going to be able to cross
16 examine whoever gets up there. Is that correct?

17 HEARING OFFICER DODUC: Yes.

18 MR. PORGANS: I'm in Part I, I didn't have any
19 witnesses because I'd have to put myself there and I can't
20 question myself, you understand. But I want assurances
21 that I will be able to question each and every person from
22 the Department of Water Resources and the Bureau of
23 Reclamation to get some data on --

24 HEARING OFFICER DODUC: Mr. Porgans, I do not
25 have your NOI in front of me, but if you checked cross

1 examination in your NOI --

2 MR. PORGANS: I did. I just wanted to make sure
3 we're on the same page and it's not going to change because
4 DWR and the rest of --

5 HEARING OFFICER DODUC: Thank you, Mr. Porgans.
6 Next, please.

7 MR. SIPTROTH: Good afternoon. Stephen Siptroth
8 for Contra Costa County and Contra Costa County Water
9 Agency.

10 HEARING OFFICER DODUC: Please, closer to the
11 microphone.

12 MR. SIPTROTH: Oh, I'm sorry. Stephen Siptroth
13 for Contra Costa County and Contra Costa County Water
14 Agency. I think we share the same concerns as some of the
15 previous parties, including Mr. Minton. We may not know
16 the full details of the Water Fix project until the Part I
17 portion of the hearing closes, we may want to cross examine
18 witnesses who have appeared in Part I, although we have not
19 noticed our intent to appear as a party in Part I. So we
20 would like some clarity on when we would be able to cross
21 examine those witnesses.

22 HEARING OFFICER DODUC: Thank you, I think that's
23 been a repeated question.

24 MR. SIPTROTH: Thank you.

25 MR. MILJANICH: Peter Miljanich from Solano

1 County. I think I'd just echo what the representative from
2 Contra Costa County said. We also have not noticed our
3 intent to participate, except for adding a policy statement
4 in Part I, but we have the same questions about the proper
5 time to cross examine in particular witnesses on the Water
6 Quality Modeling and various other topics that it sounds
7 like it will be addressed, at least most intensely in Part
8 I. So some clarity would be appreciated.

9 HEARING OFFICER DODUC: Thank you. Since you
10 opened that can of worms, Ms. Heinrich, is there anything
11 else you would like to ask? All right, thank you everyone.
12 We'll move on now to the next issue.

13 So the next issue for comment is Information
14 Requests. In our January 15th letter, parties were asked
15 to come prepared today to discuss and comment on whether
16 Petitioners or other parties should be required to submit
17 proposed terms and conditions, or other information that
18 would resolve some or all of the contested issues. In
19 written comments, CSPA and their parties, and South Delta
20 Water Agency and their parties, objected to this. Your
21 comments are noted and we'll discuss further today.

22 Also, in written comments, several parties
23 requested an opportunity for the presentation of proposed
24 settlements, specifically these parties are Metropolitan
25 Water District, Northern California Water Association, San

1 Luis and Delta Mendota Water Authority, the State Water
2 Contractors, the San Joaquin Tributaries Authority, the San
3 Joaquin River Exchange Water Authority, and Westland Water
4 Districts.

5 So let me begin by asking those parties who made
6 this proposal with respect to settlements if they want to
7 briefly provide any additional comments on their request,
8 and I'm now specifically focusing on the parties that
9 signed on to the letter, yes. All right, Mr. O'Laughlin,
10 lead the charge, please.

11 MR. O'LAUGHLIN: Well, hopefully Mr. O'Brien will
12 back me up on this one, and I get it right. You have the
13 letter in front of you. One of the things we noticed in
14 the hearing process was you had a Phase I and a Phase II,
15 we understand that. But as you know in previous petitions
16 in front of the Water Board in regards to Change Petitions,
17 the Board has encouraged settlements of various protests.
18 And so the question that we had is, if we came up to a
19 Settlement Agreement with DWR and Reclamation in regards to
20 their Change Petition, how are we going to fit that into
21 this process? Where would it fit in? And how would we do
22 it? Because we currently are having discussions in that
23 regard and we would like to hear from you and your side of
24 the aisle what that would look like, and how we would do
25 that.

1 HEARING OFFICER DODUC: And hence your request
2 for some kind of built-in process.

3 MR. O'LAUGHLIN: Yeah, you know, well, so if we
4 get to Phase I or we're in between Phase I and Phase II --

5 HEARING OFFICER DODUC: I'm sorry, now you're
6 confusing me. Are you talking about Parts I and Part II--?

7 MR. O'LAUGHLIN: Part I and Part II, sorry.

8 HEARING OFFICER DODUC: -- because Phases -- we
9 refer to our Water Quality Control Plan Update which is
10 separate, and your negotiations as part of that are
11 separate --

12 MR. O'LAUGHLIN: Fine, so Part I and Part II --

13 HEARING OFFICER DODUC: Thank you, Mr.
14 O'Laughlin.

15 MR. O'LAUGHLIN: -- of this proceeding, yes. So
16 if we came back in June or July and there was a settlement,
17 let's say, between the San Joaquin Tributaries Authority
18 and Reclamation and the Bureau in regards to their Change
19 Petition. And then it's just a simple question: how do we
20 do that? How do we process it? And where does it fit in?

21 HEARING OFFICER DODUC: Thank you, Mr.
22 O'Laughlin. As you know by now, there are no simple
23 questions, nor are there simple answers. Mr. O'Brien.

24 MR. O'BRIEN: Kevin O'Brien. I think Tim covered
25 it well. The only thing I would point out is that there is

1 precedent for this. In the 1641 hearings there was a
2 specific phase, I think it was 2A, but don't quote me on
3 that, that was set aside to consider settlements, and there
4 were a number of settlements in that proceeding that were
5 approved. So I think it makes good sense in a proceeding
6 of this side.

7 HEARING OFFICER DODUC: All right. Are there any
8 other parties who wish to voice support for including some
9 kind of procedures with respect to settlements? Not yet,
10 Mr. Jackson, I'm getting to you. All right, not seeing any
11 taker, now I will turn to the rest of the commenters and,
12 again, I pointed out that CSPA and South Delta Water Agency
13 had concerns and objections with respect to the information
14 and requests. So I will ask them now to come up and
15 provide their comments. And you may also address the
16 settlement issue, as well.

17 MR. JACKSON: Thank you. We'll rely on our
18 written documents for everything except the settlement
19 question, we didn't know about that at the time we filed
20 those.

21 We were, as you well know, Ms. Doduc, we were
22 sort of in the hall while they were settling 1641, and I'd
23 just like to indicate that in the terribly unlikely event
24 that this gets settled, there are those of us who are not
25 going to settle and we want to make sure that we're going

1 to have an opportunity to, since 4A would now shift into
2 the settlement, and that would be the proposed deal, how in
3 the world do we know whether that's supported by CEQA, or
4 whether that's consistent with the requirements of the BA,
5 the BO, the CESA, all of these Water Quality Control Plan,
6 when we don't know what those are going to be? So I would
7 suggest that if you are going to have any sort of truck
8 with the settlement issue, that it take place after
9 everything else is finished because otherwise we feel that
10 our due process rights would be eliminated, and that this
11 Board's quasi-judicial role would be violated.

12 If there's a settlement among parties, and we
13 think we're a party, in a court case they're entitled to
14 settle it, but we go forward against DWR and the Bureau,
15 and so I don't know that settlements are going to save you
16 any time, and they may cause certain due process problems,
17 but I didn't want the Bureau and DWR to leave here thinking
18 that they can settle with -- I mean, I hear there are
19 settlement negotiations going on, I didn't know that,
20 haven't been in that room. So, you know, I want them here
21 all the way through this quasi-judicial action, that they
22 start it. Thank you.

23 HEARING OFFICER DODUC: Thank you, Mr. Jackson.
24 Anyone else with brief comments on this, let's set the time
25 limits at two minutes, please.

1 MR. STROSHANE: Tim Stroshane, Restore the Delta.
2 Two minutes is no problem. I merely want to record that
3 Restore the Delta agrees with the statement by Mr. Jackson
4 about not having much truck with settlements and not being
5 willing to settle. And we look forward to the process and
6 support his idea about you putting off the settlements
7 until the end of all the other processes, parts of the
8 process, so that people's due process rights are not
9 trampled. Thank you.

10 HEARING OFFICER DODUC: Hold on, please. I just
11 want to make sure I don't neglect Mr. Herrick. You were
12 one of the commenters on this issue. You do not need to
13 make verbal comments, but I wanted to make sure that we
14 have you covered since you did submit a written letter.

15 MR. HERRICK: Thank you. John Herrick for South
16 Delta and other Parties. I appreciate being able to elbow
17 my way to the front. I just agree with Mr. Jackson's
18 point, which is a settlement sort of suggests that there
19 are different conditions than previously discussed or
20 analyzed, and the question is when would the parties be
21 able to examine, determine whether or not they think that
22 results in some other harm, or exacerbates harm, or
23 something. So I don't know if it works too good. Our
24 written testimony sets forth our reasons why we shouldn't
25 be required and that's all. Thank you very much.

1 HEARING OFFICER DODUC: Thank you. All right,
2 other commenters?

3 MS. DES JARDINS: I just wanted to --

4 CHAIRPERON DODUC: Identify yourself, please.

5 MS. DES JARDINS: Deirdre Des Jardins. I just
6 wanted to remind the Board of the protest after the '77-'78
7 drought when the Department of Water Resources and the
8 Bureau were protesting each other's permits. And at that
9 point the staff actually undertook to quantify for the
10 first time the water available in the Delta, and it was
11 abandoned because there was a settlement. And in the
12 coordinated operating agreement, you can read the EIR and
13 it states that the Bureau and DWR agreed jointly to provide
14 a supply of water for all time to the Delta Islands and
15 Delta Highlands, and yada yada. And I would argue that
16 because the evidence at that time wasn't developed fully,
17 many of the issues that have led to the ongoing conflicts
18 were not resolved. And so I would encourage you to take
19 that into consideration.

20 HEARING OFFICER DODUC: Thank you. And so your
21 point is to raise concern about the settlement process?

22 MS. DES JARDINS: Yes, to the extent that it
23 precludes evidence being introduced that will clarify some
24 of these issues.

25 HEARING OFFICER DODUC: Thank you. Mr. Obegi.

1 MR. OBEJI: Good afternoon. Doug Obegi from
2 NRDC, et al. Obviously we do not oppose settlement
3 agreements, however, we agree that any settlement
4 agreement, should the terms of that agreement change the
5 proposed operations or effects do need to analyzed under
6 CEQA and do need to be shared with all parties.

7 Moreover, I just want to request clarification
8 that any testimony that's submitted in Part I by a party
9 that ultimately settles remains part of the hearing record,
10 and that those parties remain subject to subpoena and cross
11 examination in Part II for those parties like us that are
12 not participating in Part I. Thank you.

13 HEARING OFFICER DODUC: Thank you.

14 MR. VOLKER: Stephan Volker for PCFFA, et al. We
15 concur in the comments presented by Doug Obegi, in
16 particular we're dealing with a public resource subject to
17 the public trust doctrine, it's not a private resource to
18 be divvied up among those with the wherewithal to make
19 deals. And this Board owes it to the public to make sure
20 that any settlement agreements that affect operation of
21 this project and affect the public trust resources of the
22 Bay Delta be subject to a full airing and an opportunity by
23 all members of the public to comment on the impacts on the
24 public trust values of the Delta before any such
25 settlements could be given effect by this Board. Thank

1 you.

2 HEARING OFFICER DODUC: Thank you. Mr. Porgans?

3 MR. PORGANS: I was opposed -- Patrick Porgans,
4 Porgans Associates -- I was opposed to the settlements
5 agreements in the last series of hearings. And if we
6 looked at what happened as a result of those settlement
7 agreements, and if they all worked we wouldn't be here
8 today.

9 HEARING OFFICER DODUC: Thank you. Your
10 opposition is noted. Mr. O'Brien or Mr. O'Laughlin, I will
11 provide you a very very short minute for any closing
12 comments on this issue.

13 MR. O'LAUGHLIN: Well, and strange things again,
14 I don't disagree with Mr. Jackson. If there are
15 settlements, this hearing process will go on because there
16 are maybe parties that don't settle. So parties that can
17 settle can settle, and parties that don't want to settle or
18 can't settle can continue through a full thorough hearing
19 through Part I and Part II of this process. I will say one
20 thing, though, in regards to what Mr. Obegi said, if a
21 settling party, and I put this in our papers earlier, if a
22 settling party settles and doesn't put on testimony, we're
23 out. So just letting everybody know that if we settle and
24 our witnesses haven't been called and our testimony is
25 submitted, and we're no longer a party to the proceeding,

1 our witnesses will not be available.

2 Now, if we're at the end of the hearing, then
3 that brings up a different facet, so it will depend on
4 where you stick the settlement process and how it gets
5 resolved.

6 HEARING OFFICER DODUC: Thank you, Mr.
7 O'Laughlin. All right, I am closing the discussion on this
8 issue and actually for my colleagues up here, I'm going to
9 exercise Hearing Officer's privilege and move some things
10 around because I want to tackle, I think, some of the
11 "easier" issues first. So I'm going to move next to
12 service lists.

13 In our January 15th letter, we directed parties
14 to come prepared to discuss whether an opt-out, an option
15 to opt-out of service of certain hearing materials, it
16 should be provided. We actually did not receive many
17 written comments on this. Solano County did make a request
18 that Board staff provide an estimate of the time, the
19 maximum time, I guess, needed to post documents on our
20 website. So Ms. Riddle, could you please address this?

21 MS. RIDDLE: Sure, yeah. It will largely depend
22 on how many materials we're getting out that time, how
23 large the documents are, so unfortunately I don't think
24 we're able to commit to a timeframe for which we can get
25 the documents posted. We will get them posted as soon as

1 possible and, you know, given this hearing, I would say a
2 week to two weeks is probably a good estimate, but I don't
3 think that's something we can be certain of given the
4 unknowns of what types of exhibits we're going to get and
5 in what format, and other issues such as that.

6 HEARING OFFICER DODUC: Anyone wishing to comment
7 on this issue of Service Lists, please come up to the
8 microphone.

9 MR. KELLEY: Yes, thank you. Dan Kelly
10 representing Placer County Water Agency, Sacramento County,
11 Sacramento County Water Agency, and Carmichael Water
12 District in this proceeding. I had a conversation a little
13 while ago with Ms. Heinrich about whether or not it would
14 be wise to take a look at utilizing the State Water Board's
15 Lyris List Service as a way of getting this information out
16 and distributed to people. We've had over the past couple
17 of weeks' modifications to the Service List where we've had
18 either email addresses that were entered wrong, or people
19 associating or disassociating, and that necessitates
20 everybody updating their own individual Service Lists, and
21 then hoping to have the most recent one when they send
22 things out. I would hope that there is some way to utilize
23 what the State Water Board already uses to distribute
24 information, and allow people to simply sign up. And so if
25 there are folks in the room maybe that haven't received

1 notice, or didn't know how to get notice, they could sign
2 up and they could be served with whatever submittals come
3 into the Board. And to the extent that there are law firms
4 that represent multiple parties, if attorneys join on in
5 representation, they can simply sign up themselves without
6 everyone, then, having to go and revise and trying to make
7 sure they have the most recent Service Lists in order to
8 effectuate service to everybody. It would probably be
9 something that the Board would have to ask folks to opt in
10 because I don't know that you can mandate that they accept
11 service from you from other parties, so there might be some
12 kind of opt in thing that would have to happen, but I
13 suspect that that might be a really efficient way to
14 provide a continued updated Service List and allow people
15 to opt in and opt out of receiving documents that are
16 provided to the Board.

17 MS. RIDDLE: So just one comment on that. The
18 concern that I would have is if we have 80 parties
19 submitting information, it's all due at noon, then you're
20 not going to get your material at noon if, you know, that
21 still would be a much shorter delay than waiting for it to
22 be posted. And if parties are okay with that, I think
23 that's something we could potentially investigate.

24 I think the other concern is just making sure
25 that you all are responsible for getting each other's

1 information, rather than it being the Board's
2 responsibility, there's a lot of things going on, so that's
3 yet another concern. We'll continue to think about this
4 and creative options for addressing the situation, but
5 because we manage our Lyris Lists and we would have to send
6 your email with your materials out to others, then address
7 --

8 HEARING OFFICER DODUC: We are not taking on that
9 responsibility on your behalf.

10 MR. KELLY: Yeah, and I didn't anticipate taking
11 on that responsibility, and I don't know if there's a way
12 for it to automatically, if somebody submits to Lyris, for
13 it to automatically then get distributed to that Service
14 List, it just is perhaps an option to look into, to try to
15 create -

16 HEARING OFFICER DODUC: I guess we could always
17 form a Yahoo Group.

18 MR. KELLY: Or that.

19 HEARING OFFICER DODUC: Next, please.

20 MR. KELLY: Thank you.

21 MR. STROSHANE: I actually have sort of a similar
22 problem. You may have noticed that I had to communicate
23 with the Board a couple times recently and had to send more
24 than one email because Gmail limits its users to 100
25 recipients. So I put 100 in the first email and like 45 or

1 whatever in the second email and I try to remember to send
2 both to CWF Hearing to make sure that you guys know that
3 I'm doing that. So I just want to let you know that I like
4 my Gmail address, it works fine, except that I've got to
5 send it to all these recipients through this process; so if
6 it's okay with you, I'll keep doing that and I will try to
7 be, you know, cognizant and conscientious about the whole
8 transparency issue. But if there's some easier way to do
9 this for everybody, I'm interested to avoid that kind of a
10 problem.

11 CHAIRPERSON DODUC: Thank you. Mr. Herrick.

12 MR. HERRICK: John Herrick, South Delta again.
13 Although we all want to do these things ahead of time, we
14 have to accept the fact that on the day of the due date
15 there will be myriads of problems of things not being
16 delivered and too big of attachments and somebody goes to
17 Dropbox and somebody complains about they can't have
18 access. So as long as you have some level of consideration
19 for us poor people, you should assume everything won't be
20 delivered on time, even if people are trying to. So don't
21 punish somebody because it comes in the next day -- whether
22 they cheat or not, I don't know -- but there will be
23 problems of things not going through, that happens every
24 time we try to do this, you know, something gets bounced
25 back, too big a file, somebody yells at us about not having

1 access to that storage, it was not going to work with this
2 many people quickly.

3 HEARING OFFICER DODUC: So, Mr. Herrick, you're
4 saying I should not expect perfection?

5 MR. HERRICK: Well, I have perfection, but I
6 don't know if the parties will be able to.

7 HEARING OFFICER DODUC: Thank you, Mr. Herrick.
8 Mr. Bailey, you sat down. Are you speaking or not? Okay.

9 MR. BAILEY: Actually --

10 HEARING OFFICER DODUC: Identify yourself.

11 MR. BAILEY: Excuse me. Colin Bailey for
12 Environmental Justice Coalition for Water. Actually, I
13 think that the Yahoo Group does have some merit because it
14 can be self-organized --

15 HEARING OFFICER DODUC: And this is your happy
16 sounding, you know, title.

17 MR. BAILEY: -- and then, this may not actually
18 need to be on the Board, we can actually do some self-
19 organizing potentially as parties, but I did participate in
20 a proceeding where the parties group together and actually
21 had a password protected FTP site, we could potentially
22 think about Dropbox, understanding there can be challenges,
23 that then everybody drops their stuff into when it's due
24 and it saves us all the hassle of the tremendous number of
25 emails and all things associated with it. So I just

1 thought I'd put that out there as something for staff to
2 potentially look into because I did see it work well once.

3 HEARING OFFICER DODUC: Thank you, Mr. Bailey.

4 All right, well, that was interesting, but I think the
5 intent, and I'm looking at Ms. Riddle here, of this
6 particular issue was to ask whether or not we could
7 establish an opt-out feature for parties who do not wish to
8 receive *everything*. So, Ms. Riddle, did we make any
9 progress on this issue?

10 MS. RIDDLE: Well, I think the parties are
11 identifying issues that we have concerns with two sizes of
12 documents and people getting things on time and those kind
13 of things. You know, the issue -- we did think about an
14 FTP site, we're a little concerned with having this number
15 of parties having access to it, and how you would control
16 for that, and the Board doesn't want to be responsible for
17 those things. If the parties can self-organize around
18 that, then, you know, I think that's something we can
19 entertain. We can look at maybe a designated email site
20 out of forwards as long as there's some understanding that
21 we'd have to do some testing to make sure that things would
22 work, and those kind of things. But we'll go back and
23 we'll think about it. It doesn't seem like anyone is
24 interested in the idea that Tam is raising about having an
25 opt out option, you all want to have access to the

1 information, but you don't want to have it in your email
2 box, potentially, or you don't want to have to deal with
3 the logistical issues that are kind of associated with this
4 and we understand that. So we'll think about it and anyone
5 that has suggestions, if you could send those to the
6 California Water Fix email address, we'll take those into
7 consideration and try to figure out a solution that will
8 work for everyone.

9 HEARING OFFICER DODUC: Or for most, anyway.
10 Right. Next issue, Order of Presentations. Some of you
11 who submitted written comments did propose order of
12 presentations and structure for the proceeding; thank you
13 for that. I just want to open it up now and ask if there
14 are any other comments or recommendations with respect to
15 order of presentation. Mr. O'Laughlin. And, yes, you were
16 one of the parties who did propose something in your
17 written letter. Thank you very much.

18 MR. O'LAUGHLIN: Good afternoon. Tim O'Laughlin,
19 San Joaquin Tributaries Authority. Having been through
20 these processes before, and having been the lead attorney
21 when we did D-1641, one of the key points that might be
22 helpful for your consideration is setting an order for the
23 parties and keeping an order, so when you go through the
24 process you know where you're going to fall. And you know
25 who you're behind and you can set your time limits and you

1 can schedule your day accordingly, and your witnesses and
2 everything else. So that's really important. I think
3 there's no doubt we all know that the Petitioners are going
4 to go first; I would say that the parties supporting the
5 Petition should go second; and then in our proposal we put
6 forth -- I put Sac Valley for lack of better terminology,
7 but we were thinking that maybe Walter Bourez and company
8 should go after that, that will take a large swath of
9 parties, as you already heard in the coordination
10 proceeding, not to say that's the end all to be all for
11 those parties, but that would be a large chunk of testimony
12 that would occur. But keeping the order worked very well
13 previously in the other large proceedings that we had in
14 front of the Board. Thank you.

15 HEARING OFFICER DODUC: Thank you, Mr.
16 O'Laughlin.

17 MS. RIDDLE: I had one question on that. I think
18 it would maybe make sense to have one order for Part I and
19 another ordering for Part II, you know, and I'm assuming
20 you also agree with that.

21 HEARING OFFICER DODUC: Mr. Jackson.

22 MR. JACKSON: I would suggest that the people
23 with the burden of proof go first, the people who support
24 that go second, and the rest of us who live outside the
25 Delta go third, and the people between the old point of

1 diversion and the new point of diversion go last because
2 they're the ones who you're going to be looking at the most
3 critically to see whether or not they've been injured. And
4 it will be of benefit in looking at that to allow them to
5 protect themselves by having heard all of the evidence.

6 HEARING OFFICER DODUC: Thank you, Mr. Jackson.
7 Mr. Lilly.

8 MR. LILLY: Yes. Alan Lilly for various Sac
9 Valley Water Agencies. I just wanted to comment about one
10 thing that nobody has gotten to yet, and that is when we
11 get to rebuttal, the order of rebuttal. Of course this
12 will depend on whether you decide to split Part I into a
13 Part IA and Part IB. But the State Water Contractors, and
14 I believe some of the other export interests, suggested
15 that for rebuttal the opponents to the project put on
16 rebuttal first, followed by the supporters of the project.
17 And that probably will not make a lot of sense,
18 particularly if the project proponents put on their case
19 first, and then the opponents go next, it wouldn't make
20 sense for the opponents then to put on rebuttal right after
21 they've put on their direct case. It seems like it would
22 make more sense for it to be project proponents put on
23 their case, opponents put on their case, and then project
24 proponents put on their rebuttal, and then opponents put on
25 their rebuttal. So I just flag that. It's going to depend

1 on how you decide to structure everything else, but the
2 order of rebuttal -- and frankly, it may not even be
3 something that you want to decide at this point, it may be
4 something you want to decide after you've gotten into the
5 hearing. But I just wanted to flag it as one more
6 procedural issue.

7 HEARING OFFICER DODUC: Thank you, Mr. Lilly.
8 Mr. Bailey, I think, is coming up.

9 MR. BAILEY: Colin Bailey on behalf of the
10 Environmental Justice Coalition for Water. A slightly
11 different approach to the order question that gets at some
12 of the equity issues that I mentioned from before would be
13 a request from some of the groups like ours who are lower
14 resource and will be struggling to put forward more
15 technical information, to try to order the presentation of
16 the more technical information such that it comes before
17 our own because we will be relying very heavily on what
18 other parties are putting forward for that more technical
19 piece. And forgive me if this perhaps kind of goes back to
20 this morning's discussion around the timeline, but it does
21 strike me that if the Board is to consider the proposal to
22 have kind of the phased approach to the presentation of
23 evidence, and wait until the environmental documents and
24 all the review are done, that for the same reasons the
25 Board would do that, you would also want to wait for any

1 cross examination for those documents to be done because it
2 is that information which the Protestants or the cross
3 examiners would rely upon in order to call into question
4 the validity of the affirmative case being put forward.

5 HEARING OFFICER DODUC: Thank you, Mr. Bailey.

6 MR. STROSHANE: Tim Stroshane with Restore the
7 Delta. We just want to record our support for both Mr.
8 Jackson's comments and Mr. Bailey's comments. Thank you.

9 HEARING OFFICER DODUC: Thank you. Next, please.
10 Mr. Wright, right?

11 MR. WRIGHT: Thank you, yes --

12 HEARING OFFICER DODUC: I'm starting to learn
13 names.

14 MR. WRIGHT: Bob Wright for Friends of the River
15 and Sierra Club California. Complete agreement with what
16 Colin Bailey just suggested, that on the staggered
17 approach, it would be critically important for the cross
18 examining parties to have those final environmental
19 documents before they cross examined the Part I DWR and
20 Reclamation supporting witnesses. Thank you.

21 HEARING OFFICER DODUC: Thank you. I see Mr.
22 Porgans getting up, as well. All right, next, please.

23 MR. VOLKER: Yes, thank you, Madam Chair.
24 Stephan Volker, for PCFFA, et al. I concur on the comments
25 of Colin Bailey and Bob Wright. We propose that the

1 proponents of the project and their supporters go first,
2 those opposed to the project go second, the same order be
3 followed during rebuttal, and that all the documentation on
4 which the proponents will rely, including CEQA
5 documentation, ESA documentation, and 401 Certification
6 documentation, be completed before we are asked to cross
7 examine.

8 HEARING OFFICER DODUC: Thank you, we got that
9 from this morning, yes. Thank you. Mr. Porgans.

10 MR. PORGANS: Excuse me, Madam Chair. If I'm a
11 little cranky, I got to bed at 4:30 this morning, I had to
12 get up at 7:30, so forgive me. I have to clarify one
13 thing. Full disclosure for the public issues is a
14 requirement, we have to have that. I don't know what
15 somebody is talking about "playing their hand," you know,
16 like their case-in-point. This is a public trust issue.
17 This belongs to the people of the State of California. The
18 water contractors only have permits. DWR only operates the
19 project and we cannot depend on them to come in afterwards
20 with information. Full disclosure now.

21 HEARING OFFICER DODUC: Thank you, Mr. Porgans.

22 MS. DES JARDINS: Just a very brief observation
23 about the underlying models and modeling data for the
24 supporting testimony needs to be available before cross
25 examination and for sufficient time for people with

1 expertise to look into it.

2 HEARING OFFICER DODUC: Thank you. All right, I
3 am going to close this issue.

4 I want to address one other issue before we take
5 a break, and then spend the rest of our time on a very
6 meaty topic. But the issue I want to get to right now is
7 Staff Exhibits. Several parties asked for clarification
8 concerning how the Board plans to treat the staff exhibits
9 that will be offered into evidence. So I will again turn
10 to Ms. Riddle to address this.

11 MS. RIDDLE: Sure. And so with respect to the
12 staff exhibits, what staff proposed for exhibits were what
13 we thought would be some pretty obvious exhibits that many
14 parties would want to submit into the record and we were
15 doing that as a convenient to the parties and a convenience
16 to ourselves, such that we don't get duplicate copies of a
17 number of different documents. For example, the permits,
18 the EIR. In no way is our Board staff saying that this is
19 information that we intend to testify or validate; instead,
20 we expect that the other parties who would be doing that
21 and also could put on information to contest any of the
22 materials that staff proposes to put into the record. So I
23 think there may have been some misunderstanding with the
24 intent behind those exhibits; again, they were just thought
25 to be some more obvious exhibits that we may get from more

1 than a handful of parties, and we're trying to avoid some
2 of that overlap and redundancy in the process.

3 MS. D'ADAMO: Would you give an example?

4 MS. RIDDLE: What's that?

5 MS. D'ADAMO: Would you give an example?

6 MS. RIDDLE: Yeah, like the EIR is an example,
7 several parties here today have brought up the Delta
8 Science Program, Independent Science Board Review, I know
9 some may view that as a document that speaks in favor or
10 opposed to the project, but we're suspecting that there
11 will be more than one party that's going to be submitting
12 those types of materials. They're all public materials
13 that folks have access to and that are significant
14 documents pertaining to this project, so we assume that
15 many of you would -- that both it would be important to
16 have that in the record for the Board's consideration that
17 many of you would also be submitting that information. So
18 again, parties are free to -- and also parties are free to
19 object to any of the information that we're proposing to
20 put in the record and the Hearing Officers can take that
21 under consideration and we can potentially strike some of
22 the exhibits if folks don't think they're appropriate and
23 the Hearing Officers agree.

24 HEARING OFFICER DODUC: Thank you, Ms. Riddle. I
25 will now open it up for comments. Mr. O'Laughlin. Let's

1 keep this to two minutes, please. Well, we'll see what you
2 have to say, Mr. O'Laughlin.

3 MR. O'LAUGHLIN: Yeah, this one -- Tim
4 O'Laughlin, San Joaquin Tributaries Authority. I
5 understand the Regs proffered by the State Water Resources
6 Control Board allow for the submittal of staff exhibits.
7 The problem here is we're in a quasi-adjudicatory function.
8 Your staff is not a party to this proceeding, okay? So if
9 they want to be a party to the proceeding and put documents
10 in and testify to the documents, let them have at it.
11 Otherwise, the documents should be proffered by a party to
12 the proceeding and posted.

13 Now, I know that maybe it was done for the
14 purpose of saving time, saving money, saving resources; it
15 doesn't work in this fashion because, quite honestly,
16 having the staff exhibits in, I can't question your staff
17 about what is in those documents and what is the relevance
18 of those documents and why they're being admitted, so it
19 puts your staff in the position of being an advocate for
20 those documents. So we should just take that off the
21 table. The parties here are perfectly capable of
22 submitting their own exhibits.

23 The other thing though I would ask in regards to
24 the redundancy of the exhibits, because I do agree with Ms.
25 Riddle on this, these data dumps are really truly

1 unnecessary and we've been through this before. Just
2 submitting, you know, 48,000 pages from the Draft EIR
3 doesn't do us any good, and that's like with all these
4 reports that people will be submitting. I would request
5 that the Board Chair tell people that what they need to do
6 is put the cover sheet of the report, and then attach the
7 relevant page or pages that they want from the report
8 because we all know that a lot of these documents are
9 voluminous, but putting in, you know, 500 pages of a report
10 and citing to, you know, Chapter 1, line 6, you know, page
11 79, makes no sense. So you can reach the efficiency levels
12 of what Diane is trying to do by not having numerous
13 voluminous documents come in, but at the same time you can
14 have the parties be in charge of their cases and being the
15 advocates that they should be, and not your Board staff.

16 HEARING OFFICER DODUC: Thank you, Mr.
17 O'Laughlin. Let me, before you speak, this is becoming a
18 more involved discussion than I thought, so let me ask for
19 those who are in support of Mr. O'Laughlin's comments'
20 concern to speak first. Just raise your hand. I think Mr.
21 Herrick raised his hand, all right. Okay, you know what,
22 so there are a few hands. And I assume you want to speak
23 in opposition to the concern?

24 MR. HERRICK: Not in support of what he said.

25 HEARING OFFICER DODUC: Okay, then please wait.

1 MR. BURNES: Robert Burness, Friends of Stone
2 Lakes National Wildlife Refuge. As a small organization
3 with not a lot of resources, we would greatly prefer to
4 have all exhibits refer to specific portions of the
5 Environmental document, or any large document, so that
6 those could be readily accessible and the exhibit
7 incorporate only those relevant parts of the point that's
8 being made.

9 HEARING OFFICER DODUC: Do you have an opinion on
10 the staff submitting those exhibits for the convenience of
11 everyone?

12 MR. BURNES: I think if that is going to be done
13 on the part of people or organizations that are providing
14 testimony, it should be their responsibility.

15 HEARING OFFICER DODUC: Thank you. Next, please.

16 MS. SWENSON: Anna Swenson from North Delta
17 C.A.R.E.S. I support that also, but what would be helpful
18 is a link to the entire document and then the specific, you
19 know, section. But a link so that you could go back and
20 look at the entire thing if you needed to.

21 HEARING OFFICER DODUC: Thank you.

22 MS. SWENSON: Thank you.

23 HEARING OFFICER DODUC: Next, please.

24 MS. MESERVE: Good afternoon. Osha Meserve for
25 Local Agencies of the North Delta and others. I guess I'm

1 just a little concerned that it doesn't appear that DWR as
2 the Petitioner and the Bureau are carrying their burden to
3 put forth what the evidence they are saying, you know, the
4 Board and others -

5 HEARING OFFICER DODUC: Please hold on for a
6 minute. We have not received their testimony exhibits yet,
7 we're just discussing right now the documents that staff is
8 proposing to put into the record for everyone's
9 convenience. So be assured that the Petitioners will be
10 submitting their testimony and their exhibits.

11 MS. MESERVE: Okay, well, I have a little
12 question that came up earlier, for instance, in the
13 discussion of the Biological Assessment that's in draft
14 form on the 15th that came out a couple weeks ago. It was
15 that, "Oh, that's part of the record." Well, no, that's
16 not part of the record. I received it a different way, but
17 it's not in front of the Board and it's not been put
18 properly before us.

19 HEARING OFFICER DODUC: Yes, thank you, because
20 we have yet to receive exhibits for this record. Thank you
21 very much. Next, please.

22 MR. WRIGHT: Bob Wright for Friends of the River,
23 Sierra Club, and Planning and Conservation League. We
24 request that the staff require DWR to provide you to put
25 into the record as exhibits all of the comments on the BDCP

1 and Water Fix draft environmental documents that came from
2 public agencies or from nonprofit organizations and public
3 organizations. We don't expand the request to comments
4 from individuals writing as individuals simply because
5 that's a huge volume. So --

6 MS. RIDDLE: Well, actually --

7 MR. WRIGHT: Those things are a part of the EIR,
8 so we request that they be included in the record. Thank
9 you.

10 MS. RIDDLE: So just to clarify, for the State
11 Water Board to consider this project, the one thing that
12 has to be in the record, be it whoever may submit it, is
13 the Final Environmental Document, which includes the draft
14 and all the comments on the draft. So unfortunately all of
15 those are part of the record and part of the Final
16 Environmental Document that the Board has to consider when
17 acting on the Petition. So that's an obvious -- maybe
18 that's the one staff exhibit -- I would also mention that
19 the Permits and License for this project may also be
20 appropriate exhibits that we need in order to determine
21 which permit conditions to change and those kinds of
22 things; we absolutely need that in the record. So, I mean,
23 it's either DWR or the Bureau or us that are going to have
24 to submit that in the record. So there are some just basic
25 essential things that would make sense to be part of the

1 record so that we know what permit conditions we're
2 changing and those things.

3 HEARING OFFICER DODUC: Thank you. Mr. Jackson.

4 MR. JACKSON: This question is sort of important
5 and it's morphing into the conversations we've had earlier.
6 So you're talking about a Final Environmental Document that
7 will be in some time at the end of this year or next year,
8 and it's 70,000 pages with all of its additions, I'm
9 estimating. That part of the record isn't finished yet and
10 can't be cross examined from because it's going to come in
11 after the hearing. So I guess what I would say is, how is
12 that document part of the record when it's not finalized,
13 when it can't be used for the hearing, and are you going to
14 let us ask questions from the BDCP draft? Or the other
15 draft? Or, I mean --?

16 HEARING OFFICER DODUC: Thank you, Mr. Jackson.
17 We're not going to go back to that issue, but I acknowledge
18 your point.

19 MR. JACKSON: The point I would like to make is
20 you might start your identification of what could go in the
21 record by what is a document recognized in court under the
22 acts of the State Board. And that's not one of your
23 documents.

24 HEARING OFFICER DODUC: Thank you, Mr. Jackson.
25 Mr. Berliner.

1 MR. BERLINER: Thank you. Tom Berliner for the
2 State Water Contractors. We appreciate the intent and
3 effort that the Board wants to go to for these documents
4 and to make them available. We would suggest that the
5 Board mark them for identification so they're a part of the
6 initial record that's going to be subject to admission as
7 an exhibit when parties want to make use of it. That way
8 they're there, they're available, everybody can make use of
9 them and they can point to Document 1, say "we intend to
10 make pages 10-20 as an exhibit," they can bring it as an
11 exhibit, it's subject to cross examination, everybody would
12 have a chance to review the entire document, which I assume
13 would be available online, and in that way staff is not
14 proffering these documents as evidence, the parties will
15 use them as evidence, but in the interest of not having
16 tens of thousands of pages of the same documents floating
17 around it seems like it would be useful to have them
18 readily available, but not in evidence until the party
19 seeks to move it into evidence. And then they'll have to
20 defend it and the documents will be subject to objection as
21 was mentioned before.

22 HEARING OFFICER DODUC: Thank you, Mr. Berliner.
23 I believe that was the intent. Thank you very much. All
24 right, Mr. Stroshane.

25 MR. STROSHANE: Tim Stroshane, Restore the Delta.

1 I just wanted to support the inclusion of the staff
2 exhibits because I think it does contribute to the ability
3 of less and well-endowed organizations to participate in
4 this complex process and be allowed to even just cite to a
5 specific page, as long as they're careful about how they
6 cite. And I think it's a service that you provide as a
7 government agency and as a part of this process it's
8 something that the people of California benefit from.
9 Thank you.

10 HEARING OFFICER DODUC: Thank you.

11 MS. DES JARDINS: I have two comments -- my name
12 is Deirdre Des Jardins -- I have two comments. First, I
13 strongly support the staff's inclusion of the original
14 Permits and Decisions and, if possible, the supporting
15 documents for those Decisions because the Permits do refer
16 to them, I read those Decisions closely, and there's some
17 questions that are relevant to the current hearing that
18 rely on those exhibits. And I think that it is important
19 for the Protestants to be able to refer to them.

20 Secondly, I do support admission of things we're
21 clearly going to all refer to such as the EIR and citing to
22 the page number, it allows us all to do that. I want to
23 ask that the Board, there's quite a large scientific
24 articles which people might refer to in answering
25 questions, and if one only includes the specific pages as

1 evidence, then the question becomes, what happens if under
2 cross examination you want to refer to the entire article?
3 Does the entire article have to be submitted? So I would
4 ask that if you ask people to only submit part of it, that
5 if under cross examination a question arises that could be
6 answered by the entire article, that that be allowed in the
7 testimony and that the Board consider carefully whether
8 that can be done under the Board rules before making this
9 ruling.

10 HEARING OFFICER DODUC: Thank you. Mr. Porgans.

11 MR. PORGANS: Yeah, if you stick closer to the
12 Board, it would be easier to get here. Anyway, what I'm
13 saying is I agree that all the information should be
14 included in the record for numerous reasons, one, for legal
15 reasons; but most importantly, we need to have a go back
16 and look and see what happened when the Bureau and the
17 Department of Water Resources said they were going to
18 provide us assurances and mitigate impacts. Those impacts
19 haven't been mitigated. We're not dealing with a pristine
20 environment here; we're dealing with a catastrophe --

21 HEARING OFFICER DODUC: Thank you, Mr. Porgans.

22 MR. PORGANS: Thank you.

23 HEARING OFFICER DODUC: I am, well, there is one
24 more speaker. You are trying to sneak in here!

25 MR. BRODSKY: Thank you. Michael Brodsky, Save

1 the California Delta Alliance. We do support posting the
2 staff exhibits, they've been very helpful, even so far in
3 our comment letters and so forth we've been able to refer
4 to SWRCB 1, SWRCB 3, it's clear what we're referring to.
5 With regard to Mr. Wright's suggestion, I think what's at
6 issue there is that we're requesting that the comments on
7 the Draft EIR be posted now and available to the public.
8 DWR and Reclamation have not permitted the public to see
9 everybody else's comments. This agency, the State Water
10 Resources Control Board, is very transparent, every comment
11 letter you get, everything you get, you put it up on your
12 website, everybody can see it, things aren't kept secret.
13 But DWR and Reclamation have been very secretive and have
14 refused to post the comments on the Draft EIR. So what we
15 would request -- and the actual link on your website says
16 we're posting the Draft EIR and comments, but it's only the
17 Draft EIR that's posted -- we would request that the
18 Petitioners be required to make available the comments that
19 they've gotten and that those be posted now before Phase I
20 begins. Thank you.

21 HEARING OFFICER DODUC: Thank you. Seeing no
22 other commenters, let me turn to the Department and the
23 Bureau and ask if you wish to add any final thoughts to
24 this issue, especially concerning the environmental
25 documentations and comments.

1 MR. MIZELL: Tripp Mizell with DWR. I thought
2 Mr. Berliner had a very common sense approach to the issue
3 and that seems very efficient. In terms of when the
4 environmental documents will be in the record, I believe it
5 was Dana who indicated that the Board can't make a final
6 decision until they have a complete CEQA document in the
7 record, so that will take place. And that's about all I
8 have to say on the matter.

9 HEARING OFFICER DODUC: Thank you. All right --
10 oh, no? You don't have to speak if you don't have anything
11 to add.

12 MS. AUFDEMBERGE: Yeah, I don't have to speak.
13 I'm just going to concur with Mr. Berliner and Tripp.

14 HEARING OFFICER DODUC: Thank you. All right.
15 At this time, we're going to take a break, and let me warn
16 you to go get coffee or whatever you need because when we
17 return we are going to spend as much time as necessary here
18 today to finish the last topic, which is a huge topic
19 concerning time limits and other aspects of opening
20 statements, testimonies, and briefs. So with that, let's
21 convene at 2:40. That gives you like 18 minutes, you guys;
22 2:40, please be back on time.

23 (Break at 2:24 p.m.)

24 (Reconvene at 2:47 p.m.)

25 HEARING OFFICER DODUC: You can all thank the

1 Chair for that generous break; she plead your case about
2 people still being in line for coffee, otherwise I tend to
3 be not that generous and kind.

4 So with that, we are resuming. And as I stated
5 before we are going to stay until we address this last
6 remaining issue, and it is a big one. Everyone who
7 submitted letters commented and provided recommendations on
8 this, so I expect we will be here a while.

9 Our final topic is regarding time limits, opening
10 statements, testimony, and briefs. Our January 15th letter
11 set forth some specifics regarding time limits, opening
12 statements and testimony. These measures are intended for
13 us to conduct the hearing as efficiently as possible. We
14 invited comments and, as I said, there were many that were
15 submitted in writing.

16 So what I would like to do is spend the remaining
17 time today starting with those parties to ask them to come
18 up, to summarize their comments on time limits, opening
19 statement testimony, etc.

20 In addition, I'll just flag it now so that you
21 can think about it and provide comments when you come up;
22 we had also suggestions for submission of procedural and
23 other motions and briefs, and so be prepared to comment on
24 that, as well. We also had a suggestion regarding
25 cancellation of protests from the San Luis and Delta

1 Mendota Water Authority and Westland Water District. We
2 had a suggestion from the EJ Coalition for Water with
3 respect to resources and something called Intervener
4 Compensation; Mr. Bailey will I'm sure expand upon that.

5 And so with that, I will just go ahead. And
6 since I mentioned them by name, why don't I begin with the
7 San Luis and Delta Mendota Water Authority and Westland
8 Water District, followed by the EJ Coalition for Water.
9 And again, I'm asking you to summarize your comments and
10 recommendations with respect to time limits, opening
11 statements, testimony, briefs, and other logistics with
12 respect to the hearing. Mr. Rubin, please identify
13 yourself.

14 MR. RUBIN: Good afternoon --

15 HEARING OFFICER DODUC: And since this is a
16 pretty meaty topic, you know what, let's go ahead and set
17 it for six minutes to start, and then we'll play it by ear
18 as we go along.

19 MR. RUBIN: I hope I don't take six minutes.

20 HEARING OFFICER DODUC: I love you already, Mr.
21 Rubin.

22 MR. RUBIN: Madam Chair, Board Members, my name
23 is John Rubin. I'm General Counsel for the San Luis and
24 Delta Mendota Water Authority. And I'll start with our
25 comment regarding Protests. We did indicate that there

1 should be some opportunity to allow for Protests to be
2 canceled. I think that we identified two different ways
3 for that to occur --

4 MS. RIDDLE: I don't know if everybody can hear.
5 I'm getting signs from back of the room.

6 MR. RUBIN: See if that's better? Okay, so
7 there's two ways that we identified for Protests to be
8 canceled or dismissed, one is if the Protests are not
9 adequately supported and we cited some provisions in your
10 Regulations that identify the type of information that's
11 required; and the second is if the Protests are resolved,
12 we do support, or did not come up and speak, but do support
13 the opportunity to settle Protests, or for Protests that
14 are no longer relevant because of conditions of approval
15 that are advanced by the Petitioners.

16 In terms of time limitations and presentation, we
17 are very sympathetic to both the parties' desire and need
18 to have due process, but also the need to be efficient in
19 this proceeding and move through it in some timely fashion,
20 however you define that. And so what we had suggested in
21 our letter as discussed earlier that there's opportunity
22 for parties to group, we did suggest that for direct
23 testimony that parties offer the time that they believe is
24 necessary and let that be informed by the actual testimony
25 that's submitted.

1 But in terms of ultimate decisions for
2 presentation of direct testimony, as well as cross examine,
3 redirect, recross, that that be a decision made by the
4 Hearing Officers and have that informed by the proposals
5 that are made by the parties, as well as your perspective
6 on the information and the time that you want to dedicate
7 for the proceeding. Again, I see it as a balance and that
8 balance should be informed by the information that's before
9 you. If there's any questions, this summarizes our
10 comments.

11 HEARING OFFICER DODUC: Thank you. No, please go
12 ahead.

13 CHAIR MARCUS: So you're saying something between
14 one hour, and I haven't added up all the hours people have
15 asked for, or days, but based on what people propose to do?

16 MR. RUBIN: Yes, and I don't know if it's an
17 hour, I think some people may be submitting testimony that
18 could be summarized in a lot less than that, and then
19 others may submit testimony that requires a lot more time
20 than that. And so what I'm suggesting is that there's some
21 flexibility and, again, it be informed by proposals that
22 are made by the parties, and your evaluation or your
23 staff's evaluation of the proposals that are being made, as
24 well as the information that's been presented.

25 CHAIR MARCUS: So you would say we should give

1 people the opportunity to make another proposal, other than
2 the one they made in their Notice of Intent?

3 MR. RUBIN: I just, either that or you're going
4 to be in a position where a lot more additional days are
5 going to need to be set. And that's your decision, it's
6 not for me to make that decision. Are we going to be in a
7 proceeding that's going to go at least for Part I four
8 week? And then you think about the additional time for
9 Phase II. But again, what I'm suggesting is you'll have to
10 determine how much time you're willing to spend on this
11 proceeding if it's any more than the days that you've
12 identified, and then make informed decisions based upon
13 what's being proposed and the information that's before
14 you.

15 HEARING OFFICER DODUC: Thank you, Mr. Rubin.
16 And since Mr. Rubin set such a fine example, let's change
17 that time to five minutes.

18 MR. WILLIAMS: Well, Madam Chair, my name is
19 Philip Williams. I'm the Deputy General Counsel of
20 Westlands. And if you loved Mr. Rubin, you're going to be
21 infatuated with me, as I have nothing to add, but am happy
22 to address questions. I think Ms. Marcus' question
23 anticipated a comment I was going to make, so --

24 HEARING OFFICER DODUC: Thank you very much. Mr.
25 Bailey. Intervenor Compensation.

1 MR. BAILEY: Yes. Again, Colin Bailey on behalf
2 of EJCW. So to the degree that that proposal is not a
3 familiar feature of administrative proceedings, or rather
4 EJCW's written submission refers to the Intervenor
5 Compensation Fund at the PUC. They have a whole program,
6 which I would commend to the Board for consideration. I
7 will admit, though, I don't want to concede too much that
8 it's possible that it's beyond the scope of this proceeding
9 to actually implement such a thing, but nevertheless, I
10 would point out its merit in this instance. It is
11 expressly designed to make possible the full participation
12 of groups like EJCW that are in the public interest, to a
13 degree nontraditional, and maybe pushing the envelope in
14 some sense. And without that, as you've heard from me in
15 previous comments, it is an extraordinary challenge to
16 participate fully in this. What that Intervenor
17 Compensation Fund does is it pulls -- I won't go into the
18 details of how it's funded -- but it allows us to attract
19 counsel, which has been a challenge to date, and we're
20 still in the process of trying to do so, but in cases where
21 I've practiced before the PUC, it has not been a problem.
22 And, in fact, we've received some significant awards in the
23 end that vindicated our participation, which is then based
24 upon significant contribution to the proceeding.

25 CHAIR MARCUS: Yeah, I suspect that it would take

1 legislation because the PUC is set up for a whole other
2 purpose. That doesn't negate the point you're making, but
3 I don't think we can just do it.

4 MR. WILLIAMS: You're correct. That whole
5 program was in fact enacted through legislation, and then
6 implemented at the agency level, which is one possible
7 track to take here, but as you mentioned, Chair Marcus, I
8 think it is of merit to discuss here to see just what is
9 possible because I don't know, so I pose that to the Board
10 for consideration to see what might in fact be possible.

11 The second point on time limits, our submission
12 does anticipate that we would need more than an hour, in
13 part because we submitted quite a few names for witnesses.
14 I do anticipate, as I suppose many do, that those will
15 change between now and when things are submitted. It does
16 strike me as a little bit premature to try to anticipate
17 that perfectly not knowing yet whether the Board will in
18 fact -- what the disposition of the proceedings will be vis
19 a vis the Final Environmental Review Documents because I
20 think that will also change matters.

21 But in our particular instance, I would raise yet
22 again the idea that we are knowingly entering this
23 proceeding trying to push the envelope a little bit and
24 we'll be making some perhaps unconventional arguments, I
25 say that they are --

1 HEARING OFFICER DODUC: I think the word you used
2 was "novelty" which really caught my attention.

3 MR. WILLIAMS: Yeah, I think when I wrote that at
4 2:00 a.m., it was probably not the exact right choice of
5 words.

6 Some of the arguments may be, I stand by the
7 argument that what we'll be putting forward does fall
8 within a reasonable interpretation of current law, and
9 we'll put that forward in good faith. That being the case,
10 there will be quite a few people who will be speaking to
11 nuances that are not common, I don't think, to this type of
12 proceeding. And so would ask for some concession in that
13 respect. I have anticipated that might take up to four
14 hours; the honest truth is that, too, could change and I
15 don't know -- I think it was Chair Marcus who mentioned the
16 idea of submitting a secondary proposal, which I think in
17 our case I would very much like.

18 HEARING OFFICER DODUC: Thank you very much.
19 Okay, I want to ask the Petitioners to comment, or at least
20 summarize what they submitted in writing, and then after
21 them, the Department and the Bureau/Department. Next to
22 speak will be the Coalition for a Sustainable Delta.

23 MR. MIZELL: Thank you. Tripp Mizell, Department
24 of Water Resources. As you know, the Department and
25 Reclamation are consolidating their presentation, we'll be

1 presenting as a joint panel for the purposes of the case-
2 in-chief. I'd like to touch really quickly upon our
3 concept for the time limits. We think that time limits, to
4 the extent that groups are designated, should apply to each
5 of the three different portions of the hearing as a group,
6 so the group would have a designated time limit for both
7 the case-in-chief, for the rebuttal, and for the cross
8 examination.

9 As it stands, we've requested 13 hours, that was
10 brought up earlier for our case-in-chief testimony.
11 Roughly speaking, that's about one and a half days out of
12 34. Given the burden that rests upon us to prove our case
13 and the complexity of this project, one and a half days out
14 of 34 seems reasonable to us, hence why we landed on that
15 number.

16 Understand, though, that we are continuing to
17 look for efficiencies in our testimony as we move forward
18 and craft it, and should we find ways to cut that down, we
19 will be doing so. We're not going to just fill time for
20 the sake of filling time. Ultimately, you know, I'd just
21 like to reiterate, you know, five percent of the hearing
22 time on the case-in-chief for the Petitioners is not a
23 tremendous amount of time to request given what hurdles we
24 have before us.

25 And I probably would want to touch briefly upon

1 our request on procedural motions and closing briefs. So
2 we think that it would aid in the efficiency of this
3 hearing if the Board were to accept procedural motions
4 prior to the beginning of the hearing, and provide for a
5 time before the policy statements in which they could issue
6 any rulings necessary on those procedural motions.

7 A suggested submission timeframe might be initial
8 filings by March 21st, and response filings by April 4th.
9 Otherwise, the only other remaining request is that you
10 accept closing briefs by the parties at the close of Part
11 I. Thank you.

12 HEARING OFFICER DODUC: Thank you. Anything to
13 add?

14 MS. AUFDEMBERGE: Nothing to add. You know, our
15 letter that we submitted was joint, so we concur in that.

16 HEARING OFFICER DODUC: Thank you very much.
17 Coalition for a Sustainable Delta, followed by CSPA.

18 MR. WEILAND: Hi. Paul Weiland for the
19 Coalition. I'd just like to support the Department's
20 position both with respect to the case-in-chief and, as
21 Petitioner, they have a larger burden than any other
22 parties, and so I do think it's appropriate for them to be
23 granted more time than any other parties. And also with
24 regard to procedural motions, I think that would allow us
25 to have a more efficient proceeding and winnow down issues.

1 HEARING OFFICER DODUC: Thank you. Mr. Jackson
2 and then followed by the Friant Water Authority.

3 MR. JACKSON: Mike Jackson. The CSPA parties. I
4 think you'll hear pretty much the same thing from most of
5 the attorneys, which is that those of us who represent more
6 than one client would like you to consider the time limits
7 for each of them because they have discreet issues. We
8 have no objection to panels, but I think I'm expecting that
9 most of the attorneys would like to be able to follow the
10 testimony, cross examine the testimony of any one
11 individual witness. I mean, for instance, having to land
12 downstream in the new diversion, we're particularly
13 interest in the hydrology. We're particularly interested
14 in the agricultural science. We're particularly interested
15 in Part I.

16 So the ability to not have it broken up by having
17 some manager jump in to give a political answer when we're
18 cross examining the technical witness, if you put them up
19 as panels, you can't really follow the person who produced
20 the testimony and what they knew and what they meant, and
21 what science they're relying on.

22 So this works the other way; our experts who will
23 mostly testify in the second proceeding, will be up there
24 and available for flogging by everybody who wants to get at
25 them --

1 HEARING OFFICER DODUC: Not in my hearing, Mr.
2 Jackson. No flogging allowed.

3 MR. JACKSON: No flogging, huh? So we'll rely on
4 the information we gave you in the written documentation
5 and our rationale. I have been arguing for a number of
6 years that your hearing process is a good way to deal with
7 things because of the value that you would get out of the
8 talent that's in this room, and so I think we will all try
9 to be relevant, pertinent, and quick. So I would ask you,
10 don't set a one-hour limit, let us be responsible as we
11 would be in court, and when the person running the meeting
12 decides that they've heard enough on that issue, we should
13 sit down.

14 HEARING OFFICER DODUC: Thank you, Mr. Jackson.
15 Mr. Jackson, actually before you leave, any comment on the
16 protest cancellation proposal?

17 MR. JACKSON: Well, in the same way that I would
18 love to have the opportunity to file a motion to dismiss
19 the application for being insufficient, I suppose that they
20 ought to be able to file motions about bouncing people out
21 of here for technical reasons, because I do believe that
22 this application is the most effective application I've
23 ever seen in front of the Water Board, because it doesn't
24 tell us all of the things that were lovingly gone through
25 by a better lawyer than me about your own sections dealing

1 with water availability and the various kinds of things
2 that are supposed to be in applications, but aren't in this
3 one. So I'm fine with the motion as long as a motion can
4 be made at the same time to strike the Petition, the
5 Application.

6 HEARING OFFICER DODUC: Thank you, Mr. Jackson.
7 I had to ask you for that, didn't I? Friant followed by
8 Local Agencies of the North Delta.

9 MR. CASTER: Thank you. Lauren Caster on behalf
10 of Friant Water Authority and its participating members.
11 We had suggested that we agreed with the panel approach
12 with respect specifically to three of our witnesses. These
13 are men who are very experienced in how the Friant Division
14 operates, and we think because their testimony would be
15 similar, their presentation as a panel would make a lot of
16 sense. And so we support that.

17 We think that the other witnesses we had listed
18 were more in the nature of expert, that is technical
19 expertise, as opposed to operational expertise, and those
20 probably shouldn't be handled as a panel. And we had also
21 commented on Mr. Bourez's testimony, but we talked about
22 that earlier today. So unless you have some other
23 questions, I'm fine.

24 HEARING OFFICER DODUC: Oh, thank you.

25 MR. CASTER: Thank you.

1 HEARING OFFICER DOCUC: Local Agencies of the
2 North Delta, followed by South Delta Water Agency and its
3 parties.

4 MS. MESERVE: Good afternoon, again, Osha
5 Meserve. I guess I didn't write about this topic; so was
6 there a particular question you had regarding our
7 submittals?

8 HEARING OFFICER DODUC: Let's see...

9 MS. MESERVE: Unless I'm mistaken.

10 HEARING OFFICER DODUC: You're right, you did
11 not.

12 MS. MESERVE: Thank you very much.

13 HEARING OFFICER DODUC: Actually, okay, Mr.
14 Herrick had a question for Friant. Sorry, Ms. Heinrich,
15 sorry. I'm getting the names mixed up now.

16 MS. HEINRICH: I'm sorry, I was too slow. But I
17 just wanted to ask you specifically, because you're one of
18 the parties who listed on your Notice of Intent to Appear
19 estimated times for direct that is well in excess of what's
20 allowed in the Hearing Notice, so, you know, I was
21 wondering if that was just a misunderstanding about the
22 nature of our process.

23 MR. CASTER: That probably is correct and we are
24 fine with whatever the Board comes forward with. And our
25 purpose, our intention, is to offer written direct

1 testimony that encompasses everything our witness would
2 want to say on direct testimony.

3 MS. HEINRICH: Great. Thank you.

4 HEARING OFFICER DODUC: All right, South Delta
5 followed by San Joaquin Tributaries Authority.

6 MR. HERRICK: Thank you. John Herrick for South
7 Delta, Central Delta, and the other parties. Just real
8 quickly, I think for briefing schedules I think you should
9 provide some time at the beginning so that we can brief
10 some of these issues that are brought up today, get those
11 done. I don't recommend that you have like five issues
12 briefed, and then we have a one-day thing and you decide, I
13 would break them up a little bit because some of them are
14 very important and it might take a lot of argument and, you
15 know, you guys don't yell at us and everything, but I think
16 it will take longer than just put them altogether.

17 Timelines, you know, oddly I think Mr. Rubin is
18 right, we don't need, I don't think, specific hard times
19 because as it's gone in the past, it's been pretty
20 flexible, the Hearing Officers are always open to somebody,
21 because there's a lot of questions and they only get half-
22 way through, and they give them a little more time, or if
23 cross needs a little more time, if it's just a little
24 flexible, I think that's fine. What else? The petitions,
25 I don't know, the issue of having some way of kicking out

1 somebody else's protest or petition, I don't see we spend
2 some time on that, that's what the hearing is for, we're
3 going to find out if somebody has no case or doesn't know
4 what they're doing, they'll be sitting there looking and
5 not wasting their time too much, so... Anyway, I don't know
6 if there's any other --

7 HEARING OFFICER DODUC: Mr. Herrick, you proposed
8 that opening statements should not be limited.

9 MR. HERRICK: Yes. Well, the issue is if you
10 give a timeline and say it has to be 10 minutes, 30
11 minutes, you know, there could be 500 issues, and so I
12 don't want that limit. If you think somebody is being
13 verbose, you can say move on, but I wouldn't put a limit on
14 it. I just gave a larger number so you wouldn't limit me
15 too much.

16 HEARING OFFICER DODUC: All right.

17 MR. HERRICK: Anyway, thank you.

18 HEARING OFFICER DODUC: Thank you, Mr. Herrick.
19 Mr. O'Laughlin, then followed by Solano County.

20 MR. O'LAUGHLIN: Tim O'Laughlin, San Joaquin
21 Tributaries Authority. We made a proposal to have
22 procedural motions upfront, we think they're worthwhile. I
23 would note in our comments that we said Motions in Limine
24 should take place before the witnesses, we read the State
25 Water Contractors' proposal that the Motions in Limine take

1 place upfront in a procedural motion; we're fine with that,
2 anything that can get done ahead of time to streamline the
3 process.

4 I have a question for the Chair if I may. In
5 your mind, how do you envision this working timewise during
6 the day? Do you see kind of like 9:00 to 10:30, take a 10-
7 15-minute break, go to 12:00, 12:45? Are we going to go to
8 5:00? Are we going to go to 4:30? Are we going to go to
9 6:00? Because that plays into how long the process goes
10 and I think that would be helpful for the participants to
11 know, as well, because while my kids are rug rats around
12 the house, other people have other commitments, family
13 things to do, so it would be nice to know.

14 And considering, I'll say this again, since we're
15 going to be here for a while, we need to take our breaks
16 when they're scheduled, we need to run on an orderly
17 fashion, we don't need to run until 9:00 or 10:00 at night,
18 we've got hearing dates, we're going to be here a while, so
19 we've just got to go through it, and that would be my other
20 suggestion.

21 The next one is, we actually disagree with DWR
22 and Reclamation about their time limit for 13 hours. We
23 think that's entirely insufficient. We think that it's
24 very important that DWR and Reclamation be given the time
25 to inform not only you, but us and the public because,

1 let's face it, no one is going to really sit there and read
2 -- it's 48,000 pages now and it will probably be 70,000
3 pages later -- so let's get it out in public what this
4 project is all about. And I don't think we should be
5 constrained by 13 hours for DWR. If it's going to take
6 them 16 hours, make their case because, and I'll say this
7 being in previous proceedings, about 60-75 percent of this
8 case is going to occur with the first two witnesses, not to
9 denigrate anything that anybody else is going to be
10 bringing in, but the time limits on this case are really
11 going to be how much time DWR and Reclamation take, and how
12 long the cross examination is going to take other
13 witnesses. And that's a lot of the guts of what's going to
14 happen here, and I think that the parties should be
15 afforded the time to spend time, especially with the
16 project proponents on cross examination. I think a little
17 bit differently when other witnesses come up, but at least
18 on the main witnesses I would propose that, as well.

19 And I think you'll find as you go through the
20 hearing process, as Mr. Herrick said, the time limits will
21 change and you'll see an ebb and a flow. But for the most
22 part, the proceedings are fairly orderly and especially if
23 we get through the first phase with DWR and Reclamation, so
24 I'm not too worried about the time commitments after that
25 phase. We would support closing briefs, as well.

1 One last thing, the panel concept, I like the
2 panel concept, I think it makes a lot of sense, but I don't
3 think that whether it's DWR or anybody else should hide
4 behind a panel component when it comes to cross
5 examination. So if you put up five witnesses, and I'll use
6 Mr. Herrick, South Delta Water Agency puts up five
7 witnesses and you only get an hour, well, there may be
8 somebody in there that you want to spend an hour with, or
9 more, so we shouldn't hide behind sequestering panels
10 together in diminution of time in regards for cross
11 examination. But I think you'll see that when we start
12 going through the process that that just kind of falls out
13 anyway, for the most part.

14 CHAIR MARCUS: Just a question, and maybe I just
15 didn't understand it, I should have read it more times, but
16 you had a recommendation about not submitting written
17 testimony and doing everything orally. Did I misunderstand
18 what you were proposing?

19 MR. O'LAUGHLIN: No, no, you understood correctly
20 --

21 CHAIR MARCUS: -- because I didn't quite get it.

22 MR. O'LAUGHLIN: No, you did, you understood it
23 correctly. Originally I wanted oral statements at the end;
24 on further reflection, given the amount of testimony and
25 the amount of witnesses and the amount of days, it seems to

1 me that it would be -- and you're going to probably have to
2 set some type of page limit so people don't go crazy on you
3 -- but it seemed to me to allow the parties time to reflect
4 on what it is that they want to put forward in front of
5 you, and not only that, what you want to see from us in
6 regards to that. And I think that would be much more
7 productive, especially since Phase I -- Part I, sorry --
8 and the hearing is still going to be open, so the record is
9 not going to be closed and the closing briefs can come in
10 in an orderly fashion at a time that meets with your
11 requirements.

12 HEARING OFFICER DODUC: Thank you, Mr.
13 O'Laughlin.

14 MR. O'LAUGHLIN: Thank you.

15 HEARING OFFICER DODUC: And we will certainly
16 provide at least a general outline of how the hearing days
17 will go and I promise to try to be humane. Solano County
18 followed by Sacramento Valley Water Users.

19 MR. MILJANICH: Peter Miljanich from Solano
20 County. I think again we'll stand largely on our written
21 comments unless there are any specific questions, except
22 that I will reiterate that the County is considering
23 attempting to consolidate or coordinate with other parties,
24 so it appreciates the opportunity to have an extended
25 period of time if that is the case and we do consolidate

1 with another party.

2 HEARING OFFICER DODUC: Thank you very much.
3 Sacramento Valley Water Users followed by State Water
4 Contractors.

5 MR. O'BRIEN: Kevin O'Brien for Sacramento Valley
6 Water Users and other clients that joined in those
7 comments. I'll just go down the list, Chair Doduc. As far
8 as time limits, you know, I think we could certainly
9 provide better estimates of time for direct testimony once
10 our testimony is prepared and submitted, so at about that
11 time. Frankly, when people fill out the Notice of Intent
12 forms, they kind of do their best, but you just don't know
13 much at that point, and so I think you could get a much
14 better estimate closer to the submittal deadline.

15 On cross examination, it's really I think
16 impossible to know at this point how much time parties
17 would need cross examining because we haven't seen the
18 direct testimony. I think once we've seen it, we could
19 probably give at least a ballpark estimate, and I think in
20 our group we will probably at least in some cases designate
21 a lead cross examiner with the other attorneys reserving
22 the right to do follow-up cross examination, but hopefully
23 achieve some efficiencies that way and I expect others will
24 probably do the same.

25 One point I wanted to raise, it was in our

1 letter, we would request that the Board issue a ruling in
2 advance of the March 1 deadline on the question of whether
3 certain documents such as Water Right Permits and Licenses
4 could be accepted into the record by reference, there's a
5 specific State Board Reg on that. That would I think cut
6 down the paper part of this quite a bit and I think could
7 achieve some important efficiencies.

8 As far as opening statements, you know,
9 personally I'm not a big fan of opening statements in Water
10 Right proceedings and, frankly, in most of the trials I've
11 done in Superior and Federal Court, I don't think Judges in
12 non-jury cases particularly like them, I think they view
13 them as a waste of time; I'll leave that up to the Board.
14 I think if you're going to have opening statements, you
15 ought to have a strict page limit and a strict time limit,
16 like maybe 10 and 10. But other than that, that's
17 something the Board will need to decide. I do think post-
18 hearing briefs are very important because at that point the
19 parties have all the evidence, they have the legal issues I
20 think a little more crystalized, and I think in terms of
21 the Board issuing a coherent decision, those briefs are
22 important. But again, I think some page limits are
23 appropriate. And I think that's about it on my list. I'm
24 sure Mr. Lilly might have a few others.

25 MR. LILLY: Good afternoon, Alan Lilly. And I

1 just have a couple of points to supplement, I won't repeat
2 what Mr. O'Brien just said, I certainly agree with all of
3 his comments.

4 There had been a suggestion I think in one of the
5 letters from the State Board, I think it was the January 15
6 letter, that written opening statements be due on March 1.
7 That just really would be impossible for us to deal with
8 primarily because we will not have seen the exhibits and
9 testimony from the Petitioners by then, and that very well
10 could be a major part of what we want to say. So if we had
11 to submit written opening statements on March 1 there would
12 be a lot of speculation, there would have to be in the
13 matter of necessity because we wouldn't know what the
14 exhibits and testimony actually would be.

15 So if there is going to be a deadline for opening
16 statements, we suggest it be closer to something like about
17 April 1. I mean, they're not going to be that long, as
18 long as it's at least several days before the hearing I
19 think everyone would have time to read them.

20 The only other thing, I agree with Mr. O'Brien's
21 comments on the estimates, we certainly will have a better
22 idea of when we submit our panel proposals, and for cross
23 exs', we'll certainly have a better idea after we've seen
24 the exhibits and testimony.

25 The only other thing is there have been some

1 discussions about motions to dismiss protests and
2 potentially even a motion to dismiss the petition. The
3 Water Board's normal process, I think going back, I mean
4 long before I was here, but I've read a lot of the old
5 Decisions, is both whether or not to grant a petition, and
6 also whether or not to dismiss protests is always handled
7 in the final Decision after the evidence is in. So I just,
8 I can't see why you would even want to consider taking
9 dispositive actions before you've had the evidence before
10 you to make your decision. So I just throw that out
11 because I think you may be able to save some time if you
12 just make a clear ruling on that issue, as well.

13 HEARING OFFICER DODUC: Thank you. Thank you,
14 both. State Water Contractors. Mr. Berliner.

15 MR. BERLINER: Thank you. Tom Berliner on behalf
16 of the State Water Contractors. We certainly support
17 giving the project proponents ample time to lay out their
18 case. It's a huge project. There will be many parties who
19 are overwhelmed by the documents, myself included. And I
20 think we could all benefit from a thorough presentation by
21 DWR and the Bureau on what they're proposing. So a time
22 constraint on them, I think, is probably not in the best
23 interest of the rest of us participants. And I think they
24 ought to give you an estimate if it's 13 hours or 15 hours,
25 or whatever it is, and try to meet that. I don't suggest

1 that it be totally open-ended.

2 With respect to others, we are strongly in favor
3 of time limits subject to an offer of proof, or of course
4 at the Hearing Officer's discretion to extend the testimony
5 if it's fruitful and relevant. And that would apply, I
6 believe, as well to cross examination which should also be
7 held to time limits, again, subject to an offer of proof or
8 the Chair's discretion, in part because there are an awful
9 lot of parties and this invites -- if you don't put time
10 limits on it, or pretty strict time limits on it, it really
11 invites tag team mentality and in these proceedings we've
12 seen that before.

13 The other thing that the Board has generally been
14 pretty good about is not allowing friendly cross, which I
15 think ought to be made very clear, that friendly cross is
16 not going to be permitted, it has to be actual cross
17 examination. And in my experience, the Hearing Officer has
18 been pretty good about identifying when friendly cross
19 starts to occur.

20 As far as the other subjects, we pretty much
21 outlined our views in our letters, so I don't have any
22 comments unless there's questions.

23 HEARING OFFICER DODUC: Thank you, Mr. Berliner.

24 MR. BERLINER: Thank you.

25 HEARING OFFICER DODUC: I will now open it up to

1 any other parties who wish to comment on this issue of
2 timelines, opening statements, cross examinations, and
3 testimony. Please go ahead and come on up one at a time.

4 MR. WELLS: Yeah, Madam Chair, Board Members, my
5 name is Bill Wells, I'm with the California Delta Chambers
6 and Visitor's Bureau. I'd strongly recommend not having
7 time limits on the people's testimony. We're talking of a
8 project that's certainly going to be beyond the lifespan of
9 everybody in this room, and it's going to affect every
10 Californian for generations, so I think it's really
11 critical to make sure that we have all the facts explained.
12 If DWR needs whatever time they need to present their case,
13 and then the people that are attempting to save the Delta
14 should have their time, too. So thank you.

15 HEARING OFFICER DODUC: Thank you. Next, please.

16 MS. DES JARDINS: This is with respect to the
17 request to dismiss --

18 HEARING OFFICER DODUC: Identify yourself.

19 MS. DES JARDINS: -- my name is Deirdre Des
20 Jardins. This is with respect to the request to dismiss
21 protests. The Board may cancel a protest for failure to
22 provide information requested by the Board. And I wanted
23 to suggest that if the Board was going to entertain motions
24 to cancel protests based on failure to provide information,
25 that they get the basis of those protests in advance and

1 provide adequate time for the Protestants to provide that
2 information. And also with respect to things like, you
3 know, place of use, history of use, etc., etc., for the
4 numerous water right holders between the new point of
5 diversion and the old point, I would point out that the
6 Board has already requested that information in another
7 extensive process.

8 HEARING OFFICER DODUC: Thank you. Mr. Minasian.

9 MR. MINASIAN: Mr. O'Brian and Mr. Lilly and the
10 other speakers, Mr. O'Laughlin, very correctly and we would
11 agree with all their comments. I want to add one thing.
12 No question that the Chair, Hearing Officers and the Chair
13 are capable of controlling the time limit and asking for
14 offers of proof. Remember that you are going to be
15 challenged probably in court in regard to whether there was
16 due process given --

17 HEARING OFFICER DODUC: No, really?

18 MR. MINASIAN: Due process includes the right of
19 cross examination. And here's the particular thing I want
20 you to focus upon: make the decision when the offer of
21 proof is made as to the time limit if you suspect that your
22 time is being wasted.

23 And secondly, remember that this is a very
24 peculiar Water Right proceeding. Usually the Applicant for
25 a Water Right comes with a list of proposed conditions,

1 okay? And that's what I think most of our cross
2 examination will be related to, trying to develop the idea
3 of the conditions.

4 Now time limits on that sort of examination are
5 very very hard to abide by and I don't want to say I'm a
6 friend of the Board, but I don't want to do this twice or
7 three times, okay, and I want you to give due process to
8 the participants. And I agree totally with the idea that I
9 wouldn't be surprised the Applicants take half the time in
10 the hearings. Thank you.

11 HEARING OFFICER DODUC: Thank you, Mr. Minasian.
12 Anyone else? I see Mr. Jackson coming up. Actually I
13 think someone else is going to beat him, Mr. Volker?

14 MR. VOLKER: Yes. Thank you, Madam Chair. I
15 have three quick points on this. First of all, we do
16 support the use of panels of experts, we think it expedites
17 the process; however, we wish to make sure that the cross
18 examiners have the prerogative of insisting that a
19 particular expert answer the question posed, as opposed to
20 allowing others to run interference for the expert.

21 Secondly, we're strong believers in closing
22 briefs to sum up the testimony that's been proffered and it
23 will assist all the parties, particularly the Board in
24 making an appropriate decision.

25 And finally, we would support the suggestion that

1 motions to dismiss petitioners be entertained at the
2 outset. The last thing we need is for this Board to spend
3 the next year hearing testimony and reviewing briefs, only
4 to find on review by a reviewing court that the Petitions
5 were defective in some fundamental way. So I think it
6 behooves all of us to get that out of the way. And if the
7 petitions are defective, then the Petitioner has an
8 opportunity to cure the defect and save everyone time, as
9 opposed to having that remedy only after everyone has
10 invested a year in this process. Thank you.

11 HEARING OFFICER DODUC: Thank you. Next, please.

12 MR. SIPTROTH: Good afternoon. Stephen Siptroth
13 for Contra Costa County and Contra Costa County Water
14 Agency. Regarding time limits, the Notice stated that
15 opening statements would be limited to 20 minutes and the
16 policy statements would be included within that 20-minute
17 time, and I believe the Notice also limited policy
18 statements to three minutes.

19 Contra Costa County would like to request a
20 longer amount of time for policy statements. One of our
21 Supervisors would like to come and make a policy statement
22 on behalf of the County, and we're requesting 10 minutes to
23 do that, in addition to whatever time you set for opening
24 statements.

25 The Notice also stated that as a general rule

1 witnesses would be allowed up to 20 minutes to summarize
2 their written testimony on direct examination with a one-
3 hour time limit to present direct testimony. We would ask
4 that whatever the amount set to present direct testimony,
5 whatever that is, that the parties be allowed to allocate
6 that time in whatever manner they believe is most
7 reasonable for their cases.

8 We would ask that policy statements be presented
9 before Part I of the hearing and we agree with the other
10 speakers regarding closing briefs, that closing briefs
11 would be helpful for the Board. Thank you.

12 HEARING OFFICER DODUC: Thank you. Next, please.

13 MS. SUARD: Nikki Suard with Snug Harbor again.
14 I am requesting that maybe the Board have some sort of
15 procedure where, once you read our briefs, that you might
16 say, okay, some of these issues might take a little bit
17 more time than others. I have been doing research for
18 years now and because my property is in an impacted area
19 that I can prove what's already happening, so that you can
20 understand impacts, not just a projected future by some
21 computer which who knows what data when in, you can
22 understand what's really happening, really down there on
23 the water and on the land.

24 And so I can tell you that one hour is just
25 insufficient for the different issues that I feel I can

1 present actual hard data proof. Thank you.

2 HEARING OFFICER DODUC: Thank you. Thank you
3 very much. Next, please.

4 MR. OBEGI: Doug Obegi on behalf of NRDC, et al.
5 We don't object to additional time for the Petitioners to
6 have to present their testimony, however, we believe that
7 there needs to be a concomitant increase in the amount of
8 cross examination of those witnesses. As many speakers
9 have testified, much of the hearing will probably revolve
10 around their presentation of the case and cross
11 examination, and we think there probably shouldn't be
12 limits on either, potentially. Thank you,

13 HEARING OFFICER DODUC: Thank you. Mr. Jackson
14 has been waiting patiently -- and aging as he waits.

15 MR. JACKSON: I am, but hopeful that I get to go
16 home a lot sooner than I thought I was. Thank you.

17 Mr. Berliner, who I've learned to listen to as
18 well as I can hear because of his knowledge of the law,
19 talked about a concept called "friendly cross examination."
20 And I don't exactly know what he means by that, but let me
21 posit the reason I don't think you should make any ruling
22 in that regard is because if someone is on the stand
23 testifying who -- let's just take a Hydrologist -- not
24 everybody in the world can afford Hydrologists, and if they
25 hear something from the direct testimony, or from cross

1 examination that indicates that that person has claimed an
2 expertise that might help them prove whether or not they
3 had been injured, it doesn't matter which side he's on,
4 they should be allowed to ask.

5 So before you begin to start restricting cross
6 examination by a mechanism like that, there is a due
7 process right. If you've got a right to cross examine a
8 witness, you have a right to ask him questions about what
9 he knows, or she knows. And the idea of whether it's
10 friendly or not friendly, you know, is John Herrick's
11 witness friendly to my issues? I don't know, they haven't
12 put on the -- they haven't written the testimony yet. So I
13 don't want that to be limited in that fashion because I
14 think it would begin to impinge upon due process.

15 HEARING OFFICER DODUC: Thank you, Mr. Jackson.
16 Mr. Porgans.

17 MR. PORGANS: I'm Patrick Porgans of Porgans and
18 Associates. First of all, I believe that we should leave
19 the opening statement just the way it is. Not everybody in
20 here knows what everybody else is thinking about in regards
21 to what is being proposed by the Petitioners. From direct,
22 I don't even think the Petitioners know what they're
23 talking about because they don't have enough information
24 for us to proceed in a manner that's consistent with what's
25 required. So what we have here is a situation where they

1 will try to impede cross examination. And we're going to
2 set -- we want to be able to have the opportunity --
3 remember, these guys have been working on this plan since
4 1960 when it was approved by Section 12934(d) of the Water
5 Code, this is just another rendition of that, that's all
6 we're talking about here today. And it's like a cut off
7 rendition of what was proposed, you know, what --

8 HEARING OFFICER DODUC: Mr. Porgans, no
9 commentary, please, just focus.

10 MR. PORGANS: I'm sorry, forgive me. Okay, so
11 let's -- thank you, Chair. The issue is that time
12 limitations, I can understand there should be some
13 limitations, but we have to remember this has been going on
14 for decades. If it takes a year or two to get to where we
15 gotta go, this is something that's going to impact this
16 state for 100 years to come. So we need to have the time
17 to vet out it all, and I have every intention of doing
18 that. I'm here to exhaust the administrative remedy.
19 Thank you.

20 HEARING OFFICER DODUC: Thank you. Any other
21 commenters on this issue? Please.

22 MR. WILLIAMS: Philip Williams with Westlands
23 Water District. Just a point of clarification, if not for
24 your edification, then also for the audience. But as our
25 letter makes clear regarding the cancellation of protest

1 issue, in no way, shape or form is Westlands Water District
2 suggesting that the Petitioners have the unilateral right
3 to cancel protests; rather, that authority and
4 responsibility properly lies with this body --

5 HEARING OFFICER DODUC: Thank you so much.

6 MR. WILLIAMS: -- I'm just -- again, perhaps not
7 for your edification, ma'am. As you go forward, everyone
8 is afforded -- there's a process that is due, and you must
9 balance that against an orderly proceeding, keeping in mind
10 the inevitable judicial public and perhaps historical
11 scrutiny that will follow.

12 HEARING OFFICER DODUC: Thank you for clarifying
13 that on the record.

14 MR. WILLIAMS: Thank you.

15 HEARING OFFICER DODUC: I will turn to staff and
16 my colleagues. All right, not hearing any additional --
17 oh, were you going to --? All right, I will close this
18 issue, then. Thank you very much.

19 I have to at this point issue another gentle
20 reminder, in fact this will be my last reminder, there are
21 two parties who still have not checked in, those two
22 parties are Earth Justice represented by Trent Orr, and
23 Ronald Perkes -- I can't read the handwriting -- and Teresa
24 Kelly. These two parties will need to check in like right
25 now in order to remain as parties to this proceeding.

1 With that, we are -- Mr. Jackson. Are you
2 representing those parties?

3 MR. JACKSON: I am willing to represent Earth
4 Justice for the purpose of this procedural thing. I
5 understood they were going to be here, they did talk to
6 some of us about their appearance, and I may have made a
7 mistake and not indicated that, I was thinking they were
8 going to be here, but they're not.

9 HEARING OFFICER DODUC: All right, thank you.

10 MR. JACKSON: So CSPA is perfectly willing to
11 represent them for the purpose of this hearing and we'll
12 let them know what happened.

13 HEARING OFFICER DODUC: And they have been
14 adopted into the CSPA party. Thank you very much.

15 Did Mr. Stroshane want to say something? No,
16 he's taking his seat, all right. Well with that, that
17 completes our items for today. Everyone has been extremely
18 cooperative, very much engaged, and I see a hands up from
19 DWR.

20 MR. MIZELL: If the Chair would indulge me, can I
21 spend maybe five seconds circling back on the stage
22 testimony?

23 HEARING OFFICER DODUC: Please.

24 MR. MIZELL: If the Board, as it seems is
25 inclined to further consider that proposal, I would simply

1 request that Kevin O'Brien and David Aladjem maybe provide
2 a detailed written proposal and have the parties given
3 ample opportunity to review it. It will have longstanding
4 effects on how the proceeding goes forward, so I would like
5 additional time to run that to Management.

6 HEARING OFFICER DODUC: Good, noted. Thank you
7 very much.

8 Again, thank you all for your active engagement
9 and your efficient cooperation today. We will issue a
10 ruling on the procedural issues discussed today sometime in
11 the next week or two. And with that, this meeting is
12 adjourned. Thank you.

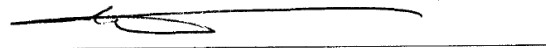
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REPORTER'S CERTIFICATE

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were reported by me, a certified electronic court reporter and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of February, 2016.



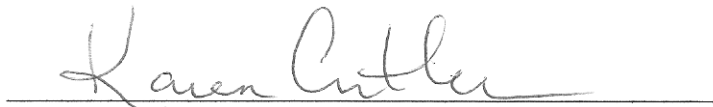
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I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were transcribed by me, a certified transcriber and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of February, 2016.

A handwritten signature in cursive script that reads "Karen Cutler". The signature is written in black ink and is positioned above a solid horizontal line.

Karen Cutler
Certified Transcriber
AAERT No. CET**D-723