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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

CALIFORNIA WATERFIX WATER)
RIGHT CHANGE PETITION)
HEARING)

JOE SERNA, JR. BUILDING
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
BYRON SHER AUDITORIUM
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SACRAMENTO, CALIFORNIA

PART 1B

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Reported by: Elizabeth A. Willis-Lewis, RPR, CCRR, CLR
CSR No. 12155
Certified Shorthand Reporter

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2 CALIFORNIA WATER RESOURCES BOARD

3 Division of Water Rights

4 Board Members Present:

5 Tam Doduc, Co-Hearing Officer
6 Felicia Marcus, Chair & Co-Hearing Officer
7 Dorene D'Adamo, Board Member

8 Staff Present:

9 Diane Riddle, Environmental Program Manager
10 Dana Heinrich, Senior Staff Attorney
11 Kyle Ochenduszk
12 Jason Baker
13 Kevin Long

14

15 PART I

16 For Petitioners:

17 California Department of Water Resources:

18 James (Tripp) Mizell, Esq.
19 Thomas M. Berliner, Esq.

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21 For Protestants:

22 Save the California Delta Alliance, et al:

23 Michael Brodsky

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1 INTERESTED PARTIES:

2 State Water Contractors:

3 Becky Sheehan, Esq.

4 San Luis & Delta-Mendota Water Authority:

5 Hans Peter Walters, Esq.

6 For Westlands Water District:

7 Philip A. Williams, Esq.

8

9 For Brett G. Baker, Local Agencies of the North Delta,
10 Bogle Vineyards/Delta Watershed Landowner Coalition,
11 Diablo Vineyards and Brad Lange/Delta Watershed
12 Landowner Coalition, Stillwater Orchards/Delta Watershed
13 Landowner Coalition, Islands, Inc., SAVE OUR SANDHILL
14 CRANES and Friends of Stone Lakes National Wildlife
15 Refuge, City of Antioch:

16 Osha Meserve, Esq.

17 County of San Joaquin, San Joaquin County Flood Control
18 and Water Conservation District, and Mokelumne River
19 Water and Power Authority:

20 Thomas H. Keeling, Esq.

21 Central Delta Water Agency, South Delta Water Agency
22 (Delta Agencies), Lafayette Ranch, Heritage Lands Inc.,
23 Mark Bacchetti Farms and Rudy Mussi Investments L.P.:

24 John Herrick, Esq.

25 California Sportfishing Protection Alliance, California
Water Impact Network, and AquAlliance:

26

27 Michael Jackson, Esq.

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1 NOVEMBER 30, 2016 - WEDNESDAY 9:00 A.M.

2 P R O C E E D I N G S

3 --oOo--

4 HEARING OFFICER DODUC: Good morning, everyone.

5 Welcome back to this water rights hearing on the Change
6 Petition for the California WaterFix Project. I am Tam
7 Doduc. With me here today are -- to my right, Board
8 Chair Felicia Marcus and I expect we will be joined by
9 Board Member Dorene D'Adamo. To my left are Dana
10 Heinrich, Diane Riddle, Kyle Ochendusko. We will also
11 be assisted by Jason Baker and Kevin Long today.

12 First of all, some quick announcements. Please
13 take a minute right now and identify the exit closest to
14 you. In the event of an emergency, an alarm will sound
15 and we will evacuate using the stairs, not the
16 elevators, down to the first floor. We will meet up in
17 the park and wait there for the all-clear signal to
18 return. If you're not able to use the stairs, please
19 flag down one of us or people wearing -- I think it's
20 fluorescent orange clothing and they will direct you to
21 a protected area.

22 The second announcement is, as always, this is
23 being recorded and Web casted. So please speak into the
24 microphone. And when you do, begin by stating your name
25 and affiliation. Our court reporter is here today.

1 Thank you. Please make arrangements with her if you
2 would like to have a copy of the transcript sooner than
3 we will make it available, which will be at the
4 completion of Part 1B.

5 And finally and most importantly, as always,
6 please take a moment and check to make sure all your
7 noise-making devices are set on, "Do not irritate the
8 board hearing officer with the noise" mode. Please take
9 a moment and check right now, even if you do think it is
10 off.

11 Let me also take a moment and send our best
12 regard to Ms. Akroyd, who I believe is starting her
13 maternity leave today, expecting a new addition to her
14 family. And we welcome back Mr. Walter.

15 With that, are there any housekeeping items
16 before we begin today? All right. Just a matter then
17 of timing. We will begin with Mr. Brodsky today and
18 Group 30. With any luck, we'll get through this party
19 today. If not, Mr. Brodsky has requested that his group
20 be continued on Friday. And I believe you are making
21 arrangements with Mr. Jackson to present his case-in-
22 chief tomorrow, if that turns out to be the case.

23 MR. BRODSKY: Yes, that's correct. He's ready
24 to go at 9:00 o'clock tomorrow morning.

25 HEARING OFFICER DODUC: All right. We will do

1 further time checks probably tomorrow and Friday in
2 order to give Ms. Womack and others an estimate of when
3 they might be up, next week or the week after. All
4 right. With that, not seeing anything else,
5 Mr. Brodsky, you may begin with your opening statement.

6 MR. BRODSKY: Thank you. Michael Brodsky on
7 behalf of Save the California Delta Alliance. And I
8 would like to just attempt in my opening statement to
9 give a little road map of what we hope to show with our
10 evidence today. If I could have DWR-1 Errata page 8,
11 which is just the overview map of the project to orient
12 us on the screen while I -- while I give the statement.

13 HEARING OFFICER DODUC: Is there a reason you
14 are standing?

15 MR. BRODSKY: I just am more comfortable
16 standing. Is that okay?

17 HEARING OFFICER DODUC: That is perfectly fine.
18 As you notice, I tend to stand as well.

19 MS. MARCUS: You guys, we could all stand one
20 day just to be in solidarity.

21 HEARING OFFICER DODUC: If you would be more
22 comfortable...

23 MR. BRODSKY: Is it okay?

24 HEARING OFFICER DODUC: Yes.

25 MR. BRODSKY: Because I usually pace when I --

1 MR. LONG: For the record, I'm pulling up DWR
2 Errata Corrected.

3 HEARING OFFICER DODUC: This one is actually
4 taller, so you don't have to bend your back there,
5 Mr. Brodsky.

6 MR. BRODSKY: Okay. So the first thing we hope
7 to show and demonstrate to the board is how water
8 quality for Discovery Bay is influenced by project
9 operations in its current configurations. Let's see.
10 Page 8 should be the map. Yeah. Thank you.

11 Okay. We hope to show how water quality for
12 Discovery Bay is currently influenced by project
13 operations. And then we hope to show how changes in
14 project operations proposed by CWF will degrade water
15 quality in Discovery Bay. And then we hope to show how
16 that degradation of water quality will injure human uses
17 of water in Discovery Bay and impact our community.

18 As far as the first two points, our expert
19 testimony from Tom Burke and Erik Ringelberg will
20 establish what we want to show about how the projects
21 are operated and how the changes will impact water
22 quality. My own testimony will then drill down into a
23 little bit more detail into the documents where those
24 operating rules are that injure us and affect us. And I
25 am going to make some suggestions about how those

1 operating rules could be changed and -- hopefully, in a
2 way that the project proponents might even take a look
3 at what I'm suggesting.

4 As far as the impacts on the community, Janet
5 McCleary will testify as to the impact on our community
6 values and our human uses. Michael Guzardo, who is an
7 expert real estate agent, will testify as to the impact
8 on our real estate values. And -- okay.

9 So I'd like to just give a little bit more of
10 an overview. So you can see on the screen there in the
11 blowup that Discovery Bay is located very close to
12 Clifton Court Forebay, which is where the current points
13 of diversion are. And so -- and then up -- let's see.
14 Can we have page 10? I must be -- must be looking at a
15 different one. Let's go back to the map, the one before
16 that.

17 Okay. And so currently, as you've heard
18 before, Sacramento River water flows down the Sacramento
19 River. Just below the new intakes there, there is a
20 cross-Delta channel, which takes Sacramento River water
21 and pulls it into the interior Delta and down the north
22 and south fork of the Mokelumne Rivers. Slightly below
23 downstream from that cross-delta channel, Georgiana
24 Slough also takes Sacramento River water and funnels it
25 into the interior Delta.

1 Then if we can have that blowup that shows
2 Clifton Court Forebay again. That -- that high-quality
3 Sacramento River water that comes to the interior deltas
4 I just described is then drawn by the pumps to Clifton
5 Court Forebay. And as you can see, Discovery Bay is
6 very, very close. So that high-quality water that is
7 being drawn by the pumps is also drawn into Discovery
8 Bay and very much improves our water quality. It's sort
9 of as if the Petitioners can't avoid helping us if they
10 want to help themselves. They need high-quality water
11 for export. To get high-quality water for export, they
12 make our water quality in Discovery Bay better.

13 Those -- those gates -- the cross-delta channel
14 is operated by USBR. And those gates are opened and
15 closed according to a schedule in D-1641 and according
16 to restrictions in -- in the by-ops. When the gates are
17 open, high -- high-quality water flows into the interior
18 Delta. When the gates are closed that high-quality
19 water does not flow into the interior and continues
20 downstream.

21 I want to point out to you in my testimony
22 where the operating rules will allow those gates to be
23 closed more often, and so that that will negatively
24 affect us. I want to show you exactly where that is.
25 Also, although there is no gate on Georgiana Slough,

1 when high-quality Sacramento River water is diverted
2 through the newly proposed points of diversion that's
3 upstream from Georgiana Slough. So less Sacramento
4 River water will be flowing into Georgiana Slough and
5 into the interior Delta and ultimately Discovery Bay.

6 Okay. And our -- our biggest problem is in the
7 July through September operating rules. Throughout the
8 rest of the year, the operating rules have a fairly
9 complicated set of constraints that limit the amount of
10 water that can be diverted at the North Delta intakes.
11 However, in July and September there are only two
12 constraints in the operating rules, which are, one, a
13 5,000 CFS bypass flow past the intakes, which is not
14 very much. The Sacramento River generally flows around
15 16 or 18,000 CFS in the summer, and they're only
16 required to maintain 5,000 CFS.

17 The second is a requirement for a 3,000 CFS
18 flow downstream at Rio Vista. So we think that a lot of
19 the operating rules that they're already applying
20 year-round and that they've showed us as reasonable
21 should also be applied in July through September. And
22 we think applying those rules in July through September
23 will prevent excessive degradation of water quality and
24 will still allow them to export more water and get --
25 get closer to meeting full contract amounts which is

1 what they want to do.

2 Okay. Another point is that, as I mentioned,
3 the drawing of the high-quality Sacramento River water
4 to Clifton Court Forebay by -- by pumping at Clifton
5 Court Forebay freshens the water in the -- in the
6 interior Delta, in the South and Central Delta. In the
7 operating rules for CDF and CWF, which are really all
8 contained in the biological assessment -- that's where
9 the project description is -- it's -- it acknowledges
10 that. And it says, "We have a preference for South
11 Delta pumping." In other words, our preference is to
12 divert first at the South Delta during the summer months
13 to maintain water quality. However, it is a preference,
14 not a rule. So they would not necessarily need to do it
15 if some situation arose where they didn't want to. And
16 we think there needs to be some kind of a rule that
17 there needs to be some use of those South Delta pumps
18 where needed to maintain water quality. And I want to
19 drill down into the documents when I testify and show
20 you exactly where that is.

21 The final thing is the export-to-inflow ratio,
22 which we raised on cross-examination. And I want to
23 drill down into the documents and show where it is our
24 argument that that export-to-inflow ratio is being
25 changed and that the point of measurement of inflow is

1 being changed from Freeport to downstream of the new
2 intakes.

3 Now, the location of that point of measuring
4 inflow and the way the export-to-inflow ratio is defined
5 is a part of D-1641, which is implementing the Bay Delta
6 Water Quality Control Plan. I don't think you can
7 change that in an adjudicative proceeding. I think if
8 you want to change that that has to be done through a
9 rule-making process. And I want to drill down into the
10 documents and show you where that is. And that
11 completes my opening statement. And is it appropriate
12 to ask for questions, or we don't do that with opening
13 statements, from the Board?

14 HEARING OFFICER DODUC: We will -- we will
15 reserve our questions, if any, for after the completion
16 of the case-in-chief and the cross-examination.

17 MR. BRODSKY: Okay. Thank you very much.

18 HEARING OFFICER DODUC: Thank you.

19 MR. BRODSKY: So I'll just go back and take my
20 seat then.

21 HEARING OFFICER DODUC: Before you do that,
22 though, since you will be testifying, could everyone
23 please stand and raise your right hands?

24 Do you swear or affirm that the testimony you
25 are about to give is the truth? If so answer, "Yes, I

1 do."

2 ALL: Yes, I do.

3 HEARING OFFICER DODUC: Thank you. All right.

4 I can't wait to see how Mr. Brodsky directs himself. It
5 is no longer John Herrick day today unfortunately.

6 MS. MARCUS: I love when he objected to his own
7 comment. That was the best.

8 HEARING OFFICER DODUC: Mr. Brodsky, please
9 begin.

10 MR. BRODSKY: Okay. So I'd like to first call
11 Mr. Tom Burke.

12 DIRECT EXAMINATION BY MR. BRODSKY:

13 Q. And, Mr. Burke, you've already affirmed that
14 your written testimony is the truth. You identified two
15 exhibits in your written testimony, which are SCDA-56,
16 SCDA-36, and SCDA-50. Do you affirm that those are true
17 and correct copies of those documents and that you
18 prepared them?

19 A. Yes, I do.

20 Q. Okay. And I'd like to -- now, you've
21 previously testified for South Delta Water Agency here.

22 A. Yes, I did.

23 Q. And you -- you submitted a written statement of
24 qualifications, and you also went over that verbally
25 with Mr. Herrick; is that correct?

1 A. That's correct.

2 Q. So I don't see any need to repeat that here
3 unless the Board would like to hear it. Okay. So I
4 would like to direct your attention to your written
5 testimony, if we could have that on the board, which
6 is -- I'm sorry. Am I going too fast for the court
7 reporter? Okay. Which is SCDA-35.

8 MR. OCHENDUSZKO: And, Mr. Burke, do you mind
9 moving the microphone a little closer to you and making
10 sure that the green light is on?

11 THE WITNESS: Sure. Can you hear me now?

12 MR. OCHENDUSZKO: Yes. You have a very soft
13 voice, so we just want to make sure that it goes through
14 on the Webcast.

15 THE WITNESS: Oh, okay. I am trying to speak a
16 little louder.

17 MR. OCHENDUSZKO: Thank you very much.

18 BY MR. BRODSKY:

19 Q. Okay. If we could have page 2 of his testimony
20 there. And you testified that -- at line 4 the projects
21 divert water presently at the southern end of the Delta,
22 that that's going to be then changed and water will be
23 diverted through the North Delta diversion points and
24 that that will limit or eliminate the high-quality
25 Sacramento River water that currently flows into the --

1 into the Central and South Delta; is that correct?

2 A. Yes, that's correct.

3 Q. And could you expand on that a little bit for
4 the Board?

5 A. Oh, what's generally happening is the fairly
6 fresh cool water from the Sacramento River is coming
7 down into the Delta. As the exports are drawn from the
8 South Delta export locations, it is drawing more of that
9 Sacramento water down through the Delta. It mixes with
10 the existing water of the Delta, freshening up the water
11 and providing a source of low-salinity, high-quality
12 water in the system.

13 As they put in the North Delta diversions, what
14 they're doing is now removing that source of water that
15 would typically be drawn into the Delta and providing a
16 relief to the high-salinity conditions that existed
17 within the system. That diversion is diverting a fair
18 amount of water from the Sacramento River. There is a
19 regulation schedule that dictates how much can be
20 diverted based on the flow of the Sacramento River,
21 leaving approximately 5,000 CFS in the river during most
22 times of the year. And I believe it's 7,000 in the
23 month of December. But during the summer months, it's
24 actually diverting up to around 45 percent of the flow
25 in the Sacramento River during the period of time of the

1 year when you need that water to relieve the salinity
2 conditions the most.

3 Q. Okay. Thank you. So you just mentioned
4 salinity. In your written testimony, you also talk
5 about the nutrient load in the San Joaquin River and the
6 nutrient load in the Sacramento River and the mixing of
7 those two. Could you expand on that a little bit?

8 A. Well, you got a salinity load that's coming in
9 from the San Joaquin River.

10 Q. Did you mean to say "nutrient load"?

11 A. Or salinity. Could you repeat your question?

12 Q. I'm asking about the nutrients.

13 A. Oh, okay. Two of the large tributaries that
14 are flowing into the Delta, the Sacramento and the San
15 Joaquin River, have very different nutrient loads coming
16 in associated with those flows. The Sacramento River is
17 relatively high-quality, low-nutrient concentration
18 water. The Sacramento -- or the San Joaquin River has
19 generally higher concentrations of nutrients that are
20 entering in the Delta. Being able to mix those two
21 systems together helps to alleviate the nutrient
22 concentrations that are developing and accumulating
23 within the system. Removing the high-quality Sacramento
24 River from that mixing process now leaves higher level
25 of nutrients within the Delta system.

1 Q. And what effect would that have on Discovery
2 Bay, if any?

3 A. By allowing the nutrient levels to increase
4 within the Delta system, it would augment and stimulate
5 the more rapid increase of algal production within the
6 Delta waters.

7 Q. So you're saying that it would promote more
8 algae growth, if I understood you correctly.

9 A. That's correct. The algae -- one of the
10 limiting factors in algal growth is nutrient
11 availability. And providing additional nutrients to the
12 system will stimulate the increased production of algal
13 growth within the system.

14 Q. Does that include the blue-green algae -- the
15 toxic blue-green algae?

16 A. That would generally be all algae that would
17 be growing within the system.

18 Q. And what about other invasive weeds, such as
19 the Egeria densa and the curly leaf pond plant?

20 A. I'm not specifically familiar with the needs of
21 those two species explicitly. But generally, all the
22 different algal types will require sunlight, nutrient,
23 and temperature to stimulate their growth processes. So
24 if you increase the nutrient level or the sunlight or
25 the temperature within the system, you'll stimulate

1 growth and have an increase of growth of all the
2 different types of algae.

3 Q. Okay. So with regard to algae and other water
4 weeds that are not algae, if there is a stimulation of
5 increased growth of those and the population expands
6 dramatically because of the higher nutrient load --
7 nutrient load, what follow-on effect, if any, might that
8 have?

9 A. Typically, the algal growth process follows a
10 boom and bust type of scenario where initially you've
11 got a high algal growth rate absorbing a lot of
12 nutrients from the system. It grows to the point at
13 which it then starts to die off. When you get a
14 die-off, the algae starts to collapse -- the system
15 starts to collapse, you create a lot of detritus of the
16 system which absorbs the oxygen out of the water and can
17 get low in oxygen levels within a system. And the low
18 oxygen levels would then adversely affect the fisheries
19 and other resources within the Delta.

20 Q. Okay. And -- okay. I'd like to move on to a
21 different subject here. In your testimony on page 6,
22 you discuss Delta hydrodynamics and D-1641.

23 A. That's correct.

24 Q. And could we take a look at SCDA-17, which is a
25 map of the D-1641 compliance stations? Okay. So in

1 your testimony on page 6, you state that the submitted
2 BA, which is SWRCB-104, and the Aquatic Science Peer
3 Review, which is SCDA-1, both confirm that the CWF will
4 radically alter the hydrodynamics of the entire Delta.
5 Do I understand that correctly?

6 A. That's correct. By removing the volume of
7 water from the Sacramento River that will be diverted
8 through the North Delta diversions, changes the flow
9 patterns throughout the whole delta. They are all
10 responding to that new diversion that's been removed
11 from the Sacramento River.

12 Q. Okay. And could we have the map of SDA 17
13 again? Sorry for switching back and forth. And as you
14 said, if those -- the hydrodynamics of the Delta are
15 radically altered, what -- well, what is this map here?
16 What do we see?

17 A. Basically, this is a map of the Delta showing
18 the interconnected channels. North is up on this map.
19 And you can see the Sacramento River entering the Delta
20 system in the north. You've got the San Joaquin River
21 down in the south at Vernalis entering the Delta and
22 then the interconnected systems of channels within the
23 Delta that is mixing all the flows in the different
24 contributing tributaries that are entering the system.

25 Q. And what about the D-1641 compliance stations?

1 I'm seeing there S-49, Contra Costa at Rock Slough,
2 Prisoners Point terminus, et cetera. What does that
3 represent?

4 A. Each of these 1641 compliance locations tries
5 to characterize a representative section of the Delta
6 for characterizing the water quality characteristics of
7 that specific reach. So these sites have been selected
8 specifically to try to characterize different regions of
9 the Delta system.

10 Q. Okay. And so if the hydrodynamics of the
11 Delta -- and are the -- are all those points, taken as a
12 whole, hope to present a reasonably accurate picture of
13 water quality in the Delta as a whole?

14 A. That's the attempt in selecting these specific
15 locations for these monitoring points.

16 Q. And if the hydrodynamics of the Delta are
17 radically changed due to CWF, what effect might that
18 have on the existing D-1641 compliance stations to
19 accurately portray water quality in the Delta as a whole
20 reasonably?

21 A. Well, these specific locations were selected
22 given the existing hydrodynamics in the Delta and water
23 quality characteristics. If you change those
24 hydrodynamic flow patterns within the Delta system and
25 you change the water quality characteristics that would

1 result from that change in flow patterns, these specific
2 locations that are present in the D-1641 might not be at
3 the proper locations to be representative for areas of
4 the Delta anymore.

5 MR. BRODSKY: Okay. Thank you very much.
6 That's all my questions on direct for this witness.

7 HEARING OFFICER DODUC: Thank you, Mr. Brodsky.
8 Please move on to your next witness.

9 MR. BRODSKY: Okay. So my next witness is
10 going to be Erik Ringelberg.

11 DIRECT EXAMINATION BY MR. BRODSKY:

12 Q. Okay. Mr. Ringelberg, you submitted a
13 statement of qualifications on your expertise in the
14 area of aqualogy and particularly knowledge about
15 aquatic weeds.

16 A. I did.

17 Q. Okay. And you have previously testified, I
18 believe, for Central Delta Water Agency and perhaps
19 others. I think Land, also.

20 A. Not for Central. For San Joaquin County,
21 excuse me.

22 Q. Okay. And at that time did you give an oral --
23 expand on your qualifications and experience?

24 A. I did.

25 Q. Okay. So I don't see any need to repeat that.

1 Okay. Thank you.

2 All right. So you heard Mr. Burke testify that
3 the effects of CDF are likely to increase the nutrient
4 load in Discovery Bay.

5 A. I did.

6 Q. And do you agree with his reasoning and how he
7 arrived at that?

8 A. I do. And I would be happy to expand on why
9 that's particularly relevant to Discovery Bay.

10 Q. Okay. Please.

11 A. Sure. So one of the characteristics of
12 Discovery Bay that I think gets glossed over a lot is
13 that Discovery Bay is a series of dendritic channels
14 with --

15 Q. Can I just interrupt you for a moment? Could
16 we have SCDA-12? And what do you see there?

17 A. Sure. That is a view from the north, looking
18 sort of southwest of Discovery Bay.

19 Q. And you're familiar with Discovery Bay?

20 A. I am.

21 Q. And is that photograph an accurate depiction of
22 Discovery Bay?

23 A. It appears to be an accurate description of the
24 morphology of Discovery Bay. I'm not sure what
25 additional changes have happened since this picture was

1 taken.

2 Q. Okay. All right. I'm sorry. I interrupted
3 you. Go ahead.

4 A. Sure. Well, there are unique characteristics
5 of Discovery Bay that I think appear to be self-evident
6 to folks who are aware of what Discovery Bay is like and
7 how it functions internally but are sort of not obvious
8 just by looking at it. So there is a series of flow
9 paths within Discovery Bay that yield either to a series
10 of other bays or ultimately to dead ends. And so that
11 has some consequential effects, which I discussed in my
12 testimony.

13 Q. Okay. And so going back to the increase in
14 nutrient load. Within your knowledge and experience and
15 having visited Discovery Bay and surveyed the scene,
16 what effect will that have on aquatic weeds in Discovery
17 Bay?

18 A. Yes. If there was an increase in nutrients,
19 there would be an increase in aquatic weeds depending on
20 a couple other factors associated with flow.

21 Q. Okay. And what effect, if any, would it have
22 on algae?

23 A. Algae respond in a manner that I've described
24 in previous testimony. In this system, it appears to be
25 largely limited by light. Nutrients appear to be in

1 sufficient quantities to maintain their growth. And so
2 factors associated with flow, particularly the reduction
3 of flow where the sediment falls out and the ability to
4 break up harmful algal blooms is reduced by the lack of
5 flow, which then exacerbates certain members of the
6 algal community.

7 MR. BRODSKY: Okay. I think that's all the
8 questions I have for this witness on direct.

9 HEARING OFFICER DODUC: Thank you, Mr. Brodsky.
10 Please move on.

11 MR. BRODSKY: Okay. Let's have Janet McCleary.

12 MS. MCCLEARY: Okay. Now my mic is on.

13 DIRECT EXAMINATION BY MR. BRODSKY:

14 Q. Okay. Ms. McCleary, I have SCDA-59 in front of
15 me, which is a revised version of your testimony. Could
16 we have SCDA-59?

17 HEARING OFFICER DODUC: Why do I have it as 62?

18 MR. BRODSKY: You are correct. There was a
19 labeling mixup that was caught later, yes. Thank you
20 very much. It is 62.

21 MR. LONG: You'll note that the document still
22 says 59.

23 MR. BRODSKY: When I was labeling exhibits to
24 do the exhibit index, I was rushed and I labeled some
25 things twice. And later on, I got together with the

1 staff and we corrected that on the -- on the index. But
2 perhaps, I should submit an errata so that's no longer
3 labeled 59. I'll take care of that with the staff.

4 HEARING OFFICER DODUC: You may clean that up
5 when you submit all your exhibits.

6 MR. BRODSKY: Okay. All right. Thank you.
7 That was my mistake. I apologize for that.

8 Okay. So we could -- could we take a look at
9 62?

10 HEARING OFFICER DODUC: I believe that is 62
11 even though it is labeled as 59.

12 MR. BRODSKY: Okay. So could we scroll down
13 and we can see that a lot of stuff is crossed out in red
14 there all the way through.

15 BY MR. BRODSKY:

16 Q. So, Ms. McCleary, you originally formulated
17 your own testimony; is that correct?

18 A. That's correct.

19 Q. And then I told you that we needed to change it
20 and take some things out; is that correct?

21 A. That's correct. I did that.

22 Q. And in -- in that process of taking it out, I
23 helped you quite a bit with that in determining what
24 needed to be taken out.

25 A. Correct.

1 Q. Okay. All right. And where do you live?

2 A. In Discovery Bay.

3 Q. And how long have you lived in Discovery Bay?

4 A. We moved there full-time in 2007.

5 Q. And prior to that, do you have experience with
6 Discovery Bay and the Delta?

7 A. Yes. We first saw the Delta in 1969, when we
8 visited friends from college. We moved to Silicon
9 Valley in 1973 and began boating on weekends at that
10 point. In '85, we bought our own boat. And from then
11 on, we took the family, and every weekend we were on the
12 Delta, every weekend in the summer. Plus at least once
13 or twice a week, we would take the boat and travel to
14 either an anchorage for a week, to San Francisco, to
15 Stockton, to Sacramento, other places to enjoy the
16 different areas of the Delta. So we've had extensive
17 experience.

18 Q. Okay. And are you an active member of the
19 Discovery Bay community?

20 A. Yes, I am.

21 Q. And you heard testimony from Mr. Ringelberg and
22 Mr. Burke about the potential for degrading water
23 quality in Discovery Bay. Let me back up. Let's strike
24 that.

25 Has there been any problem with toxic

1 blue-green algae recently in Discovery Bay?

2 A. There certainly has. Earlier in the summer, we
3 started noticing some of the standard green algae, but
4 it looked a lot heavier. The Board of Health was
5 contacted, and they found several hot spots of the toxic
6 blue-green algae, mainly at the end of Kellogg Creek
7 where the water doesn't move very far and up near the
8 Marina. We're lucky our bay is a deep bay. So we
9 didn't have a lot of effect from that. My husband could
10 still swim; the dog was okay.

11 But a couple of months later, it was awful. It
12 was everywhere. It was in every bay. It was in the
13 fast-flowing water that goes from the Marina to the
14 lighthouse. It is -- and there was a sign that went up,
15 said, "Toxic. Do not touch." So it's been very bad.

16 Q. All right. And that -- has that happened in
17 previous years?

18 A. No. The -- I contacted the Health Department
19 and they said they measure each year but this is the
20 first year that they've had any significant toxic algae
21 at all.

22 Q. And what effect did that have on the community?

23 A. Well, it was -- it was awful. There were signs
24 went up that you couldn't get in the water. The Marina,
25 people told me their business had gone down. And we

1 were just not able to enjoy the water the way that our
2 community normally enjoys the water.

3 Q. And did it have any effect on the visitors to
4 Discovery Bay, as far as you know?

5 A. My understanding is less people came to launch
6 their boat, and less boats came down to use the Marina
7 business.

8 Q. Okay. You testified in your written testimony
9 that our -- could we have SCDA-12 again?

10 And what do we see there on the screen?

11 A. Yes. That's Discovery Bay.

12 Q. And is that an accurate depiction of Discovery
13 Bay?

14 A. It is.

15 Q. Okay. And so you heard Mr. Ringelberg and
16 Mr. Burke testify about the potential for water quality
17 degradation and toxic algae. In your written testimony,
18 you testified about the role of the bays of Discovery
19 Bay in our community identity and community life as
20 separate from recreation. Could you expand a little bit
21 on the role of the bays in Discovery Bay's community
22 identity and community life?

23 A. Yes. In fact, our house is the second bay.
24 It's called Marlin Bay. All the bays have names, and
25 the houses back on to the bay. We have a deck in the

1 back, stairs and ramps that go down to our dock where
2 our boats are. So we don't have much of a backyard, but
3 we spend all of the time on the decks, on the dock. And
4 as you look across to look around, we actually see more
5 of our neighbors from the back than we do walking on the
6 streets.

7 Some communities -- I was thinking it was like
8 a lot of communities have a big, grassy common area
9 where people have their houses and they see and they
10 meet in the green. The bays are our common area.
11 That's where we live. That's where we are. That's
12 where we really socialize and see people travel from
13 place to place, even travel the waterways to go to the
14 Boardwalk restaurant for dinner or we go further out to
15 various restaurants, lunch, brunch. The waterways are
16 as much streets in our community as any. And we're a
17 freshwater community. So that -- that only works if we
18 have clean, fresh water.

19 Q. Okay. And what effect do you think it would
20 have on community values and community identity if the
21 toxic algae were to be made worse and become a regular
22 feature in Discovery Bay?

23 A. Well, right now, I know that the home values, I
24 have been told, are 300,000 more if you live on a bay.
25 If you live on a toxic bay or a brackish bay, the home

1 values won't be worth anything. People will not buy
2 those homes, and it really destroys our way of life.

3 Q. Okay. Do you have a pet?

4 A. I do. I have a dog.

5 Q. And does the dog get down and drink out of the
6 water?

7 A. Well, that's been the normal practice for the
8 last few years. And we also walked on that levee that
9 comes up on the left side. That's the dog walk. And
10 dogs walk there and they run down and they swim in the
11 levee. With the toxic algae problem, it's been really
12 difficult and we don't know what to do because dogs --
13 as you're going to and from your boat, the dogs are out
14 on the dock.

15 Even my grandkids. I mean, I think about if it
16 is as toxic as it right now is that they can't touch it.
17 If one of the kids jump in or fall in or -- you know,
18 I'm really concerned about having our docks and being
19 able to even use them when the water becomes too toxic.

20 Q. Okay. And as apart from recreation, just with
21 kids and dogs being in the community, living there, do
22 you see if there were a regular toxic algae, a danger to
23 the health and safety of kids and pets?

24 A. Do I see if it would impact us?

25 Q. Do you see a danger to the health and safety of

1 kids and pets if the toxic algae becomes a regular
2 feature apart from recreation, apart from intentionally
3 going in the water?

4 A. Well, there is right now just having dogs
5 around there because they do jump in. There is no way
6 to fence your docks off and keep, you know, dogs away
7 from it. So it would really discourage people that have
8 pets. And probably people who have young children that
9 want to live there would be very discouraged from living
10 in Discovery Bay.

11 Q. Okay. You testified a moment ago, "We're a
12 freshwater community and if it became salt water, that
13 would destroy us." I mean, so what? People, you know,
14 have houses on the ocean that are on San Francisco Bay.
15 What difference would it make to the community if it
16 became salt water?

17 A. Well, maybe if it was fresh salt water, but
18 there's a lot of pollution that comes in from the San
19 Joaquin River, which would be our main source of water.
20 So it wouldn't be like an ocean. It would be brackish,
21 full of algae, polluted, pesticide water and nobody
22 wants to live there.

23 MR. BRODSKY: Okay. I think that's all the
24 questions I have for you.

25 HEARING OFFICER DODUC: Next, please.

1 MR. BRODSKY: Okay. Next is going to be Frank
2 Morgan.

3 THE WITNESS: Good morning.

4 DIRECT EXAMINATION BY MR. BRODSKY:

5 Q. Let me just get your testimony. Let's see.
6 Mr. Morgan, your written testimony -- well, first of
7 all, do you affirm that your written testimony is the
8 truth?

9 A. Yes, I do.

10 MR. BRODSKY: And let me just -- I forgot to do
11 that with the other witnesses. Can I ask you,
12 Ms. McCleary, do you affirm that your written testimony
13 is true?

14 MS. MCCLEARY: I do.

15 MR. BRODSKY: And, Mr. Guzardo?

16 MR. GUZARDO: I do.

17 MR. BRODSKY: Mr. Ringelberg?

18 MR. RINGELBERG: I do. However, my name is
19 misspelled at the first line header.

20 MR. BRODSKY: Okay. I'll -- Well put that on
21 our lists, our to-do list.

22 And, Mr. Burke?

23 MR. BURKE: Yes, I do.

24 BY MR. BRODSKY:

25 Q. Okay. All right. Mr. Morgan, there is quite a

1 bit crossed out in your testimony in red ink. It looks
2 like a little bit of a bloodbath. Did I help you
3 determine what to cross out?

4 A. Well, what you did is showed me what apparently
5 the Board -- or through this process, wasn't appropriate
6 for this type of hearing.

7 Q. Okay. And other than that, did you -- did you
8 formulate the testimony on your own? It is your
9 testimony?

10 A. Yes, it is.

11 Q. Okay. Thank you. And could you tell us a
12 little bit about your experience and history and -- with
13 the Delta and Discovery Bay?

14 A. Sure. I first came to Discovery Bay when I was
15 about 15 -- 14, 15 years old to a water ski camp up in
16 the Meadows, which is in the Walnut Grove area. I spent
17 the summer -- a week in that summer as a camp
18 participant. The following year, I came back as a camp
19 water ski instructor on the Delta and spent the entire
20 summer navigating the waters up in the Walnut Grove --

21 Q. I'm sorry, Mr. Morgan. Let me interrupt you.
22 That -- what you're touching on now is a portion of the
23 testimony that we crossed out. I know it's a bit
24 complicated. So and I want us to stay honest with
25 everybody here and not try and slip anything in. So

1 could we move forward to your experience when you moved
2 to Discovery Bay and the operation of your charter boat
3 and so forth?

4 HEARING OFFICER DODUC: Starting at age 40.

5 THE WITNESS: Okay. Sorry about that.

6 MR. BRODSKY: That was nearly six months ago.

7 THE WITNESS: I was going to get there rather
8 quickly, otherwise we'd be here a long time. But I
9 appreciate that direction. Yes. So 15 years ago, I
10 moved to Discovery Bay. And in 2012 -- October of 2012,
11 I started a business called Captain Morgan's Delta
12 Adventures. And basically, it is a cruise operation
13 business where we cruise around in a 50-foot, 55-foot
14 converted houseboat to a certified U.S. Coast Guard
15 passenger vessel to take up to 35 passengers throughout
16 the Delta region.

17 We do all kinds of different types of cruises.
18 They range anything from recreational cruises, which
19 we're not going to talk about today; but also include
20 educational cruises, like bird watching, to talk about
21 the levee system, to talk about the town of Locke and
22 the history of the, you know, how -- how the Delta was
23 formed, the water issues related to the farmers and how
24 they supply water to their fields for crops, and
25 bridges, et cetera, et cetera. So we've been running

1 that tour business. At our first year that we started
2 that, in 2012, we did about 12 cruises. Last year, we
3 did about 135 cruises total. And this year we're going
4 to break 165 cruises.

5 BY MR. BRODSKY:

6 Q. Okay. So you spend a lot of time cruising in
7 the Delta yourself, running a boat?

8 A. Literally, you know, well, an awful lot.
9 Almost three or four times a week we're out there and
10 could be multiple times a day.

11 Q. And would you say you've gained a familiarity
12 with the flow patterns in the Delta and the presence or
13 absence of aquatic weeds and algae at different times of
14 the year and in different years?

15 A. Sure. You know, again, I don't profess to be a
16 water -- aquatic weed expert or anything like that; but
17 I am, you know, an observation expert of the Delta. I
18 spend a lot of time cruising the delta. And I can
19 relate that experience from year-to-year and what has
20 been in the past and what it's like this year, as
21 compared to last year. And it is -- it's easily
22 discernable when you spend that much time on the water.

23 Q. All right. And this past year, did you have
24 any difficulty getting your boat out of the harbor
25 because of weeds?

1 A. Actually, this -- two years ago, the aquatic
2 weed and the water hyacinth was probably the worst I had
3 ever seen it in the Delta in the Discovery Bay area.
4 The water hyacinth was so bad in the Discovery Bay
5 Marina where I berth my vessel, I literally was locked
6 in the slip and couldn't get out until I had staff from
7 the Marina come and help, with the smaller boats, clear
8 the aquatic weeds so that I could get the Rosemarie out
9 of the slip and -- and conduct a charter.

10 Also, as I would cruise and tour around the
11 Delta, as I would go into the Port of Stockton,
12 literally, the San Joaquin River, from levee to levee,
13 was packed solid of water hyacinth and literally
14 unpassable in some areas. Since then, the Department of
15 Boating and Waterways have done an excellent job of
16 trying to get a handle on that, and they've made great
17 progress with the water hyacinth and the Egeria densa in
18 Discovery Bay. However, those problems are an ongoing
19 issue and require ongoing attention, you know, all the
20 time.

21 Q. Okay. And if that water weed problem were to
22 continue or get worse, would that interfere with your
23 ability to conduct the educational portions of your
24 business?

25 A. Sure. Any of that does. As you know, there's

1 many different kinds of evasive weeds in the Delta. And
2 the one, the Egeria densa, is an especially big problem
3 for me because it grows from the bottom of the Delta and
4 creates issues with the intakes of my outdrives on the
5 boat, whether I can operate safely without overheating
6 my engines running through that.

7 Some of the bays in Discovery Bay, when the
8 weed was at its worst, you literally could look across
9 the water in the bay and it looked like a green lawn to
10 where birds and things would walk across, you know, on
11 top of the water. Which obviously, you've heard
12 testimony about home values. Cabrillo Bay comes to
13 mind, where if somebody said they were looking for a
14 home and you were trying to sell it on Cabrillo Bay, you
15 could forget it at that time. It just was that
16 disgusting.

17 Q. Okay. Thank you.

18 MR. BRODSKY: I'd like to ask if I could ask a
19 question about what I can question him about. There was
20 a portion in his testimony about environmental justice
21 and the effect on the ethnic subsistence fisher. And I
22 was told to take that out because fishing is part 2, but
23 it is really the environmental justice part I wanted to
24 go to.

25 So my question is if I can ask him just about

1 the environmental justice aspect of that now. And if I
2 can't do that now, can I ask about environmental justice
3 in part 2?

4 HEARING OFFICER DODUC: I believe we struck the
5 environmental justice because it was a late addition to
6 his testimony.

7 MR. BRODSKY: No. Actually, it was struck
8 because it had to do with the health of a fishery.

9 HEARING OFFICER DODUC: Ah. Got it. Okay. If
10 you would like to reframe it so that it fits within the
11 scope of part 1, then go ahead.

12 MR. BRODSKY: Let me try.

13 BY MR. BRODSKY:

14 Q. Mr. Morgan, when you cruise, do you observe
15 ethnic minorities on the banks of the Delta, the various
16 sloughs and channels?

17 A. Yes.

18 Q. And is it your understanding and belief that
19 those folks are not there recreationally fishing?

20 A. That's correct.

21 Q. And that that's how they live; they get their
22 food that way?

23 A. That's correct.

24 Q. And is it your belief, based on your knowledge
25 and experience in the Delta, that if water quality is

1 degraded, the weed problem, the algae problem become
2 worse, that that will interfere with those people's
3 ability to catch their daily bread, so to speak?

4 A. Yes.

5 MR. BRODSKY: Okay. Thank you. That's all I
6 have for this witness.

7 HEARING OFFICER DODUC: And now are you moving
8 on to yourself?

9 MR. BRODSKY: Well, it would be myself unless
10 we want to cross-examine them so they can go and then --
11 because I think they're going to probably want to spend
12 a lot of time cross-examining me.

13 HEARING OFFICER DODUC: Well, let me ask them.

14 MR. BRODSKY: But we can ask Mr. Mizell what he
15 thinks.

16 HEARING OFFICER DODUC: Do you anticipate
17 conducting cross -- oh, Mr. Guzardo has not --

18 MR. BRODSKY: Oh, I'm sorry. Thank you.

19 HEARING OFFICER DODUC: But since we're taking
20 a break, let me go ahead and ask, does anyone wish to
21 cross-examine these five witnesses? Petitioners?

22 MR. HERRICK: We do, but we prefer to
23 cross-examine with Mr. Brodsky and the entire panel.

24 HEARING OFFICER DODUC: Ms. Womack? Your
25 microphone is not on, I don't believe.

1 MS. WOMACK: It's really frustrating. My
2 father can't hear anything. We're supposed to wait
3 until the break, but it just doesn't seem fair that he
4 can't hear. He's supposed to have accommodations. I
5 don't want to interrupt Mr. Brodsky, but...

6 HEARING OFFICER DODUC: Okay. Mr. Ochenduszko?

7 MR. OCHENDUSZKO: So right now, the captioning
8 service on this iPad stopped. Can we swap it out with
9 another one?

10 MS. WOMACK: It's just because he can't hear
11 anything.

12 HEARING OFFICER DODUC: So, Mr. Ochenduszko, do
13 you have it fixed or do we need to take a break?

14 MR. OCHENDUSZKO: We can keep going.

15 HEARING OFFICER DODUC: Okay.

16 MS. WOMACK: Thank you. I appreciate that.

17 HEARING OFFICER DODUC: Thank you, Ms. Womack,
18 for bringing it to our attention. All right. Let's do
19 this then. Mr. Brodsky, complete your direct of both
20 yourself and Mr. Guzardo. And then we'll get to
21 cross-examination.

22 MR. BRODSKY: Okay. My direct will be longer
23 than -- considerably longer. I was trying to minimize
24 time on them so I could have a little more time for
25 myself. But let me -- may I suggest after Mr. Guzardo's

1 direct might be a good time for a break. Okay. All
2 right.

3 DIRECT EXAMINATION BY MR. BRODSKY:

4 Q. Good morning, Mr. Guzardo.

5 A. Good morning.

6 Q. And do you affirm that the written testimony
7 that you submitted is the truth?

8 A. Yes.

9 Q. Okay. And where do you live?

10 A. Discovery Bay.

11 Q. And how long have you lived there?

12 A. About 14 years now.

13 Q. Okay. And are you familiar with the community?

14 A. Extremely.

15 Q. Okay. And what is your profession?

16 A. Real estate broker.

17 Q. Okay.

18 A. Residential.

19 Q. And do you have any -- do you have a license?

20 A. I do.

21 Q. Okay. And do you have any particular
22 experience with waterfront homes in Discovery Bay?

23 A. Yeah. We live on the water, and I'm a
24 waterfront specialist. Actually, grew up on the water
25 on San Francisco Bay.

1 Q. And have you sold -- represented buyers and
2 sellers in transactions for waterfront homes in
3 Discovery Bay in the past?

4 A. Yes.

5 Q. Okay. And you heard the testimony of
6 Mr. Ringelberg and Mr. Burke. If the toxic algae and
7 weed problem in Discovery Bay continues and gets worse,
8 what is your opinion as to how that might impact home
9 sale prices and home sale volume of waterfront homes?

10 A. It would have a dramatic effect on home prices
11 and home sales. Just the thought of tunnels and just
12 the appearance of algae this year has caused sales to
13 fail. And it's not just the real estate brokers that
14 suffer; it's the people buying and selling. I just want
15 to say that I did get a couple cases of where this
16 happened recently from one broker and one sale in
17 Discovery Bay on the water --

18 Q. Let me just stop you.

19 MR. BRODSKY: So this was not in his written
20 testimony. May he elaborate in this way?

21 THE WITNESS: It'll be quick.

22 HEARING OFFICER DODUC: Let's hear it.

23 THE WITNESS: Okay. So it's not just the house
24 that was going to be sold in Discovery Bay, but that
25 person was selling a house in Beaumont and also

1 purchasing a business in Brentwood. So it had a ripple
2 effect. And I think my point is it's not just the home
3 sales in Discovery Bay or the people in Discovery Bay
4 that will be affected. It's a lifestyle out there, and
5 it will be affected across the region.

6 BY MR. BRODSKY:

7 Q. And what about -- we've discussed waterfront
8 homes, single-family residence. What about commercial
9 real estate in Discovery Bay?

10 A. Well, that stands to follow. If less people
11 are moving into the area, then commercial real estate is
12 going to be dramatically affected as well. You know,
13 the thing about Discovery Bay, it's a lifestyle out
14 there. It's not a typical housing tract where you'd
15 find in Phoenix or Carmichael. People come to the Delta
16 area to enjoy the Delta. And so it is completely
17 different than any other kind of real estate because
18 that is what people enjoy; for generations, they've
19 enjoyed. This would have a dramatic effect not just
20 for, you know, the years leading up to the tunnels but
21 for generations and generations beyond.

22 MR. BRODSKY: Okay. I think that that
23 concludes my direct of these witnesses.

24 HEARING OFFICER DODUC: Thank you.

25 Ms. Heinrich, do we need to straighten the record?

1 MS. HEINRICH: No.

2 HEARING OFFICER DODUC: Okay. Apparently, I
3 was correct all along. Do we need to --

4 MS. HEINRICH: Well, I guess I don't know. I
5 suppose that you can't un-ring the bell. But the
6 earlier ruling with regard to the scope of Mr. Morgan's
7 testimony indicated that anything that had to do with
8 the health of a fishery, including subsistence fishing,
9 should be presented in Part 2. So, Mr. Brodsky, I do
10 think your question strayed into Part 2 issues, but it
11 was a minimal amount of testimony.

12 HEARING OFFICER DODUC: Any objection to
13 allowing that minimal testimony to remain in this
14 section?

15 MR. MIZELL: Tripp Mizell, DWR. The difficulty
16 we'll have is that if it remains as testimony on the
17 record, we're going to have to respond to it in rebuttal
18 and that will expand the scope of rebuttal a
19 commensurate amount. So we would prefer if it's truly
20 going to be given an opportunity to be presented to
21 simply hear it in Part 2 and have it removed from the
22 record.

23 HEARING OFFICER DODUC: Mr. Brodsky?

24 MR. BRODSKY: We can do it that way. It's just
25 that I didn't want if -- if environmental justice is

1 supposed to be in Part 1 and fishing is in Part 2, how
2 do I do something that can't be separated? So if you'll
3 allow me to do that in Part 2, then that's fine.

4 HEARING OFFICER DODUC: You may do subsistence
5 fishing in Part 2.

6 MR. BRODSKY: Thank you.

7 HEARING OFFICER DODUC: So with that, we will
8 strike that portion of Mr. Morgan's testimony.

9 Mr. Brodsky, you are up next. And how long do
10 you expect your testimony to take?

11 MR. BRODSKY: I think about 45 minutes.

12 HEARING OFFICER DODUC: Not 20?

13 MR. BRODSKY: I'm going to ask for 45. I have
14 tried to really be brief here and that overall, we're
15 using much less time. And if it seems to you that it is
16 not productive as I'm going through it, then...

17 HEARING OFFICER DODUC: All right. Why don't
18 we go ahead and take our break now then? We will take
19 our 15-minute break, and we will resume at 10:15.

20 MR. BRODSKY: And should I just continue to sit
21 here when we come back or does it matter?

22 MS. MARCUS: I want you to move.

23 MR. BRODSKY: Move back over there.

24 HEARING OFFICER DODUC: Actually, I would
25 prefer there. That way, I don't have to crane my neck

1 to look at you.

2 MR. BRODSKY: All right. Very good.

3 (Off the record.)

4 HEARING OFFICER DODUC: We're missing

5 Mr. Brodsky. There he is.

6 MR. BRODSKY: Oh, sorry.

7 HEARING OFFICER DODUC: All right. Let's do a
8 time check. Mr. Brodsky has requested 45 minutes,
9 though reading his 18-page testimony, I'm not sure why
10 it would take 45 minutes. But we will allow Mr. Brodsky
11 to at least proceed. At this time who-all will
12 anticipate conducting cross-examination and how much
13 time do you anticipate needing? Petitioner or
14 Department of Water Resources?

15 MR. MIZELL: Tripp Mizell, DWR. We anticipate
16 an hour-and-a-half for the panel.

17 HEARING OFFICER DODUC: All right. I see
18 Mr. Keeling.

19 MR. KEELING: Tom Keeling for the San Joaquin
20 County Protestants. I will have just a few questions
21 for Mr. Burke. And by the way, I do volunteer to do the
22 direct examination of Mr. Brodsky.

23 HEARING OFFICER DODUC: How much time,
24 Mr. Keeling?

25 MR. KEELING: Just a couple of questions. I

1 anticipate no more than five minutes.

2 HEARING OFFICER DODUC: All right.

3 Ms. Meserve?

4 MS. MESERVE: Osha Meserve for Land. I

5 anticipate about ten minutes of questions.

6 HEARING OFFICER DODUC: All right.

7 Mr. Herrick?

8 MR. HERRICK: John Herrick, South Delta

9 parties. If I do cross, it'd be just two minutes, five
10 minutes.

11 HEARING OFFICER DODUC: Mr. Jackson?

12 MR. JACKSON: No more than 15 minutes for

13 Mr. Burke. Although, it may very well be that the

14 lawyers in front of me ask my questions and I don't need
15 the time.

16 HEARING OFFICER DODUC: All right. So just

17 looking ahead, it looks like, unless there is something

18 explosive, we should finish with this panel -- oh, this

19 group actually today. Then we will begin tomorrow,

20 Mr. Jackson, with your group. And I would like to wrap

21 up your group, Mr. Jackson, this week. And we will

22 begin next Thursday -- is that our next hearing day?

23 MS. HEINRICH: The 8th.

24 HEARING OFFICER DODUC: Well, the week after.

25 Next week we will begin with Group No. 32, Restore the

1 Delta. We might get to 38 and -- I'm sorry -- 38 and
2 37. So I'm doing this for the purposes really of
3 Ms. Womack who requested some time. So let me give you,
4 Ms. Womack, a time -- a date certain. We will take you
5 up on Tuesday, December 13th. All right.

6 MS. WOMACK: Thank you.

7 HEARING OFFICER DODUC: Even if we have to move
8 you out of order, we will do so on Tuesday, December
9 13th.

10 Mr. Herrick. I'm sorry. You have one witness
11 to come back.

12 MR. HERRICK: Yes. I was just going to say I
13 am going to try to get him before or after Restore the
14 Delta.

15 HEARING OFFICER DODUC: All right. Thank you.
16 I think that does it for housekeeping for now.

17 Mr. Brodsky, there you are.

18 DIRECT EXAMINATION BY MR. BRODSKY:

19 MR. BRODSKY: Thank you. Let's see. I affirm
20 that my written testimony is the truth and also that
21 SCDA -- Exhibits SCDA-1 through 62 are true and correct
22 copies and that SWRCB-46 and 104, which I also referred
23 to in my testimony, are true and correct copies.

24 I'd like to start by taking a look at SWRCB-104
25 at page 3-84. Thank you. And this is the submitted

1 biological assessment prepared by Petitioners that's
2 been submitted to U.S. Fish and Wildlife Service as a
3 part of their process of obtaining biological opinions
4 for the project. What I want to point out is that this
5 table -- if we could just scroll down just a little bit
6 so we can see the heading of the table. This table 3 --
7 right there -- 3.3-1 and the following table, 3.3-2,
8 those are the operating criteria for WaterFix. And this
9 is the only place that you can find really what the
10 flows are going to be and how the thing is going to be
11 operated.

12 So if we can scroll down a little bit, we have
13 different flow rules for different months of the year.
14 And we can see there that for July, August, and
15 September, the minimum flow is 5,000 CFS required in the
16 river after diverting at the North Delta intakes. So
17 the requirement there is, for example, if the flow in
18 the river were 14,000 CFS, they could remove 9,000 CFS
19 and leave 5,000 CFS in the river. And that's true in
20 the summer months. That's not true at other times of
21 the year. Other times of the year, there are much more
22 complicated rules about how much water has to be left in
23 the river.

24 So then if we could scroll down to page 3-93.
25 Maybe let's just pause here for a moment and scroll up.

1 We're on page 3-91. So you can see here these are
2 the -- the rules for December through April, bypass
3 rules. And you can see there is some pretty complicated
4 calculations that go into place there. And there are
5 three different operating levels; Level 1, Level 2, and
6 Level 3.

7 And so, for example, under December through
8 April, Level 1, post pulse operations. If the
9 Sacramento River flows between 15,000 and 17,000 CFS,
10 the bypass flow is 15 CFS plus 80 percent of the amount
11 over 15,000 CFS. So that would be approximately -- if
12 it were 17,000 that would be 16,600. Okay. So now if
13 we scroll down -- and that's true for all the different
14 months and scenarios except the summer.

15 So if we go down to 3-93, there, we see July
16 through September, we don't have all those complicated
17 tables and calculations. It's simply if the flow is --
18 Sacramento River flow is 5,000 CFS up to no limit, then
19 the bypass flow is 5,000 CFS. And the reason for that
20 is that these tables were developed to satisfy the fish
21 agencies. And the fish need water and pulses at certain
22 times of the year, and apparently the fish agencies have
23 decided they don't need that in July through September.
24 And so the effect of this, though, is on Central Delta
25 and South Delta downstream water users, on legal users

1 and on human uses.

2 Now, I will comment that currently, the fall X2
3 requirement in the Federal by-ops is in effect in
4 September. They want to change that going down the
5 road. But let's just say then as to July and August,
6 the only requirement is that it be over -- that we leave
7 5,000 CFS in the river. And they've also developed a
8 requirement for Rio Vista, which is at page 3-88. If we
9 could see page 3-88. Down a little bit. It must be up.
10 Let's go up a little bit. There it is. It says, "Rio
11 Vista minimum flow, January through August, will exceed
12 3,000 CFS." You currently have a Rio Vista minimum flow
13 requirement in other months, but D-1641 does not cover
14 those months. So Petitioners have added a
15 3,000-CFS-flow requirement at Rio Vista.

16 So in July and August, you have two
17 constraints. You need to leave 5,000 bypass, and you
18 need to maintain 3,000 at Rio Vista.

19 HEARING OFFICER DODUC: Hold on a second,
20 Mr. Brodsky. Mr. Berliner?

21 MR. BERLINER: Good morning. Tom Berliner,
22 B-e-r-l-i-n-e-r, on behalf of DWR. We can't find
23 reference to this table in Mr. Brodsky's testimony.
24 Before objecting that this is beyond the scope of his
25 testimony, if we could be oriented, it would be helpful.

1 HEARING OFFICER DODUC: Mr. Brodsky?

2 MR. BRODSKY: Well, this is SWRCB-104. This is
3 the biological assessment, which I did cite in my
4 testimony.

5 MR. BERLINER: Yes. But we don't see all this
6 discussion in the testimony.

7 MR. BRODSKY: Well, I don't believe I've
8 decided -- I cited this particular table. But I -- I
9 argued, I guess if testimony is argument -- I alleged
10 that in the summer months, the flow -- there were not
11 the constraints on the flow and that I needed to suggest
12 additional criteria and that I wanted to explain to the
13 Board why it is that July and August, in the operating
14 rules, do not leave enough water in the river.

15 So I didn't -- I thought that this would be
16 extremely cumbersome to try to lay this out in written
17 testimony. It's walking them through the documents, and
18 I felt that this part of it was appropriate for
19 presentation.

20 HEARING OFFICER DODUC: A word on this,
21 Mr. Berliner?

22 MR. BERLINER: We couldn't find it. We weren't
23 aware that we were going to go walking through this
24 chart. If that's all we're going to do and just
25 walk-through the chart, then I don't have an objection

1 to that. But I would note it was not in the -- in the
2 written testimony.

3 HEARING OFFICER DODUC: I would concur with
4 Mr. Brodsky that his broad allegations and comments in
5 his testimony does cover some of the issues that he is
6 talking about right now. What I will suggest we do then
7 is allow Mr. Brodsky to continue with his testimony. We
8 will take an early lunch break so that you may review
9 your cross-examination. And we will start with your
10 cross-examination after the lunch break.

11 MR. BERLINER: That would be fine. Thank you
12 very much. Appreciate that.

13 MR. BRODSKY: And I'm also -- we're willing to
14 suggest, if perhaps it would be an incentive to
15 Mr. Berliner, if he wanted to cross-examine the rest of
16 the panel today and then I'd come back on Friday and
17 that would give him more time to prepare to grill me.

18 HEARING OFFICER DODUC: We will revisit that,
19 Mr. Berliner, after lunch.

20 MR. BRODSKY: My only reason to suggest that is
21 just to let -- so these folks go.

22 Okay. All right. So those are the two
23 requirements in July and August which are the 5,000 CFS
24 bypass and 3,000 CFS at Rio Vista.

25 Okay. So if we go to page 3-91 and we look at

1 April through December or December through April here,
2 there is a complicated set of rules here that determines
3 the bypass amount, and we need something like that for
4 July and August. I'm going to put together a proposal
5 in our rebuttal case that's specific. But I want the
6 Board to understand that for every other time, it's just
7 not so simple as leave 5,000 in the river and 3,000 at
8 Rio Vista. They have recognized that the delta has much
9 more needs than that simple one-size-fits-all. So we
10 need flow rules for the summer. That's my point. Okay.
11 Then I would like to go to DWR 5, page 25.

12 MR. LONG: I'm pulling up DWR errata.

13 MR. BRODSKY: Errata, yes. I'm sorry. So we
14 have looked at this chart many times, and Petitioners
15 put it up on the board. And it looks reasonable, right,
16 you're leaving quite a fair amount of water in the
17 river. You've got Level 1 pumping, Level 2 pumping,
18 Level 3 pumping. But this applies only in December and
19 April, and you don't have anything like this in July and
20 August. In July and August, this chart would look very
21 different. And you'd just show going from 5,000 up
22 to -- up -- immediately up to a 9,000 bypass. The only
23 constraint being that you have to maintain that 3,000 at
24 Rio Vista.

25 So we need a chart that really depicts what

1 goes on in the summer. I didn't have time to put that
2 together and submit it with the case-in-chief. And I'm
3 not going to try to put in late exhibits, but we'll put
4 it in in the rebuttal. But this is not a reasonable
5 depiction or representation of what is going to happen
6 in July and August. Okay.

7 Now, what's the result of that going to be? If
8 they can take less water in July and August, then let's
9 go to DWR-411. So this is Mr. Leahigh's exhibit for an
10 operating period from December to April, using December
11 to April operating rules. And he showed there very
12 effectively that because he has the North Delta
13 diversions, he can harvest an additional 1.2 million
14 acre feet of water without much impact on outflow.
15 That's true. So if he's doing that and then you have a
16 very big storm event and a very high outflow, look, it's
17 up to 140,000 CFS there.

18 So the result of limiting -- putting limiting
19 rules for July and August is that they'll have to
20 harvest their water here, and then they'll have to store
21 it somewhere for use in July and August. And the
22 practical place to store it is groundwater recharge.
23 And I submitted a number of exhibits in my testimony
24 that show that that groundwater charge is feasible. And
25 most of the contractors that are beneficiaries of these

1 already have ground -- aggressive groundwater recharge
2 programs under way.

3 So I'm -- I'm alleging that what I'm saying,
4 those restrictions in the summer, it's feasible and it
5 also can help them. It can -- it can still work. They
6 can still get more water. I'm not proposing a final
7 deal here, but I want to -- I'm just making the point.
8 Okay.

9 All right. All right. Now I'd like to go to
10 SWRCB-104, page 386 -- 3-86, note 19. There we go. All
11 right. And what that says is that, "The PA" -- PA is
12 the Proposed Action -- "operations include a preference
13 for South Delta pumping in July through September months
14 to provide limited flushing flows to manage water
15 quality in the South Delta." And then if we go to page
16 3-97, at the bottom of the page. And it says here,
17 "Additionally, the PA operations include a preference
18 for South Delta facility pumping in July through
19 September to limit any potential water quality
20 degradation in the South Delta." So there is an
21 acknowledgment there that, you know, in this highly
22 altered system that there's a need for some limited
23 South Delta pumping in the summer to maintain water
24 quality, but it is only a preference. It should be a
25 rule. It should be an operating rule. If we need it

1 and it is acknowledged that it is there, we should have
2 some rule addressing that.

3 Okay. The next thing I'd like to go to is the
4 Delta Cross-Channel Gates, which are on page 3-102.

5 Okay. And what this basically says is that we're going
6 to continue to operate the gates -- let's go down.
7 Scroll down to the bottom there. Maybe it's up at the
8 top.

9 So it says, "When the gates are open, water
10 flows from the Sacramento River through the Cross-Delta
11 Channel to channels of the Lower Mokelumne and San
12 Joaquin River toward the interior Delta. The DCC
13 operation improves water quality in the interior Delta
14 by improving circulation patterns of higher-quality
15 water from the Sacramento River towards Delta diversion
16 facilities." And that's what Mr. Burke and
17 Mr. Ringelberg and many other people have been saying.
18 And it's been disputed prior to this, but I ran across
19 it. It's right there in the BA that they acknowledge
20 that that higher-quality Sacramento River water flowing
21 to the pumps freshens the interior Delta. And so just
22 to demonstrate that a little more, there is a good map
23 on SWRCD-3. This is a little difficult to find. And
24 then in Appendix A there, there's a Figure 7-27.

25 MR. LONG: Give me that figure again, please.

1 MR. BRODSKY: 7-27. So I think there is an
2 Appendix A figures. Yeah, there it is. It was my
3 understanding we're not allowed to make Power Points
4 extracting pages, that we have to go to the original
5 exhibit. So...

6 HEARING OFFICER DODUC: You may. You just have
7 to submit it in time.

8 MR. BRODSKY: Okay. I think there's a block
9 of -- of Appendix A figures somewhere. There it is.
10 Appendix A figures. Yeah. Okay. Little bit smaller.
11 All right.

12 So -- so this was actually -- it's dealing with
13 groundwater, but it's just for orientation because it's
14 a good map. So you can see there that for the cross --
15 the -- I don't know if you can see it. But the
16 Cross-Delta Channel Gates are just downstream of the --
17 of the North Delta intakes of Walnut Grove. And there
18 is a canal that's about a mile long that goes across and
19 connects to the north and south fork of the Mokelumne
20 River. And there are radial gates on there. When those
21 gates were open, the Sacramento River water flows
22 through that canal and into the north and south forks in
23 the Mokelumne River and down to the San Joaquin River
24 and throughout the interior Delta. And we just heard
25 that that's higher-quality water and that's needed.

1 When the gates are closed, then that Sacramento River
2 water does not flow through there. So what they've said
3 under cross-channel gates in the biological assessment
4 is that there is no change and we'll continue to operate
5 it as per D-1641.

6 HEARING OFFICER DODUC: Hold that thought,
7 Mr. Brodsky. Mr. Berliner?

8 MR. BERLINER: I apologize for interrupting
9 again. But we can't find any reference in Mr. Brodsky's
10 testimony to State Water Board Exhibit No. 3.

11 MR. BRODSKY: Exhibit No. 3? There isn't. And
12 it's just -- it's the -- well, I do -- I do reference
13 the EIRS. And this is -- this is the -- this is the
14 EIR. And this is an appendix to the EIR. And the only
15 point of this is just for orientation, just to look at
16 that map just because it's a better map that labels the
17 north and south fork of the Mokelumne River. I could do
18 the same thing just verbally. I just think it helps for
19 them to have a map to look at.

20 MR. BERLINER: Well, if the map is just for
21 orientation, that is not a problem but --

22 MR. BRODSKY: That's all it's for.

23 MR. BERLINER: But if we're going to delve into
24 Delta cross-channel operations, then we're going to have
25 another objection.

1 MR. BRODSKY: Okay. With that, I'm going to do
2 through looking at the BA, which I -- which I did
3 reference in my testimony. You'll object --

4 MR. BERLINER: You'll stick to the BA?

5 MR. BRODSKY: The BA and D-1641, which I was --

6 MR. BERLINER: We have no objection to that.

7 HEARING OFFICER DODUC: All right.

8 MR. BRODSKY: So that was just for orientation.

9 All right.

10 HEARING OFFICER DODUC: Just for orientation?

11 MR. BRODSKY: Yeah. All right. While we're on
12 here for orientation, Sacramento River water also flows
13 into Georgiana Slough there to get into the South and
14 Central Delta. There is no gate on Georgiana Slough,
15 but if they're diverting more water at those North Delta
16 diversions above Georgiana Slough, then less
17 high-quality Sacramento River water can flow into
18 Georgiana Slough. Okay.

19 DWR-4, page 16, if I could see that.

20 MR. LONG: I'm pulling up DWR-4 Errata.

21 MR. BRODSKY: Yes. Sorry. Okay. So this is
22 Petitioner's representation on -- at the bottom there of
23 the -- of the top box, it says, "Delta Cross-Channel
24 Gates." And then you can see there is a gap there that
25 they're open. There's no bar. They are open from May

1 15th to October 31st approximately. And they say that
2 there's no change in D-1641 requirements. So one would
3 assume that they're going to continue to be open during
4 that period of time. But the problem is that D-1641
5 doesn't require that the gates be open at any time. It
6 only requires that they be closed at certain times. So
7 we could look at that. We can look at D-1641, page 184,
8 I believe.

9 MR. LONG: Do you have an exhibit number for
10 that?

11 MR. BRODSKY: It's SWRCB -- I can just see it
12 here. There it is. It's 21. And then down toward the
13 bottom, there's the Delta Cross-Channel Gates closure,
14 and the criteria is closure of gates. And so that shows
15 the times that D-1641 requires them to be closed. And
16 the reason for that is because the salmon get confused
17 and go through the gates and get lost in the Central
18 Delta. So these are the period of time when we're
19 concerned that salmon may be present and we don't want
20 them to get lost. But there's no requirements in this
21 D-1641 that the gates ever be opened. So I think we
22 need a requirement that they be open. We need a rule
23 for that, that they be open certain times so that what
24 it depicted on that chart is part of the operating rule.

25 HEARING OFFICER DODUC: Okay. Hold on,

1 Mr. Brodsky. Mr. Jackson?

2 MR. JACKSON: Yes. I'm going to object to the
3 testimony and move to strike in regard to the salmon.
4 That's -- and operation of the gates for the salmon.
5 That's clearly Part 2 material.

6 HEARING OFFICER DODUC: Agreed. And,
7 Mr. Brodsky, I've given you quite a bit of leeway, but I
8 don't see any specific discussion in your testimony
9 about the channel gate operation. There are references
10 to D-1641 and how compliance with D-1641 does not mean
11 that there is no injury. There is that broad discussion
12 that you have, but I don't see anything specific.

13 MR. BRODSKY: Okay. It was in the context of
14 the -- of the general discussion of getting the
15 higher-quality Sacramento River water into the Delta and
16 the pumps draw it -- draw it very -- to Discovery Bay.
17 And this is part of the mechanism that allows that to
18 happen. And with regard to Mr. Jackson's objection, the
19 part about the salmon was just an aside. It is not a
20 part of what I'm testifying to here today. And I
21 understand that there is a concern about the salmon and
22 the gates need to be closed at certain times and that
23 that needs to be addressed in Part 2.

24 HEARING OFFICER DODUC: All right.

25 MR. BRODSKY: And I think that's all I have on

1 the gates.

2 And the next thing is the export-to-inflow
3 ratio, which is on the submitted BA at SWRCB-104.

4 MR. LONG: Sorry. Page again?

5 MR. BRODSKY: SWRCB-104, page 3-89.

6 HEARING OFFICER DODUC: And where in your
7 testimony specifically did you discuss this ratio?

8 MR. BRODSKY: I don't think I discussed it
9 specifically in my written testimony. It is a part of
10 the general assertion that this -- that there is a lot
11 less water flowing downstream the Sacramento River than
12 Petitioners have made -- made there out to be, and I'm
13 showing specifically why that is. And we did discuss
14 this on cross-examination as well.

15 HEARING OFFICER DODUC: I remember their
16 discussion on cross-examination, but I don't see it in
17 your testimony.

18 MR. BRODSKY: Okay.

19 HEARING OFFICER DODUC: Does DWR have any
20 objections?

21 MR. BERLINER: Yes.

22 MR. BRODSKY: Okay. You know, I touched on it
23 in my opening statement. And the opening statement is
24 not evidence, but it calls your attention to it. So I
25 think that's adequate.

1 HEARING OFFICER DODUC: All right.

2 MR. BRODSKY: And so those are basically the
3 points that I wanted to bring to your attention, and I
4 have done that. And...

5 HEARING OFFICER DODUC: Then just let me check
6 with Ms. Heinrich, my legal counsel here. But those are
7 things that you may bring up in your rebuttal, I would
8 presume. And I would prefer you do so since it's not
9 very explicit in your written testimony.

10 MS. HEINRICH: I think that's right. The rule
11 on rebuttal is that it needs to be responsive to
12 petitioner's case-in-chief. And I think that that would
13 be...

14 MR. BRODSKY: To bring it up again more
15 explicitly?

16 MS. HEINRICH: Yes.

17 MR. BRODSKY: Okay. And then one quick thing
18 in closing. If we could just look at the map again of
19 DWR-1 Errata, page 25. No. Excuse me. Page DWR-1,
20 page 8 -- DW (sic) 1 Errata, page 8.

21 MR. LONG: This is actually DWR-1 Errata
22 Corrected.

23 MR. BRODSKY: Okay. And then if you click to
24 the next page, it shows a blowup of the southern part of
25 that map. Yeah. So there, I just want to, again, call

1 your attention to the fact of how close Discovery Bay is
2 to the exports at Clifton Court and testify about how
3 much we're affected when that high-quality Sacramento
4 River water is not going down to the pumps as is being
5 proposed. And that's it.

6 HEARING OFFICER DODUC: All right. Thank you,
7 Mr. Brodsky. Let me ask the Department. Do you still
8 wish additional time to prepare your cross-examination?

9 MR. BERLINER: Yes, please.

10 HEARING OFFICER DODUC: Do any of -- actually,
11 do you have any cross-examination for witnesses other
12 than Mr. Brodsky?

13 MR. MIZELL: Yes, we do.

14 HEARING OFFICER DODUC: Let's get that out of
15 the way so that they can be dismissed. Does anyone else
16 have cross-examination for witnesses other than
17 Mr. Brodsky? I think we can get this done within the
18 hour so that they may be dismissed during our lunch. So
19 with that, then the Department, if you could please come
20 up and do your cross-examination.

21 MR. BRODSKY: Should I go sit over there while
22 that's going on?

23 HEARING OFFICER DODUC: Um-hum. Oops. I
24 forgot. I believe that is where the cross-examination
25 parties sit.

1 MR. BRODSKY: Let me get my stuff out of the
2 way here.

3 HEARING OFFICER DODUC: So, Mr. Brodsky, either
4 next to Mr. Burke or up here.

5 And, Mr. Mizell and Mr. Berliner, I will assume
6 you do not need 90 minutes for these five witnesses.
7 More like half an hour or less?

8 MR. BERLINER: Half hour-ish.

9 HEARING OFFICER DODUC: All right. So,
10 Mr. Berliner, Mr. Mizell, a brief outline of the topic
11 areas you will be covering?

12 MR. BERLINER: Just a second.

13 Okay. We have just a couple of questions for
14 the witnesses other than Mr. Burke and Mr. Ringelberg
15 only on algae issues. We have questions for both --
16 well, for Mr. Burke on algae issues, some modeling
17 questions, some of his experience with modeling,
18 salinity issues. I should probably just say water
19 quality issues, covers it more generally. Yeah. Water
20 quality will finish it up. There's several questions on
21 water quality, including both salinity and nutrients.
22 And for -- somehow I just managed to mess up my iPad.

23 HEARING OFFICER DODUC: It's always user error,
24 Mr. Berliner.

25 MR. BERLINER: This was definitely user error.

1 There is an issue with the monitor. It's showing
2 somebody's e-mail. There it goes.

3 HEARING OFFICER DODUC: Hopefully, it's not
4 mine.

5 MR. BERLINER: The Russians have come after the
6 Water Board.

7 MS. MARCUS: Why not everyone else?

8 HEARING OFFICER DODUC: And your questions to
9 Mr. Ringelberg?

10 MR. BERLINER: Yes. For Mr. Ringelberg,
11 questions about the nature of Discovery Bay and a little
12 bit again on water quality and nutrient issues. That's
13 it.

14 HEARING OFFICER DODUC: All right. Please
15 proceed.

16 CROSS-EXAMINATION BY MR. BERLINER:

17 MR. BERLINER: Okay. If I could please start
18 with, I guess, Ms. McCleary and Mr. Morgan I guess would
19 be appropriate. And whichever one of you is best to
20 respond to this. It's my understanding that,
21 Mr. Morgan, you indicated during your testimony that at
22 times, algae got so bad that you could see birds walking
23 across it and the parts of the bay were entirely covered
24 by a green algal bloom; is that right?

25 WITNESS MORGAN: No. I wasn't referring to the

1 algae as much as I was the Egeria densa that grows up
2 from the bottom and then mats on the top of the water.

3 MR. BERLINER: Okay. Then let me focus more on
4 Ms. McCleary because you raised the toxic algae issue.

5 Do you know what causes the toxic algae?

6 WITNESS MCCLEARY: No.

7 MR. BERLINER: If you knew that toxic algae was
8 caused by different nutrients in the water, would that
9 be important to your consideration as to where that
10 water is coming from?

11 WITNESS MCCLEARY: I'm not sure.

12 MR. BRODSKY: I will object to that. She --
13 her only testimony was that if the algae increases, as
14 Mr. Ringelberg and Mr. Burke had said, that it would be
15 a problem to the community. She didn't pretend to be or
16 testify in any area about what causes algae or where it
17 comes from.

18 HEARING OFFICER DODUC: So noted. She may
19 answer that she does not know.

20 WITNESS MCCLEARY: Right.

21 MR. BERLINER: That's fine.

22 And, Mr. Morgan?

23 HEARING OFFICER DODUC: Guzardo?

24 MR. BERLINER: Mr. Guzardo, yes. So this is
25 both for Mr. Guzardo and Ms. McCleary because I don't

1 remember which one of you actually said it. There was
2 concern expressed that there currently are problems with
3 algae in Discovery Bay. And there was concern that
4 animals, children could come into contact. And I think
5 that was you, Ms. McCleary, correct?

6 WITNESS MCCLEARY: Correct.

7 MR. BERLINER: And, Mr. Guzardo, you've
8 indicated that if toxic algae becomes a problem that
9 could affect home values, right?

10 WITNESS GUZARDO: Yes, absolutely.

11 MR. BERLINER: And you also indicated that
12 while there's -- while saltwater bays can command good
13 real estate values, if they become polluted that would
14 hurt real estate values, right?

15 WITNESS GUZARDO: I don't believe I said
16 anything about saltwater bays.

17 WITNESS MCCLEARY: I -- I said saltwater bays
18 would not be accepted if they are also polluted.

19 MR. BERLINER: Okay. So you currently have a
20 pollution problem, correct?

21 WITNESS MCCLEARY: This year we had a toxic
22 algae problem.

23 MR. BERLINER: Okay. And, Mr. Guzardo, have
24 you seen real estate prices drop in Discovery Bay
25 because of the toxic algae problem?

1 WITNESS GUZARDO: Not yet. But you have to
2 remember the testimony that it just started this year
3 and so we're just starting to see it. There are
4 multiple instances of escrows falling out of escrow,
5 people's homes not getting sold because of the algae
6 issue. We know there are less people coming to
7 Discovery Bay, opting not to because we have a big
8 flashing sign on the side of the road that says, "Do not
9 touch. Toxic. Don't touch the water."

10 MR. BERLINER: Okay. So this is a current
11 problem, correct?

12 WITNESS GUZARDO: It is.

13 MR. BERLINER: Okay. And it has nothing to do
14 with whether the Discovery Bay is saltwater or
15 freshwater, correct?

16 WITNESS GUZARDO: I wouldn't agree with that
17 actually because if we had more freshwater flow, it's my
18 opinion -- and I'm not an expert. But if we had more
19 freshwater flow, we wouldn't have the algae problem.

20 MR. BERLINER: Okay. And is that the extent of
21 your understanding of what causes the algae problem?

22 WITNESS GUZARDO: I'm not an expert. Grew up
23 on San Francisco Bay and understand water and
24 navigation. I'm not a hydrologist or an expert in water
25 quality. But I don't think it takes an expert in water

1 quality to understand that an environment like the Bay
2 Delta Estuary needs a good flow of freshwater to
3 maintain a healthy base. And without that healthy base,
4 our lifestyle goes away. And if our lifestyle goes
5 away, we will not be selling homes out there. Why come
6 to Discovery Bay?

7 MR. BERLINER: Fair enough. Then why don't I
8 turn to a couple of folks who have more expertise in
9 this area? And let me start with you, Mr. Burke, if I
10 might. We established when you testified before that
11 your expertise is in the area of -- of modeling,
12 correct?

13 WITNESS BURKE: That's correct.

14 MR. BERLINER: And you're testifying today on
15 that basis, correct?

16 WITNESS BURKE: That's correct.

17 MR. BERLINER: And you have no expertises (sic)
18 in the areas of biology or plant science, correct?

19 WITNESS BURKE: I have expertise in the area of
20 hydrologic characteristics of aquatic life, including
21 fish and plant communities.

22 MR. BERLINER: Okay. But that is from the
23 water side, correct, not the biology side?

24 WITNESS BURKE: That's correct.

25 MR. BERLINER: Okay. With respect to the

1 formation of algae, does it matter what nutrients are in
2 the water regarding the formation of the algae?

3 WITNESS BURKE: It will matter what the
4 nutrients are, primarily phosphorous and nitrogen for
5 algal and plant growth within the water. But the
6 specific communities of different algae species require
7 different levels of phosphorous and nitrogen
8 concentrations.

9 MR. BERLINER: Okay. And do you have any
10 knowledge about what role ammonia plays in the formation
11 of algae?

12 WITNESS BURKE: Not specifically, no.

13 MR. BERLINER: Okay. All right. You had in
14 your testimony -- I'm trying hard not to repeat what we
15 got into previously when you -- when you were
16 cross-examined before. It's my understanding that you
17 did a rerun of the DSM II -- DSM numeral II model for
18 the five scenarios after you downloaded DSM II from the
19 Board's web site; is that right?

20 WITNESS BURKE: That's correct.

21 MR. BERLINER: And do you know which version of
22 DM (sic) II you were -- you were running?

23 WITNESS BURKE: Version 6.

24 MR. BERLINER: Now, in your -- if we could put
25 up SCDA Exhibit No. 35, please. And if you could go to

1 page 4, I think it might be. Could you scroll down just
2 a touch? Okay. Here at line 24, you indicated that you
3 had -- that you had done various plots and that these
4 are provided in SCDA-36, correct?

5 WITNESS BURKE: That's correct.

6 MR. BERLINER: Okay. Then could we have now
7 Exhibit 36, page 1, please? And you'll recall that this
8 is a map that shows various locations in the Delta,
9 correct?

10 WITNESS BURKE: (No audible answer.)

11 MR. BERLINER: And I believe if you -- I
12 believe this is sufficient. These are the sites that
13 you analyzed for Discovery Bay, correct?

14 WITNESS BURKE: Yes, that's correct.

15 MR. BERLINER: Now, these are not sites that
16 are compliance points for D-1641, right?

17 WITNESS BURKE: No. These are sites that
18 surround the channels around the Discovery Bay area.

19 MR. BERLINER: And you understand that the
20 projects are regulated by, among other things, D-1641,
21 correct?

22 WITNESS BURKE: My understanding is that D-1641
23 provides compliance points at certain locations within
24 the Delta that are supposed to provide characteristic
25 water quality parameters that are representative of

1 regions of the Delta, not specifically those points
2 where those compliance stations are located.

3 MR. BERLINER: Okay. But the points you chose
4 were ones essentially immediately adjacent to Discovery
5 Bay, correct?

6 WITNESS BURKE: We were trying to determine
7 what the water quality changes might be at the Discovery
8 Bay specifically.

9 MR. BERLINER: Okay. And yet you recognize
10 that Discovery Bay is not in itself a compliance point
11 for any regulations that affect the operation of the
12 projects?

13 WITNESS BURKE: Yeah. The compliance -- there
14 is no compliance point that's been specified right at
15 the Discovery Bay location.

16 MR. BERLINER: Now, you've shown a number of
17 figures that indicate daily salinity. And are you --
18 are you -- sorry. I'm trying to avoid questions I have
19 asked you before.

20 All right. If we could go to page 10, please.
21 So this is the average annual salinity change for
22 WaterFix scenarios and you prepared this document,
23 correct?

24 WITNESS BURKE: Yes, I prepared that.

25 MR. BERLINER: And I think we established

1 previously that the source of information for this
2 document came from DWR exhibits, correct?

3 WITNESS BURKE: The source of the information
4 that was used to develop this plot was from the output
5 from the DSM II models.

6 MR. BERLINER: Yes. So you have a series of
7 figures, page 10, 12, 14, 16, 18, that show changes in
8 salinity comparing each of the scenarios to a no-action
9 alternative on an annual basis, right?

10 WITNESS BURKE: Yes. This is showing the
11 results of the salinity changes averaged over a full
12 year.

13 MR. BERLINER: And just for the benefit of the
14 Board to orient, if you could -- Mr. Long, if you could
15 just scroll down and hit page 12 and 14 just to
16 highlight the charts that Mr. Burke prepared.

17 Now, based on these charts, we can't know if
18 these predicted changes occurred in the winter during
19 the wet period; is that right?

20 WITNESS BURKE: No. You wouldn't be able to
21 tell when these changes occurred because it is averaged
22 over the full year. And these charts were provided
23 primarily to compare and contrast the individual daily
24 data or show in the charts between each of these average
25 annual charts.

1 MR. BERLINER: Okay. And if we're concerned
2 about water quality of Discovery Bay, since that's the
3 panel we're dealing with here, if salinity were -- if
4 flows were higher during -- during the -- during the
5 winter or wet periods, isn't it likely that water around
6 Discovery Bay would continue to be relatively fresh?

7 WITNESS BURKE: I would have to look at a
8 specific example to determine that. It can change from
9 year-to-year.

10 MR. BERLINER: Well, let's say we're talking
11 about flows on the Sacramento River about 30,000 CFS or
12 greater.

13 WITNESS BURKE: Yeah. I didn't analyze that
14 specific scenario, so I wouldn't be able to say.

15 MR. BERLINER: Okay. Now, just looking at this
16 chart, everything that's below the line which is at zero
17 shows better conditions, right?

18 WITNESS BURKE: Better conditions as you
19 average the salinity change over the full year, which
20 includes the wet period as well as the summer drier
21 periods.

22 MR. BERLINER: Okay. So just based on these
23 charts, it would appear that conditions are getting
24 better, not worse, correct?

25 WITNESS BURKE: It would appear -- if you

1 looked at an average annual it would show that some of
2 these scenarios the conditions are getting better. But
3 the reason I put these average annual charts up there
4 was to compare and contrast the actual daily values,
5 which show significant change in salinity that was
6 causing additional problems in the area. If you went
7 back to the previous chart prior to this one, you'll see
8 what the daily changes look like, which is significantly
9 different than what is shown when you do an average
10 annual.

11 MR. BERLINER: Well, and that is kind of the
12 point, isn't it, that these average annual charts really
13 don't help us understand the problem?

14 WITNESS BURKE: Exactly. That was kind of my
15 point is that the average annual -- the averaging that
16 takes place when you look at an annual basis or a mean
17 annual over multiple years hides the problem of what the
18 actual salinity increases may be at any specific month
19 or week in any year.

20 MR. BERLINER: So you came to a -- a conclusion
21 in your testimony that salinity increases in the Delta
22 would impact agricultural diverters in the vicinity of
23 Discovery Bay, right?

24 WITNESS BURKE: I don't think I addressed
25 agricultural diverters. I just addressed the fact that

1 the salinity level would rise in the area of Discovery
2 Bay due to the B1 California WaterFix scenario.

3 MR. BERLINER: Are you making any contention
4 that it would harm ag diverters in the area of Discovery
5 Bay?

6 WITNESS BURKE: I think other people have
7 talked about the impact of increased salinity levels on
8 the application to agricultural interests, but I haven't
9 gone to that step in this analysis. I've only looked at
10 whether or not the WaterFix scenarios would cause an
11 increase in salinity during certain times of the year.

12 MR. BERLINER: So in your testimony on page 5
13 at line 24 -- and if you have it handy that's great --
14 you make the statement, "These salinity increases will
15 also impact agricultural diverters in the vicinity of
16 Discovery Bay." So what's the basis for that statement?

17 WITNESS BURKE: The basis would be just my
18 general knowledge from what I've heard about the impacts
19 of salinity on agricultural production.

20 MR. BERLINER: Okay. But I asked you before
21 whether increased salinity would impact agricultural
22 diverters, and you indicated that you hadn't actually
23 offered testimony on that. So what I'm trying to
24 understand is what is the basis for this statement that
25 you made on page 5? Is this just a general supposition

1 on your part?

2 WITNESS BURKE: Just from my experience working
3 with agriculture diverters, knowing that increases in
4 salinity level have a direct impact on crops; but the
5 level of that impact, I'm not able to say. But I do
6 know that increased salinity levels will affect crop
7 growth.

8 MR. BERLINER: But you haven't provided any
9 data or any analysis in that regard, correct?

10 WITNESS BURKE: Not on the direct impact to
11 agricultural production, no.

12 MR. BERLINER: Okay. And then referring to
13 your testimony, again, on page 2, lines 15 to 20, you
14 talk about the concentration of nutrients in the
15 Sacramento River. And what I'd like to know -- what is
16 -- what's your basis for the statement that nutrient
17 concentrations in the Sacramento River is lower than in
18 the Central Delta? Have you done any analysis?

19 WITNESS BURKE: I haven't done any analysis
20 specifically, but I have seen other studies which refer
21 to the concentrations within the Sacramento River, the
22 tributaries coming from the west, as well as the San
23 Joaquin River entering the Delta from the south.

24 MR. BERLINER: So you didn't cite any of that
25 in your -- in your testimony, correct?

1 WITNESS BURKE: No. I didn't cite any of the
2 testimony. But the modeling that we have shows that
3 reduction of the Sacramento River inflow into the Delta
4 resulted in elevated salinity levels.

5 MR. BERLINER: But I'm talking about nutrients.

6 WITNESS BURKE: Oh, okay. Yeah. Salinity can
7 often be used as a proxy for nutrients because they
8 often go together because the salinity of the nutrient
9 levels from agricultural return flows often go together.

10 MR. BERLINER: Okay. But they don't
11 necessarily, correct?

12 WITNESS BURKE: That's correct.

13 MR. BERLINER: And you might have nutrients,
14 let's just say for instance, in the Sacramento River
15 that you wouldn't have in another river, correct?

16 WITNESS BURKE: You could have a distribution
17 that's different from one river to the next. That's
18 correct.

19 MR. BERLINER: And even if you had a similar
20 nutrient, you might have concentration levels that are
21 very different, correct?

22 WITNESS BURKE: The concentration levels in any
23 particular river would probably be individual for that
24 particular river.

25 MR. BERLINER: You continue with your testimony

1 on that same page, same paragraph and talk about when
2 Sacramento River water flows through the Delta on the
3 way to the pumps, it generally dilutes the nutrient load
4 in the Central and South Delta. Are you aware that
5 there are studies that have been submitted into evidence
6 that indicate that nutrients do not control year-to-year
7 variations in microcystis?

8 WITNESS BURKE: I'm not familiar with those
9 specific studies.

10 MR. BERLINER: Okay. Well, I'm referring to
11 Layman 2013 just for the record. Do you have any
12 knowledge that ammonia is one of the primary factors in
13 the formation of microcystis?

14 WITNESS BURKE: I know ammonia is basically
15 part of the nitrogen cycle within the water column, and
16 that it can provide nitrogen that's avail -- readily
17 available to plant uptake for algae, as well as aquatic
18 growth.

19 MR. BERLINER: And do you have any knowledge
20 about the role that ammonia plays in the formation of
21 microcystis other than just generally?

22 WITNESS BURKE: Nothing -- it's just generally.

23 MR. BERLINER: Maybe we could move over to
24 Mr. Ringelberg then.

25 Good morning, Mr. Ringelberg.

1 WITNESS RINGELBERG: Good morning.

2 MR. BERLINER: I know that you've testified
3 before. I just want to confirm that SCDA Exhibit No. 33
4 is the entirety of your testimony on behalf of the Save
5 the California Delta Alliance.

6 WITNESS RINGELBERG: It is.

7 MR. BERLINER: And your testimony concerns
8 water quality conditions in Discovery Bay, which you
9 contend would exacerbate impacts from cyanobacteria and
10 other invasive species, correct?

11 WITNESS RINGELBERG: Actually, can you ask that
12 question in a different manner? Because it's actually a
13 compound question.

14 MR. BERLINER: Well, I'm just trying to focus
15 on exactly what you're addressing with your testimony,
16 which is, as I understand it, you're focusing
17 essentially on impacts from cyanobacteria and invasive
18 species; is that correct?

19 WITNESS RINGELBERG: Yes. My focus was on the
20 consequential effects of water quality and flow factors
21 in the hydrology constrained by Discovery Bay.

22 MR. BERLINER: Okay. And you haven't provided
23 any -- any citations. But in your testimony, you
24 identify cyanobacteria, algal weeds, and Asian clams
25 that allegedly presently occur in Discovery Bay.

1 WITNESS RINGELBERG: That's correct.

2 MR. BERLINER: And -- and do you know that of
3 your own personal knowledge, or were you relying on any
4 references?

5 WITNESS RINGELBERG: For the Asian clams, I did
6 not personally observe Asian clams, although I've seen
7 Asian clams in other areas throughout the entire
8 watershed. The aquatic weeds, I saw personally and the
9 remnants of algal blooms, although I could not verify it
10 was cyanobacteria.

11 MR. BERLINER: Have you done any analysis of
12 water quality conditions in Discovery Bay?

13 WITNESS RINGELBERG: I have not.

14 MR. BERLINER: You're familiar with Discovery
15 Bay, though, right?

16 WITNESS RINGELBERG: I am.

17 MR. BERLINER: You've been there in person?

18 WITNESS RINGELBERG: I have.

19 MR. BERLINER: You understand it's an entirely
20 man-made waterway; is that right?

21 WITNESS RINGELBERG: Well, Discovery Bay itself
22 is quite a complex area. There are some naturalized
23 features such as the Old River, and then there are areas
24 which are man-made within Discovery Bay.

25 MR. BERLINER: Well, where all the homes and

1 walkways are located -- perhaps we can pull up a picture
2 of Discovery Bay. Might ask Mr. Brodsky what exhibit
3 was that that you had that was a good picture?

4 MR. BRODSKY: The aerial photograph, I think,
5 was SCDA-12 that labels the sloughs there. I believe if
6 you scroll down, they are labeled, yeah.

7 MR. BERLINER: So looking at what essentially
8 is the essence of Discovery Bay, which is these -- which
9 is a built housing community that's all man-made, right,
10 where you see all those different houses located and
11 little inlets there?

12 MR. BRODSKY: I'm going to object to that. I
13 mean it's vague. The entire Delta is highly altered,
14 and you could say that everything in the Delta is
15 man-made. So I think we need to be more specific.

16 MR. BERLINER: I think I'm being pretty
17 specific. The picture is kind of obvious. There's a
18 bunch of houses that are in there and little inlets and
19 that's not natural, is it?

20 HEARING OFFICER DODUC: Ms. McCleary, would you
21 like to answer?

22 WITNESS MCCLEARY: Sorry. Certain things like
23 Kellogg Creek, Indian Slough and out that whole area
24 that has houses on it and the area there, we used to ski
25 at a little inlet on the upper part that was -- is now

1 sand -- oh, I forget the name of the beach but Shell
2 Beach has now got houses on it. So a lot of that area
3 had always existed.

4 MR. BERLINER: So --

5 WITNESS MCCLEARY: At least in my lifetime.

6 MR. BERLINER: So with the exception of Indian
7 Slough and Kellogg Creek and Sand Beach, wasn't this
8 all --

9 WITNESS MCCLEARY: I think it was Shell Beach
10 but...

11 MR. BERLINER: Shell Beach. Sorry. Do you
12 understand the history of Discovery Bay, Mr. Ringelberg?

13 WITNESS RINGELBERG: I do not have an
14 understanding of the detailed history of Discovery Bay,
15 no.

16 MR. BERLINER: With the exception of the
17 waterways and Shell Beach pointed out by Ms. McCleary,
18 does it appear that the rest of that development there
19 is man-made?

20 WITNESS RINGELBERG: Yeah. The geometry of
21 that area appears to be man-made.

22 MR. BERLINER: Now, because of the way that
23 this was discovered -- was constructed, doesn't it, in
24 and of itself, create a backwater?

25 WITNESS RINGELBERG: Yes. I believe I

1 testified to that effect.

2 MR. BERLINER: Now, in your testimony, you
3 talked a little bit about nutrients. And you suggested
4 that reducing the flow from the Sacramento River would
5 concentrate nutrient-rich water from the San Joaquin.
6 Do you recall that on page 2 of your testimony?

7 WITNESS RINGELBERG: I believe I said it
8 concentrated the drainage of the San Joaquin River,
9 which influences the dilution and the mixing of
10 nutrients.

11 MR. BERLINER: Okay. And you indicated that
12 would increase the nutrient load in the water around
13 Discovery Bay, right?

14 WITNESS RINGELBERG: Yes. With a changing of
15 the source waters as identified in SCDA-1, the changing
16 of the ratio of San Joaquin River flow, allowing that to
17 be the dominant source signal and/or allowing greater
18 Bay Area water source signal would have potential
19 consequential effects on nutrients.

20 MR. BERLINER: And you've identified a number
21 of different weeds that might be -- the production of
22 which might be increased from this -- from a lowering of
23 the dilution factor from the Sacramento River, right?

24 WITNESS RINGELBERG: I did.

25 MR. BERLINER: Okay. And are any of these that

1 you identified toxic?

2 WITNESS RINGELBERG: No. In terms of the
3 vegetation that I identified in that Section 17 through
4 20, these species are not toxic in and of themselves.

5 MR. BERLINER: Okay.

6 WITNESS RINGELBERG: To be clear, though, they
7 have the potential to bio-accumulate toxins, but they
8 are not toxic in themselves.

9 MR. BERLINER: Okay. And just a general
10 question for you. Regarding -- you are -- among your
11 expert -- areas of expertise would be -- would be
12 nutrient loading in rivers, correct?

13 WITNESS RINGELBERG: I have knowledge and
14 understanding of nutrient loading in rivers, yes.

15 MR. BERLINER: And so you understand that
16 different rivers could have different nutrient
17 loadings -- different rivers that feed into the Delta
18 could have different nutrient loadings, correct?

19 WITNESS RINGELBERG: Yes, that's correct.

20 MR. BERLINER: And are you aware that nutrient
21 loadings on the Sacramento are different than nutrient
22 loadings on the San Joaquin?

23 WITNESS RINGELBERG: That question really has
24 reams of responses. It depends on the water year, the
25 mix of water years, the prior water years, which

1 facilities are operating, which facilities are under
2 different permits and it is too complex of a question to
3 address.

4 MR. BERLINER: I don't think I have any more
5 questions for this panel.

6 MR. BRODSKY: I just have two quick questions
7 on re-direct.

8 HEARING OFFICER DODUC: We haven't, I don't
9 think, finished with cross yet. Hold on.

10 MR. BRODSKY: I thought -- okay.

11 HEARING OFFICER DODUC: Mr. Berliner is done.
12 The Department is done. But I believe -- let's see.
13 Going through my list. Ms. Meserve, do you have
14 cross-examination for these five witnesses? And Mr. --
15 I'm going through my list.

16 So, Ms. Meserve, do you have cross?

17 MS. MESERVE: Yes.

18 HEARING OFFICER DODUC: And after Ms. Meserve
19 will be Mr. Herrick. Do you have cross?

20 MR. HERRICK: Yes.

21 HEARING OFFICER DODUC: All right. And then,
22 Mr. Keeling, do you have cross?

23 MR. KEELING: Yes.

24 HEARING OFFICER DODUC: Mr. Jackson, do you
25 have cross?

1 MR. JACKSON: Yes.

2 HEARING OFFICER DODUC: All right.

3 CROSS-EXAMINATION BY MR. KEELING:

4 MR. KEELING: Is that all right? Tom Keeling
5 for the San Joaquin County Protestants. I have just a
6 few questions for Mr. Burke. Good morning.

7 WITNESS BURKE: Good morning.

8 MR. KEELING: Good morning, Mr. Burke.

9 WITNESS BURKE: Good morning.

10 MR. KEELING: I want to go back to Exhibit
11 SCDA-17, which is the D-1641 standards -- standard
12 stations. Can you put that up, please? Thank you.

13 Mr. Burke, do you recall your testimony
14 concerning this exhibit?

15 WITNESS BURKE: Yes, I do.

16 MR. KEELING: And to make sure I understand, is
17 it your -- what is your understanding as to why these
18 particular points, these locations were selected as the
19 D-1641 Bay Delta standards stations?

20 WITNESS BURKE: My understanding is these
21 stations were selected to represent areas of the Delta
22 to determine or monitor water quality characteristics
23 for that area. Even though the stations exist at a
24 specific point, it doesn't mean that 100 feet upstream
25 or downstream from that point there is no criteria. The

1 station itself is representative of a larger reach and
2 zone of the Delta.

3 MR. KEELING: So is it fair to say these
4 locations were selected because it was thought that
5 collectively they would most accurately reflect
6 conditions in the Delta at that time, including water
7 quality conditions?

8 WITNESS BURKE: That's correct.

9 MR. KEELING: But the accuracy of that
10 selection of D-1641 standards stations was based, at
11 least in part, on hydrologic conditions that existed at
12 the time those stations were selected; is that not true?

13 WITNESS BURKE: Yeah. The stations were
14 selected based on experience of the state personnel and
15 water users in those locations that determined that
16 these specific locations were representative of larger
17 areas based on the hydraulics and hydrology that were
18 present at that time.

19 MR. KEELING: And those hydrologic conditions
20 will be significantly altered in the -- if the proposed
21 WaterFix project is approved, will they not?

22 WITNESS BURKE: That's correct. If the
23 WaterFix project is approved, if you change the
24 component of water that's flowing in from the Sacramento
25 River, you are reconfiguring the hydrodynamics of the

1 whole Delta. And as you do that, you're moving around
2 the different locations and representative
3 characteristics that apply to the flow and water quality
4 at each location.

5 MR. KEELING: It would be a different Delta, in
6 effect, would it not?

7 WITNESS BURKE: Yes, it would.

8 MR. KEELING: Would these current D-1641
9 standards stations shown on the exhibit be appropriate
10 for showing water quality if the North Delta diversions
11 were actually built and operating?

12 WITNESS BURKE: There is no way to really tell
13 that until we actually see what the change in
14 hydrodynamics to the system is based on the select
15 scenario that may be implemented for the fix project.

16 MR. KEELING: To your knowledge, have the
17 Petitioners proposed any relocation of the existing
18 D-1641 Bay Delta standard stations to respond to the
19 WaterFix project's alteration of Delta hydrologic
20 conditions?

21 WITNESS BURKE: No. I haven't seen any
22 wholesale redistribution of points to better reflect the
23 water quality characteristics that would result from the
24 project.

25 MR. KEELING: If one assumes that the project

1 is approved and that these D-1641 standard stations
2 remain unchanged, wouldn't that undermine the relevancy
3 of reports on D-1641 compliance?

4 WITNESS BURKE: It could because you would
5 never be able to be sure until you've actually
6 experienced the flow characteristics and water quality
7 for several years. You wouldn't be able to be sure
8 whether those points are truly representative of those
9 reaches in the post-projects condition.

10 MR. KEELING: And you saw nothing in the -- in
11 the conceptual design or in any other document
12 reflecting the Petitioners' awareness that they may have
13 to change those stations?

14 WITNESS BURKE: No. I haven't seen anything to
15 that regards.

16 MR. KEELING: Have you looked at the
17 correlation between compliance -- compliance standard or
18 compliance at these stations and other locations in the
19 Delta? Did you do any study like that?

20 WITNESS BURKE: I've looked at two of the
21 stations in the South Delta, but I haven't done all of
22 the compliance stations throughout the Delta.

23 MR. KEELING: And what did you find with
24 respect to those two stations?

25 WITNESS BURKE: The one that comes to mind

1 first would be the Old River at Tracy where there is
2 significant number of non-compliance points that I
3 observed in the past few years.

4 MR. KEELING: Mr. Burke, thank you very much.
5 That's all.

6 WITNESS BURKE: Thank you.

7 HEARING OFFICER DODUC: Thank you, Mr. Keeling.
8 Ms. Meserve? Ms. Sheehan?

9 MS. SHEEHAN: Becky Sheehan for the State Water
10 Contractors.

11 HEARING OFFICER DODUC: Your microphone is not
12 on.

13 MS. SHEEHAN: Becky Sheehan for the State Water
14 Contractors. I should have jumped up quicker. I didn't
15 want to get in the way of progress. But I do have two
16 questions that I would like to ask on cross-examination.
17 Could I go after maybe Ms. Meserve?

18 HEARING OFFICER DODUC: You may go after
19 Ms. Meserve.

20 MS. MESERVE: And good morning. I am Osha
21 Meserve for Local Agencies of the North Delta. I am
22 relieved she wasn't objecting to me, so this is awesome.

23 HEARING OFFICER DODUC: There is still time,
24 Ms. Meserve.

25 CROSS-EXAMINATION BY MS. MESERVE:

1 MS. MESERVE: Anyway, it is a good morning so
2 far. I just have a couple of questions for
3 Mr. Ringelberg regarding his HABS testimony.

4 You were testifying as an expert on HABS for
5 the Coalition to Save the California Delta, correct?

6 WITNESS RINGELBERG: That's correct.

7 MS. MESERVE: And do you keep up on literature
8 regarding harmful algal blooms; or did you, I guess,
9 review that literature in preparation for this
10 testimony?

11 WITNESS RINGELBERG: I do, but it's a vast
12 literature. So I don't -- both within the Delta and
13 outside of the Delta, both in the lake systems and river
14 systems. And so there are certain other areas that I
15 have not kept up with. But I have been participating as
16 a volunteer editor for the California HABS group and
17 have tried to stay abreast of the most recent issues in
18 the Delta.

19 MS. MESERVE: And for your testimony for the
20 San Joaquin County case-in-chief, did you cite some of
21 that literature in your testimony and include it?

22 WITNESS RINGELBERG: Yes. For the San Joaquin
23 case, I gave a relatively long list of citations in
24 support of my testimony.

25 MS. MESERVE: And then for -- with respect to

1 the Leeman studies that were referenced earlier, DWR-576
2 and 577, have you reviewed those documents now?

3 WITNESS RINGELBERG: I had a chance to review
4 one of the Leeman documents, the most recent one,
5 DWR-576 that was provided during the cross-testimony --
6 or sorry -- cross-examination.

7 MS. MESERVE: And in general, what did the
8 Leeman study address?

9 WITNESS RINGELBERG: Well, the Leeman study, as
10 did the prior Leeman studies cited, looked at the -- the
11 causal factors, the factors that are associated with the
12 development of identifiable algal blooms in the Delta.

13 MS. MESERVE: And was there anything in the
14 Leeman studies that you saw that conflicted with the
15 opinions you expressed in your testimony regarding HABs?

16 WITNESS RINGELBERG: Give me just a second to
17 address that. So in terms of my prior testimony on
18 hazardous algal blooms and microcystis in particular in
19 the Delta, all the information identified in Leeman --
20 I'm sorry. I should say all the associated information
21 identified in Leeman DWR-576 matches what my testimony
22 described and, in fact, goes into greater detail about
23 why drought characteristics would have a greater
24 influence on HAB formation in the Delta.

25 HEARING OFFICER DODUC: Mr. Berliner?

1 MR. BERLINER: Tom Berliner on behalf of the
2 Department of Water Resources. I'm concerned that what
3 we are getting here is actually what should have been
4 handled on re-direct following Mr. Ringelberg's
5 testimony on behalf of Land. This is directly
6 responsive to cross-examination that we conducted. And
7 Ms. Meserve is now using this opportunity with her own
8 witness to clean up testimony that should have been
9 handled on re-direct at that point. So I know he's here
10 on behalf of another panel, but this is multiple bites
11 at the same apple.

12 HEARING OFFICER DODUC: Ms. Meserve?

13 MS. MESERVE: I think it is extremely relevant
14 to the testimony he's presenting for -- I mean, we're
15 focused on the case with Mr. Brodsky today. I
16 understand that. Mr. Ringelberg has presented expert
17 testimony regarding his view of what -- his opinion as
18 to what would occur if the North Delta diversions were
19 built and operated. What he's reviewed is relevant in
20 terms of that. So I mean, I certainly have my rebuttal
21 case, and I can do the kinds of things you're talking
22 about in that. But I don't really see how the objection
23 is relevant here.

24 HEARING OFFICER DODUC: Mr. Berliner, your
25 objection is noted, but Ms. Meserve is allowed to go

1 beyond the direct testimony in her cross-examination and
2 it is relevant to the testimony that he did present. So
3 I will allow her to continue.

4 MS. MESERVE: That was all of the questions I
5 had on Leeman, also.

6 So you state in your testimony that the
7 Petitioners failed to analyze the potential for a
8 blue-green algae formation under the project; is that
9 correct?

10 WITNESS RINGELBERG: That's correct. The
11 project application did not identify blue-green algae as
12 being a threat to beneficial uses of water.

13 MS. MESERVE: And are you only concerned about
14 cyanobacteria, or would it be -- are you concerned about
15 other algae, as well?

16 WITNESS RINGELBERG: Yeah. I want to be clear
17 about that. I often use the term, which is not a
18 general use, of hazardous algal blooms versus harmful
19 algal blooms. I believe that the state of the science
20 today points to cyanobacterial toxins as being
21 exceptionally toxic, certainly in the same order as what
22 we would traditionally consider hazardous chemicals.
23 And the knowledge and understanding of those is very
24 weak because it is difficult to accurately sample for
25 those.

1 The -- the focus on a single, readily
2 understood organism, microcystis is a diversion and a
3 potentially dangerous diversion away from the other
4 microsystem and other algal toxin creating blue-green
5 algae or microbacteria and have the potential of
6 creating multiple kinds of algal blooms with different
7 kinds of toxicity, different ratios, different mixes of
8 different toxins.

9 MS. MESERVE: Now, back to your statement about
10 the failure to analyze the potential for blue-green
11 algae and other algae to be caused under this project.
12 Why wouldn't information regarding average conditions be
13 helpful in this kind of analysis?

14 WITNESS RINGELBERG: I believe I gave testimony
15 about some of the specific issues -- that I think
16 ecological systems don't respond on an average basis, on
17 the basis of what we happen to be metering. Algal
18 systems respond due to very site-specific conditions.
19 And if the wind is blowing from a direction or -- it
20 might break up an algal bloom. If the flow and
21 circulation of a particular nearby agricultural ditch
22 provides a burst of nutrients that can cause a bloom.

23 And so there's a -- at the fine scale, at the
24 site-specific scale, algal community development can
25 happen very, very quickly. And quickly in a sense that

1 averages don't adequately reflect the ecological
2 conditions that are driving the growth and formation of
3 hazardous algal blooms.

4 MS. MESERVE: And just can you clarify what the
5 life cycle -- how quickly algae can form?

6 WITNESS RINGELBERG: Sure. I provided a
7 presentation on how a couple -- two different species of
8 algae can grow. But most algae and cyanobacteria being
9 microcystis bacteria that we have been looking at grew
10 logarithmically. So literally, in a matter of days,
11 their population can increase by several orders of
12 magnitude.

13 MS. MESERVE: So that could occur, for
14 instance, several times over within a 14-day period?

15 WITNESS RINGELBERG: Yes. Depending on the
16 particular genuses that we're talking about and the
17 physical conditions, you could have multiple algal
18 blooms of multiple species or the same species within a
19 14-day period.

20 MS. MESERVE: Could I have SCDA-13? It's a
21 map, please. I just wanted to go over briefly, since
22 you were talking about Discovery Bay and reduced
23 freshwater inflows. And I was hoping on this map, which
24 is not up on the main screen yet, you could show what
25 the freshwater sources for Discovery Bay are.

1 WITNESS RINGELBERG: I don't have any
2 particular expertise on the interior drainage patterns
3 of freshwater from storm water within Discovery Bay.
4 But the predominant rivering source of water is the Old
5 Middle River, which is that dashed line down the middle
6 and its connection to Indian Slough, which is where the
7 symbol is.

8 MS. MESERVE: So why, if the North Delta
9 diversions were built and operated, would there be less
10 freshwater in Discovery Bay?

11 WITNESS RINGELBERG: Sure. The proposed
12 interoperation of the north -- the proposed new North
13 Delta intakes would rely less, depending on the
14 particular operational screen, depending on the water
15 year and the pulse flow, on Clifton Court Forebay. So
16 Clifton Court Forebay would no longer be the dominant
17 intake source and the -- there would be a consequential
18 reduction in water withdrawals and water transport from
19 north to south along the Old River.

20 MS. MESERVE: Now, under normal -- we talked
21 about earlier today, there was testimony about what's
22 been occurring in Discovery Bay in the last few years.
23 Why would conditions be different with the North Delta
24 diversions than normal droughts, cyclic droughts than we
25 might experience?

1 WITNESS RINGELBERG: Based on some of the
2 proposed operational criteria during certain water
3 years, it would essentially create continuous conditions
4 similar to droughts depending on their ultimate realtime
5 operational curves. And those would be very similar to
6 what we have seen in the last several years. And ergo,
7 the current conditions in Discovery Bay should be very
8 similar to those that we would expect under operational
9 conditions that mimic the same amount of water flow
10 through that system in droughts.

11 But I want to be clear because there's -- the
12 ecology of the algal community and the reason I brought
13 up the aquatic plants is quite complex. So at times, if
14 you have a complete coverage of the water surface with
15 hyacinth, the hyacinth itself can block out the light.
16 It acts the same as a high sediment load in that system.
17 And so if the driving factor for the microcystis at that
18 particular time -- the missing driver is light, then,
19 actually, you can have the competitive influence of the
20 hyacinth and other floating weeds if they dominate the
21 entire surface of the water reducing the ability of
22 microcystis to form blooms.

23 So in the last year, they've been very
24 successful in knocking out the hyacinth, which then
25 opened up the water surface. And then this year, we saw

1 an -- I'm sorry -- cyanobacteria -- algal bloom. There
2 is a significant algal community there already.

3 MS. MESERVE: So is it -- so is it the removal
4 of the freshwater -- or so is it the -- the less
5 freshwater coming through the Delta cross-channel in
6 particular that you would be concerned about
7 exacerbating those conditions?

8 WITNESS RINGELBERG: Well, as I just described,
9 there's multiple competing conditions, right. So if you
10 have good flow of Sacramento River water and it's being
11 drawn into Clifton Court Forebay that reduces the
12 conditions that would exacerbate algal formation. As
13 we've seen, we don't have a long history of algal
14 blooms -- cyanobacterial algal blooms in Discovery Bay.
15 When you interoperate the Delta cross-channel in a
16 hypothetical situation, you're moving more of that fresh
17 Sacramento River water into the Central Delta, as is
18 being done for a variety of purposes to get water today
19 to Clifton Court Forebay. So if you operated the gates
20 in an open position that should -- and the evidence from
21 the monitoring station is, is it freshens up the water
22 that goes in the Old River.

23 MS. MESERVE: That's all the questions I have.
24 Thank you.

25 HEARING OFFICER DODUC: Mr. Herrick, followed

1 by Mr. Jackson. Oh, sorry. I forgot about Ms. Sheehan.

2 Ms. Sheehan, your two questions.

3 CROSS-EXAMINATION BY MS. SHEEHAN:

4 MS. SHEEHAN: Hello. My name is Becky Sheehan.

5 I am with the State Water Contractors, and I just have

6 two really quick questions for Mr. Burke.

7 Good morning, Mr. Burke.

8 WITNESS BURKE: Good morning.

9 MS. SHEEHAN: Are you aware that as DWR

10 explained in its testimony that it has a permitted

11 existing -- well, I should -- let me rephrase. That DWR

12 has an existing permitted diversion location at or near

13 Hood?

14 WITNESS BURKE: I'm not an expert on the water

15 rights that exist today, but I understand from their

16 presentation that they claim that they have a permitted

17 diversion on the Sacramento River.

18 MS. SHEEHAN: Thank you. And isn't it also

19 true that the State Board adopted decision 1641 after

20 DWR had already gained approval for a permitted

21 diversion at Hood?

22 WITNESS BURKE: Since I'm not familiar with

23 when that permit was issued, I couldn't really say.

24 MS. SHEEHAN: Okay. Thank you.

25 HEARING OFFICER DODUC: Thank you. Now

1 Mr. Herrick.

2 CROSS-EXAMINATION BY MR. HERRICK:

3 MR. HERRICK: Thank you. John Herrick for
4 South Delta parties. Could we bring up SWRCB-27,
5 please?

6 HEARING OFFICER DODUC: Which part of 27,
7 Mr. Herrick?

8 MR. HERRICK: I'm going to start with just the
9 cover page, and then I'll move to page 10.

10 Mr. Burke, are you an expert in Delta water
11 regulations?

12 WITNESS BURKE: I'm familiar with water
13 regulations. I wouldn't necessarily consider myself an
14 expert.

15 MR. HERRICK: Are you familiar with the 2006
16 edition of the Water Quality Control Plan for the San
17 Francisco Bay Delta?

18 WITNESS BURKE: Yes, I am.

19 MR. HERRICK: Can we move to page 10 on that?
20 And the second-to-the-bottom paragraph.

21 Mr. Burke, could you read -- let's see -- the
22 second sentence of that paragraph, second from the
23 bottom? Starts with the word "Unless."

24 WITNESS BURKE: "Unless otherwise indicated,
25 water quality objectives cited for a general area, such

1 as for the Southern Delta, are applicable for all
2 locations in that general area, and compliance locations
3 will be used to determine the compliance with cited
4 objectives."

5 MR. HERRICK: So in your opinion, it is
6 possible -- you may not be familiar with it. But it is
7 possible that an objective that is not located in a
8 particular spot may apply in some other part of a
9 channel; is that correct?

10 WITNESS BURKE: That's correct.

11 MR. HERRICK: And are you -- do you then have
12 any opinion on what water quality standard might apply
13 around Discovery Bay?

14 WITNESS BURKE: I would generally think that
15 the water quality objective would probably be associated
16 with the nearest compliance point to that location.

17 MR. HERRICK: And to your knowledge, have the
18 Petitioners provided any information regarding changes
19 in the water quality around Discovery Bay as part of
20 their presentation?

21 WITNESS BURKE: No. I haven't seen any
22 information to -- that responds directly to the water
23 quality changes that might be around Discovery Bay.

24 MR. HERRICK: But your testimony is that using
25 their modeling, you're able to tease out at different

1 locations what the changes in water quality might be; is
2 that correct?

3 WITNESS BURKE: Yes. By looking at the model
4 detailed output and looking at the daily averages for
5 that detailed output, we were able to see that there are
6 sometimes dramatic changes in water quality or salinity
7 in the Discovery Bay area.

8 MR. HERRICK: Thank you. I have no further
9 questions.

10 HEARING OFFICER DODUC: Thank you.
11 Mr. Jackson. As always, excellent job, Mr. Herrick, on
12 cross-examination.

13 CROSS-EXAMINATION BY MR. JACKSON:

14 MR. JACKSON: I'm afraid to follow that. Could
15 you put up SCDA-17, please?

16 Mr. Burke, I'm going to ask you a couple of
17 questions about the hydrology and the resulting
18 hydrodynamics in a couple of locations on this map. The
19 first location is the lower Sacramento. And by lower
20 Sacramento, for the purposes of these questions, I want
21 you to address -- the questions will address the
22 situation below the new proposed intakes, and they will
23 basically be with and without questions. Does that make
24 sense to you?

25 WITNESS BURKE: I believe it does, yes.

1 MR. JACKSON: All right. The second locations
2 will be the Central Delta and the area of Jersey Point
3 and, I believe, Prisoners Point and, again, with and
4 without questions.

5 So presently, there is a diversion that the --
6 that the Bureau owns and manages that we -- that we call
7 the cross-channel gates?

8 WITNESS BURKE: Yes.

9 MR. JACKSON: What is the effect on water
10 quality in the lower Sacramento below the cross-channel
11 gates without the WaterFix in terms of freshening the
12 area below the cross-channel gates?

13 WITNESS BURKE: I am not sure that I understand
14 the question.

15 MR. JACKSON: All right. When the gates are
16 open, there is one way -- there are a couple of ways
17 that the water can go, correct?

18 WITNESS BURKE: That's correct.

19 MR. JACKSON: And when the gates are closed,
20 there is only one way that the water can go.

21 WITNESS BURKE: That's correct.

22 MR. JACKSON: You've indicated that the opening
23 and closing of the gates changes the -- the
24 hydrodynamics and therefore, the water quality in the
25 central part of the Delta.

1 WITNESS BURKE: That's correct. It does.

2 MR. JACKSON: And why is that, sir?

3 WITNESS BURKE: The cross-channel gates allow
4 water from the Sacramento River to move over to the
5 eastern side of the Delta and down towards the southern
6 end of the Delta, bringing in a lot more freshwater to
7 that area of the system and freshens the water through
8 that process.

9 MR. JACKSON: With the WaterFix, will the
10 cross-channel -- the cross-channel gates are below the
11 new points of diversion?

12 WITNESS BURKE: That's correct. They are, yes.

13 MR. JACKSON: Did you find anything in your
14 review to indicate whether or not the cross-channel
15 gates will be operating at the -- in the summer months,
16 let's say July and August?

17 WITNESS BURKE: I actually didn't look at the
18 specific operation plans for the gates, but I understand
19 that they're generally going to be operated in a similar
20 fashion as they are today. But I am not sure if that's
21 correct or not because I didn't look at the details of
22 their operations.

23 MR. JACKSON: So if they were operated the way
24 they are today with the addition upstream of the
25 WaterFix diversions, would water that passed the

1 northern diversions still go through the cross-channel
2 gates?

3 WITNESS BURKE: If the gates were open,
4 whatever passed the northern diversion points would
5 still -- water would still go in there depending on how
6 the gates were operated.

7 MR. JACKSON: Now, below the -- so the bypass
8 flow would be lessened depending upon how much water
9 went into the cross-channel gates?

10 WITNESS BURKE: That's correct. It would be.

11 MR. JACKSON: Now, below the cross-channel
12 gates, are you familiar with Georgiana Slough?

13 WITNESS BURKE: To some extent, yes.

14 MR. JACKSON: Presently, without WaterFix, does
15 water leave the Sacramento River through the Georgiana
16 Slough into the Central Delta?

17 WITNESS BURKE: I haven't looked at the exact
18 flow pattern there, but I believe it does.

19 MR. JACKSON: So in terms of with the WaterFix
20 and in the months that -- where the -- where both
21 diversions are operating, the bypass flow has two routes
22 to leave the Sacramento River, correct, the
23 cross-channel gates, if they're open, and Georgiana
24 Slough?

25 WITNESS BURKE: That's correct.

1 MR. JACKSON: Did you see any modeling about
2 how much water would be left by the time the bypass flow
3 got past the Georgiana Slough?

4 WITNESS BURKE: I haven't seen any results that
5 actually quantify what that volume would be. No, I
6 haven't.

7 MR. JACKSON: Now, calling your attention to
8 the -- the lower Sacramento and the Bay Delta standard
9 stations, you notice that there is one at Collinsville,
10 correct?

11 WITNESS BURKE: That's correct.

12 MR. JACKSON: With the -- with the new
13 diversions and the potential of the gates being open for
14 water quality purposes in -- in the Central and South
15 Delta and Discovery Bay, given the bypass flows that are
16 possible, the 5,000 minimum, have you seen any
17 information that indicates how much water would get to
18 Discovery Bay, freshwater, Sacramento River water?

19 WITNESS BURKE: By the time you get to
20 Discovery Bay, there's a mixing of water from multiple
21 sources. And in order to determine how much Sacramento
22 water -- Sacramento River water got to Discovery Bay,
23 you'd have to do a fingerprinting analysis to determine
24 what percentage at any particular time of year would be
25 from Sacramento River versus other sources. And I

1 haven't seen any fingerprinting analysis being presented
2 to determine that yet.

3 MR. JACKSON: And yet, there is a capability in
4 California of fingerprinting water, correct?

5 WITNESS BURKE: That's correct. The DSM II
6 model allows you to fingerprint the different sources
7 and track that source over time to determine where it's
8 going and where it's been.

9 MR. JACKSON: But it wasn't done in this case?

10 WITNESS BURKE: No. I haven't seen any
11 presentation on that.

12 MR. JACKSON: All right. So going back to
13 Collinsville. If the cross-channel gates with the new
14 diversion and the bypass flow suggested and the ability
15 of water to move through closed -- or through open
16 cross-channel gates and the ability of water below the
17 diversions to move out of the Sacramento River through
18 Georgiana Slough and into the Central Delta, is there
19 going to be less than the minimum flow by the time we
20 get to Collinsville?

21 WITNESS BURKE: That's a complex question
22 because there's a lot happening within the Delta at
23 different times of the year. How much would be going
24 through the Sacramento River below those two diversion
25 points would have a lot to do with how much water is

1 flowing into the Delta at that time through other
2 sources, the tidal rain at the time. And so it's -- I
3 don't know if you could say specifically that it would
4 always be lower or you can determine what that would be.
5 It would change on a daily and then monthly basis.

6 MR. JACKSON: The amount might not always be
7 lower, but the freshwater influence would be less?

8 WITNESS BURKE: The freshwater influence at the
9 Delta outflow for that portion that came from the
10 Sacramento River after those two diversions through
11 Georgiana Slough and the cross-channel gates would be
12 less than the 5,000 CFS that they allowed to bypass the
13 North Delta diversions. That's correct.

14 MR. JACKSON: In your work, did you see any
15 quantification of how much less?

16 WITNESS BURKE: No. I haven't seen that.

17 MR. JACKSON: Now, in regard to the Central
18 Delta, presently without the WaterFix, the cross-channel
19 gates are sometimes open in order to freshen the Central
20 Delta, correct?

21 WITNESS BURKE: That's correct.

22 MR. JACKSON: Do you have any estimate of --
23 from your review of the WaterFix program, how much water
24 is going to go -- how much less water, on an annual
25 basis, is going to go underneath the Delta rather than

1 through the Central and South Delta?

2 WITNESS BURKE: When you say, "underneath the
3 Delta," are you talking through the diversion pipe?

4 MR. JACKSON: Yes, sir, I am.

5 WITNESS BURKE: Okay. Could you repeat that
6 question, please?

7 MR. JACKSON: Yeah. In your review of the
8 altered hydrology caused by the WaterFix program, do you
9 have any idea how much less freshwater will move from
10 the Sacramento River through the Delta with the project
11 in operation?

12 WITNESS BURKE: No. I don't think we have
13 actually computed that percentage of the -- or that
14 reduction in Sacramento River water that goes into the
15 Central Delta specifically. We looked at the quantity
16 of Sacramento River water that's diverted as a function
17 of the total flow in the Sacramento River, but we didn't
18 look at how that water is split in terms of either going
19 out through the Sacramento River as Delta outflow or
20 into the Central Delta through the cross-channel gates
21 or Georgiana Slough.

22 MR. JACKSON: So does that leave us with a lack
23 of knowledge in regard to the differences between the
24 project as it exists today and the project as it is
25 proposed to be built?

1 WITNESS BURKE: In terms of that a quantity of
2 freshwater that would go down in the Central Delta
3 would definitely be an unknown at this time given the
4 information that's been presented.

5 MR. JACKSON: Now, is the balance between
6 freshwater and saltwater in the Delta system important
7 to other things like clams and Egeria and cyanobacteria?

8 WITNESS BURKE: All these different biological
9 organisms have a range of freshwater or saline water
10 that they can exist in. If you start to change that
11 ratio by either increasing or decreasing the amount of
12 salinity in the water, you can change the conditions
13 that favor or don't favor those particular species to
14 grow in.

15 MR. JACKSON: Thank you very much, sir.

16 HEARING OFFICER DODUC: Mr. Mizell?

17 MR. MIZELL: If he's done with his questioning,
18 I have no objection.

19 HEARING OFFICER DODUC: He's done. Any
20 re-direct, Mr. Brodsky?

21 REDIRECT EXAMINATION BY MR. BRODSKY:

22 MR. BRODSKY: Yes, briefly. For Ms. McCleary,
23 there was discussion of saltwater in Discovery Bay,
24 freshwater in Discovery Bay, brackish water, pollution.
25 In your written testimony, you referred to Discovery Bay

1 as a freshwater community; did you not?

2 WITNESS MCCLEARY: I did.

3 MR. BRODSKY: And is it important that the
4 water in Discovery Bay be fresh rather than salt
5 regardless of pollution?

6 WITNESS MCCLEARY: Yes.

7 MR. BRODSKY: Okay. And then for
8 Mr. Ringelberg. In your written testimony, at the top
9 of page 2, you mention risk to human health from
10 blue-green algae cyanobacteria; is that correct?

11 WITNESS RINGELBERG: That's correct.

12 MR. BRODSKY: And then down below that, around
13 line 16, you say, "The project would amplify conditions
14 that are suitable for toxic and non-toxic invasive
15 aquatic plants"; is that correct?

16 WITNESS RINGELBERG: I did. And actually --

17 MR. BRODSKY: And may I ask, is that blue-green
18 algae one of the toxic plants you had in mind?

19 WITNESS RINGELBERG: Yes. And --

20 MR. BRODSKY: Okay. Thank you, Mr. Ringelberg.

21 And next, to Mr. Burke. Well, actually, I do
22 have a couple more questions for Mr. Ringelberg.

23 HEARING OFFICER DODUC: You get to talk after
24 all, Mr. Ringelberg.

25 WITNESS RINGELBERG: Can I talk about the last

1 thing?

2 MR. BRODSKY: Okay. So you mentioned a
3 backwater effect and that the project may create or
4 exacerbate a backwater effect in Discovery Bay. To the
5 extent that there is already a backwater effect in
6 Discovery Bay, did you mean that the project would
7 exacerbate it?

8 WITNESS RINGELBERG: Yes. That's why I used
9 that particular phraseology.

10 MR. BRODSKY: Okay. And then as far as
11 Ms. Meserve asked you about freshwater source. And you
12 spoke about the cross-channel gates and the operations
13 of the pumps. Does -- would diversions through the new
14 points of diversion proposed lessen the freshwater to
15 Discovery Bay regardless of whether the South Delta
16 pumps are operating or not?

17 WITNESS RINGELBERG: I don't know the answer to
18 that because it depends on the water year and the
19 operational rural curve.

20 MR. BRODSKY: Okay. All right. And then if I
21 could pull up SWRCB-104 at page 3-102.

22 MR. LONG: Page what again?

23 MR. BRODSKY: 3-102.

24 Okay. And then the paragraph there that
25 discusses, "Improving water quality in the interior

1 Delta by improving circulation patterns of
2 higher-quality water from the Sacramento River towards
3 the Delta diversions." Do you see that sentence there
4 at the bottom of the first paragraph?

5 WITNESS RINGELBERG: The last sentence of the
6 first paragraph?

7 MR. BRODSKY: Yes.

8 WITNESS RINGELBERG: I do.

9 MR. BRODSKY: And is that consistent with your
10 testimony that less Sacramento River water going into
11 the interior Delta would degrade water quality?

12 WITNESS RINGELBERG: It is my understanding the
13 purpose of the Delta cross-channel is specifically to
14 improve water quality in the interior Delta for the
15 purposes of export and in some conditions, to meet water
16 quality standards.

17 MR. BRODSKY: All right. Putting aside the
18 cross-delta gates, is it consistent -- this paragraph
19 here is talking about higher-quality Sacramento River
20 water. Is it consistent with your testimony that less
21 higher-quality Sacramento River water entering the
22 South -- Central Delta would mean lower water quality?

23 Let me rephrase the question here. Is this
24 paragraph consistent with your testimony that Sacramento
25 River water is of higher quality than San Joaquin River

1 water?

2 WITNESS RINGELBERG: That is correct.

3 MR. BRODSKY: Okay. Thank you.

4 Mr. Burke, as far as this same paragraph here
5 with the higher-quality Sacramento River water, is this
6 paragraph consistent with your testimony that less
7 Sacramento River water entering the Central Delta will
8 degrade water quality?

9 WITNESS BURKE: Yes, it is.

10 MR. BRODSKY: Okay. Thank you.

11 HEARING OFFICER DODUC: Re-cross? Any takers?

12 All right. Not seeing any, I will thank these five
13 witnesses, and you are dismissed. Does the Department
14 still wish some additional time to prepare for your
15 cross-examination of Mr. Brodsky? That's a yes. Will
16 1:30 give you enough time?

17 MR. BERLINER: 1:45 will be better.

18 HEARING OFFICER DODUC: Okay. 1:45. We will
19 take our lunch break and reconvene at 1:45.

20 (Off the record.)

21 HEARING OFFICER DODUC: All right. Welcome
22 back, everyone. Let me do a quick time check. We have
23 Mr. Brodsky remaining to -- for cross-examination. How
24 much time do you anticipate needing, Mr. Berliner,
25 Mr. Mizell?

1 MR. BERLINER: Say between 45 minutes and an
2 hour.

3 HEARING OFFICER DODUC: Okay. Who else wishes
4 to conduct cross-examination of Mr. Brodsky? Everyone
5 wanted to direct you, but not cross-examine you,
6 Mr. Brodsky.

7 MR. BRODSKY: Thank you.

8 HEARING OFFICER DODUC: All right. With that,
9 then we will turn this over to Mr. Berliner and
10 Mr. Mizell for their cross-examination.

11 MR. BERLINER: Thank you very much.

12 HEARING OFFICER DODUC: And, Ms. Sheehan,
13 you're not going to change your mind?

14 MS. SHEEHAN: No.

15 HEARING OFFICER DODUC: All right.

16 MR. BERLINER: Just in case.

17 CROSS-EXAMINATION BY MR. BERLINER:

18 Q. Good afternoon, Mr. Brodsky.

19 A. Good afternoon, Mr. Berliner.

20 Q. I'm going to be asking Mr. Brodsky a number of
21 questions, first about his expertise and qualifications,
22 then about various contentions that he makes in his
23 testimony, including comments submitted regarding prior
24 alternatives that were investigated and rejected, the
25 issue about water conditions in -- in Discovery Bay and

1 the presence of Asian clams, formation of toxic algae,
2 and water quality. And some specific questions about
3 the bypass flow chart that we had brought up earlier and
4 how the standards work regarding bypass flows.

5 Mr. Brodsky, you're testifying this afternoon
6 as an expert, correct?

7 A. Yes.

8 Q. And what's your area of expertise?

9 A. My area of expertise as -- as related to my
10 testimony about WaterFix is my legal training and my
11 long and in-depth engagement with the project and the
12 project documents.

13 Q. And by "the project," you're referring to BDCP
14 California WaterFix?

15 A. Yes.

16 Q. Are you -- but you're not an expert in water
17 quality, correct?

18 A. I -- as far as training, I did take a graduate
19 class in hydrology, which was basically designed -- it's
20 called "Hydrology for Planners," designed to give
21 lawyers enough expertise to be able to interface with
22 experts. But I am not an expert in water quality.

23 Q. Okay. And you're not an expert in
24 hydrodynamics either, correct?

25 A. No, I am not.

1 Q. And you're not an expert in primary
2 productivity like algae?

3 A. That is correct.

4 Q. Okay. And did you -- you understand that as
5 testifying today as an attorney, you're waiving
6 attorney-client privilege, right?

7 A. I'm not testifying as an attorney. I'm
8 testifying as an expert. I don't -- I'm not waiving any
9 privilege.

10 Q. Well, you're here testifying on behalf of your
11 client, correct?

12 A. Well, I'm -- I am a part of the client.

13 Q. Yes. Understood. So if you were --

14 A. I live in Discovery Bay.

15 Q. Yes. And your client is -- is your client
16 today the Save the California Delta Alliance?

17 A. Correct.

18 Q. And are they an organization?

19 A. Yes.

20 Q. What kind of organization are they?

21 A. They are an unincorporated association.

22 Q. And is there a board of directors?

23 A. Yes, there is.

24 Q. And have they hired you as their counsel?

25 A. Yes.

1 Q. And you're testifying today on their behalf?

2 A. Yes.

3 Q. Okay. So I'm going to ask you the question
4 again. You are appearing as a witness on behalf of Save
5 the California Delta Alliance, right?

6 A. That is correct.

7 Q. So you can't have attorney-client privilege
8 with yourself, you understand, right?

9 A. I'm not waiving any privilege as far as any
10 communications that I've had with the board of directors
11 or the organization. As far as anything you want to ask
12 me about what I know, I'm...

13 Q. I'm not planning to ask you anything about
14 anything outside of your testimony, but I also don't
15 want you asserting attorney-client privilege about your
16 own testimony.

17 A. I don't intend to do that. I don't see where
18 that would come up. If it comes up, we'll have to deal
19 with it.

20 Q. All right. Well, we'll find out because it's a
21 little unusual.

22 A. It is very unusual, and I would prefer not to
23 be testifying. It's just certain -- you know, we have
24 very limited resources and very short on time. And
25 there are certain things that I thought it was important

1 that the Board understand about the way these documents
2 are put together, and that's why I'm testifying.

3 Q. So you didn't do any of your own modeling work,
4 right?

5 A. I did not. Mr. Burke did some modeling that he
6 presented earlier.

7 Q. Understood. And I understand Mr. Ringelberg
8 also did some technical work. But in putting together
9 your testimony, you have not done any technical work
10 along the lines of work that Mr. Ringelberg or Mr. Burke
11 or some of the other experts that we've had testify,
12 correct?

13 A. That is correct.

14 Q. And as I understand your testimony, what you've
15 done is you've reviewed the record and you have
16 excerpted from the record and provided certain -- your
17 views about what is in the record, correct?

18 A. That is correct. And then also my knowledge of
19 the Delta and Delta flows and the way -- the way that --
20 my knowledge of the way the projects operate and how
21 that affects Discovery Bay. And I -- I offer that -- I
22 don't know if you want to call it an expert or a
23 quasi-expert or a knowledgeable layperson. But I'm -- I
24 can observe what happens in front of my face for, you
25 know, 40 years boating on the Delta and since 2007,

1 having a home in Discovery Bay and being out there very
2 frequently looking at the water.

3 Q. So with respect to those matters, since you're
4 an attorney and you understand the difference between
5 these terms, I would characterize you as a percipient
6 witness as to those matters, rather than an expert.

7 A. I'm not sure. I mean, you know, a
8 knowledgeable -- a knowledgeable expert, I'm not sure
9 really whether -- how much any of that means anything.
10 I -- you know, I think the question is if what -- I have
11 enough knowledge with what I'm saying is useful to the
12 Board in reaching a decision.

13 Q. All right. Well, let's -- let's jump into some
14 of the substance of what you talked about. Let's start
15 with the -- the bypass flow question that came up.

16 MR. BERLINER: And I'm not sure who is driving
17 the exhibits over there this afternoon. Mr. Hunt, are
18 you doing that?

19 MR. HUNT: Yes, sir.

20 MR. BERLINER: Thank you. If you could please
21 pull up the exhibit that Mr. Brodsky used for the bypass
22 flows for the North Delta diversion, please.

23 MR. HUNT: Can you --

24 MR. BRODSKY: That would be the BA. That's
25 SWRCB-104, I believe. Around -- around 3-86, somewhere

1 in there.

2 MR. MIZELL: Yeah. 3-84 and 3-85.

3 BY MR. BERLINER:

4 Q. So, Mr. Brodsky, you had -- you had asserted
5 that the minimum 5,000 CFS bypass flow was the only
6 condition that's been proposed as part of the WaterFix
7 for the North Delta diversion, correct?

8 A. During July and August, as far as the operating
9 rules, and also the 3,000 CFS flow at Rio Vista is also
10 proposed.

11 Q. So and did you base that then on the tables
12 that are on 3-84, 3.3.1 and 3.3.2?

13 A. I based it on those two tables, and I based it
14 on my cross-examination of Mr. Leahigh and Mr. Miniver,
15 who were -- if I'm pronouncing their names correctly --
16 were not able to point to any other constraint in the
17 operating rules. I looked at it, and then I asked them.
18 And it's based on that.

19 Q. That's fine. Thank you. Let's go to the
20 page -- let's start with page 3-4, if we could, please.
21 Scroll back to it.

22 MR. HUNT: Is that table or page 3-4?

23 MR. BERLINER: Page. So can you go up higher?
24 Let's try the very top of the table. Okay. All right.
25 So this is Table 3.1-1, which is entitled, for the

1 record, "CVP/SWP Facilities and Actions Included and Not
2 Included in the Proposed Action."

3 So if you could scroll down to page 3-4 now. I
4 think we need to go lower on the -- it may be the next
5 page. Okay. There we go.

6 BY MR. BERLINER:

7 Q. All right. Now, I understand that this is a
8 biological assessment, correct?

9 A. Yes.

10 Q. And it's for purposes of setting the stage for
11 the fishery agencies to prepare their biological
12 opinion. You understand that?

13 A. Yes.

14 Q. So the BA has identified facilities and
15 activities that are not included in the preferred
16 alternative. Do you see where it says that?

17 A. I -- I do see it. I thought that that "PA"
18 stood for "proposed action" rather than "preferred
19 alternative." Am I mistaken about that?

20 Q. Proposed action, yeah.

21 A. Okay.

22 Q. But this -- this is a BA that is from the
23 perspective of the fishery agencies, not from the Water
24 Board. So do you see where it says -- it identifies
25 D-1641, then COA or the Coordinated Operating Agreement

1 and CVPIA, et cetera?

2 A. Yes.

3 Q. Do you understand CVPIA is Central Valley
4 Project Improvement Act?

5 A. Yes.

6 Q. And do you understand that these are, in one
7 way or another, actions that regulate how the projects
8 operate?

9 A. Yes.

10 Q. Now, you're not suggesting that any of these
11 are being waived, are you?

12 A. Well, you're -- you're proposing alterations to
13 D-1641, which is to change the export-to-inflow ratio.
14 And in terms of the -- the by-ops -- the federal by-ops,
15 what the BA says repeatedly is that things like fall X2,
16 you want to -- you want to do away with those. And then
17 you're going to try to do that through adaptive
18 management. And that between now and the time you're
19 ready to begin operations of the project, which is 10,
20 15 years, you're going to look at the science and you're
21 going to take a look at this again and see if fall X2
22 and some other things are really going to stay in there.

23 Q. Well, let me refer you to the right-hand box,
24 where it says for all of those that they're incorporated
25 into the environmental baseline. Do you understand that

1 the environmental baseline means those are set, those
2 are fixed for purposes of this document?

3 A. No. The environmental baseline is for CEQA
4 purposes. I don't agree with that. And in your
5 narrative near those tables, it says repeatedly, you
6 know, the science about fall X2 is unsettled and we're
7 going to be taking another look at that. And that's the
8 reason why you're presenting this to the Board in the
9 range of between Boundary 1 and Boundary 2 because you
10 want to get a permit from the Board that will allow you
11 to do anything between Boundary 1 and Boundary 2. And
12 you're currently constrained by the by-ops, and then you
13 want to try to change those by-ops as time goes forward
14 without having to go back to the Board. That's the way
15 this is set up.

16 Q. That's your understanding?

17 A. That's my opinion.

18 Q. Okay. Let's take a look at DWR-515, please.
19 And just for reference, after that, I'll want DWR-404.

20 Now, we've seen this before. This is the
21 various modeling assumptions and what's going to be
22 included and -- for the different scenarios. And if you
23 look at this chart and you look down the left-hand side,
24 you'll see that it indicates that there are a number of
25 actions that are going to remain in place. Do you see

1 that? It tells you what the planning horizon is going
2 to be?

3 A. Which column are we on? There is NAA H3, H4.

4 Q. So look on the left-hand side.

5 A. Far left?

6 Q. Yes.

7 MR. BERLINER: And if you could scroll down a
8 little bit, Mr. Hunt.

9 BY MR. BERLINER:

10 Q. It explains what -- what facilities are
11 involved, North Delta diversion intakes ahead of Old
12 River. And in any case, there are North Delta diversion
13 bypass flows, which we've been talking about. If we
14 could scroll down a little further. And there are
15 minimum flows for Rio Vista that are set under D-1641
16 and --

17 A. Are these the ones that are set under D-1641 or
18 the additional ones that you're proposing?

19 Q. Pardon me?

20 A. Are these the ones that are set under -- there
21 are some set under D-1641 already for certain months.
22 And then you're proposing additional months to be
23 covered. I guess I'm not supposed to be asking you
24 questions. I'm unsure whether this is the 3,000 CFS
25 that is already included in D-1641 or it includes the

1 other additional months that you're offering as an
2 environmental bonus.

3 Q. No. These are -- these are existing.

4 A. Okay.

5 Q. So you see those?

6 A. Yes.

7 Q. So let's go to DWR-404 then, please. Now, you
8 had indicated that it was your understanding that the
9 only constraint was going to be this minimum 5,000
10 bypass flow, right?

11 A. In your operating rules, D-1641 remains in
12 effect. I don't argue -- claim that, other than the way
13 you're proposing to alter it for the export-to-inflow
14 ratio.

15 Q. Okay. And if you look at this chart, which by
16 the way, you mentioned Mr. Leahigh. This was also in
17 his Power Point presentation. But it's a standalone
18 chart in Exhibit 404, but it is out of his Power Point.

19 But you'll also see that there's, for instance,
20 a minimum Delta outflow of 3,000 to 8,000 CFS. Do you
21 understand that minimum Delta outflow is measured at the
22 west -- westernmost end of the Delta?

23 A. Well, there's -- there's the net Delta outflow
24 index in D-1641. But my -- my point was for bypass
25 flows the only -- looks like the only operating

1 requirement in the operating rules was the 5,000 minimum
2 in the summer. There are other things. You have to
3 meet salinity at Rock Slough, et cetera, et cetera or
4 attempt to. And -- but I don't think those are
5 adequate.

6 Q. Okay. Well, I'm not really asking you about
7 whether you think the standards that the Water Board has
8 set are adequate. What I'm really asking you is aren't
9 there other criteria that affect the operation of the
10 project that have to be taken into account when
11 you're -- when you made the contention that the only
12 obligation is to bypass 5,000 CFS?

13 A. Well, in the operating rules, the only two
14 things -- the operating rules that you're proposing, the
15 only two things in there are the -- are in July and
16 August, are the 5,000 bypass and the 3,000 at Rio Vista.
17 You argue that you -- for example, I -- I put up a chart
18 and said that, well, if the river is flowing at 14,000,
19 you could divert 9,000 and you'd still be meeting the
20 5,000 bypass rule. And you argue, no, we couldn't
21 divert that much because if we diverted that much, we
22 wouldn't be able to meet D-1641. And I understand that.
23 We both understand that.

24 My claim is in the operating rules, you have
25 very specific requirements for bypass flows in all the

1 other months that are protective of the fish. And I'm
2 arguing we need some -- some of those type of bypass
3 rules that are protective of the Central Delta water
4 quality and our farmers and other uses.

5 Q. So you must be aware that there are municipal
6 and industrial standards in the Delta, correct?

7 A. Yes. In D-1641, around page 182, 181.

8 Q. And there are also agricultural standards at
9 those same pages?

10 A. Yes. And fish and wildlife.

11 Q. But just talking about the summer because
12 that's what you focused on.

13 A. I did.

14 Q. You understand that those M&I standards and
15 agricultural standards apply during the summer, right?

16 A. Right. But they are not a part of the
17 operating rules of WaterFix. I mean, my testimony
18 stands. And I've always said that I understand that
19 D-1641 is there also. But, you know, so the -- the M&I
20 standard of Rock Slough which is a chloride standard,
21 you made a settlement with Contra Costa Water District
22 that you're just going to put them on another source of
23 water, not that you're going to check and see if the
24 water quality standards exceeded at Rock Slough. You're
25 just going to put them on another source of water. So

1 we're concerned about that.

2 Q. Well, to some extent, we're beating a dead
3 horse, and I'm going to move on pretty quickly. But you
4 understand that operations are dictated by regulations
5 or restrictions that are imposed on the project, right?

6 A. That is correct to some extent. And what I'm
7 saying is that you've developed a very complicated set
8 of bypass rules as operating criteria that aren't
9 contained in any other standards anywhere else, to
10 please the fish agencies because they're not going to
11 give you a permit unless you do that. But there is
12 nothing there for July and August because the fish
13 agencies don't care about July and August. But we do.

14 Q. And it's your understanding the Water Board
15 also cares about July and August, right, because it's in
16 D-1641?

17 A. The Water Board is very concerned and
18 conscientious about all things relevant.

19 Q. Well, the --

20 HEARING OFFICER DODUC: Well said, Mr. Brodsky.

21 MR. BERLINER: That, I'm sure is true.

22 MS. MARCUS: I want to remind him he's under
23 oath.

24 MR. BRODSKY: Did you put me under oath again?

25 HEARING OFFICER DODUC: I'm going to quote you

1 now.

2 THE DEPONENT: Okay.

3 MR. BERLINER: We can get a printout of that
4 from the court reporter.

5 BY MR. BERLINER:

6 Q. But you understand the Water Board has -- has
7 dictated certain requirements that cover the summer as
8 well, right?

9 A. Yes. I do understand that the D-1641 has
10 standards that vary in different months in different
11 water-year types and according to different variables.

12 Q. And the projects have to meet those
13 requirements regardless of what they would like to do in
14 terms of operations, correct?

15 A. They don't always meet them, and they're often
16 suspended through TUCPs. But they're supposed to meet
17 them.

18 Q. So is the answer to my question yes?

19 A. Could you repeat the question?

20 Q. That the projects are -- the projects are
21 obligated to meet the Water Board's standards despite
22 how they might otherwise like to operate?

23 A. Well, that's correct. Except you're proposing
24 to change an important standard.

25 Q. You understand that's subject to the Water

1 Board?

2 HEARING OFFICER DODUC: Let's move on,

3 Mr. Berliner.

4 MR. BRODSKY: Beg your pardon?

5 MR. BERLINER: I think we're going in circles

6 here.

7 HEARING OFFICER DODUC: Yes. Move on, please.

8 BY MR. BERLINER:

9 Q. All right. Let's pull up Exhibit 602, please,
10 which is on the thumb drive.

11 MR. HUNT: And this is DWR-602, correct,

12 Mr. Berliner?

13 MR. BERLINER: Yes.

14 MR. BRODSKY: I hope I'm not going to need my
15 glasses. I think I can see it okay.

16 BY MR. BERLINER:

17 Q. This is pretty straightforward. So this chart
18 is an excerpt from the modeling data that has been
19 provided that's part of the record, and this chart
20 itself is not in there. This chart is an exceedance
21 chart based on the numbers that are in the modeling
22 data. We prepared this during the lunch break to
23 respond to the testimony that came up earlier. And what
24 you will see on this chart is that there is a line that
25 says, "5,000 CFS," at the bottom, just above the zero.

1 And the green line is the proposed project H3+. And the
2 red line is the no-action alternative.

3 Do you understand that there's -- that 100
4 percent of the time, based on the exceedances, there has
5 never been a flow at Hood that went as low as 5,000 CFS?

6 A. You mean in your modeling?

7 Q. Correct. And in the no-action alternative.

8 A. In your modeling of the no-action alternative?

9 Q. Yes.

10 A. Yeah. I understand that that's what you're
11 purporting to show in your modeling. I don't think the
12 modeling is representative of how you're going to
13 operate the project. I agree with Mr. -- what was his
14 name -- the expert for Sac Valley. And what was it?

15 HEARING OFFICER DODUC: No coaching.

16 BY MR. BERLINER:

17 Q. Walter Beret?

18 A. Beret, yeah. And also, I agree with Mark
19 Cowan that, you know, people run projects, not modeling.
20 You know, he said you're going to hear a lot of about
21 modeling. The modeling is not that relevant. It's
22 people who run the projects, and we have good people and
23 you can trust us.

24 And if you're not worried about it, then let's
25 just put those December-to-April Level 1 rules in place

1 in July and August. Because you're never going to
2 pump -- you're never going to take it down to 5,000
3 anyway, so that won't bother you to put those in place.

4 Q. All right. You -- as part of your review of
5 various items in the record, you referenced a letter
6 that was submitted by the EPA in 2014 which is a CDA
7 Exhibit 26. And you understand that this letter was
8 written before the recirculated draft EIR EIS, correct?

9 A. Yes.

10 Q. And isn't it true that the EPA letter was
11 actually more specific than what you indicated in your
12 testimony with regard to the constituents that it was
13 concerned about, which were selenium, mercury, and
14 bromides at the North Bay Aqueduct?

15 A. Well, as I recall, the letter said that it
16 thought that WaterFix would result in persistent
17 violations of water quality standards. Now, the letter
18 also expressed that there's a problem here because what
19 we need is more freshwater flow out to sea and WaterFix
20 doesn't do that.

21 There are two letters. There is the July 26,
22 2014, letter and the October 30th, 2015, letter. The
23 October 30th, 2'15, letter was addressing WaterFix
24 after it was addressing the recirculated. And in -- I
25 guess it was in the 2'15 letter, it said because there

1 are going to be some increases in salinity, your
2 flexibility to operate the projects is going to be
3 severely limited. And that still holds true, in my
4 opinion. I agree with Mr. Bloomenfeld.

5 Q. Can we go to SCDA 57, please?

6 MR. HUNT: Can you repeat that?

7 MR. BERLINER: Exhibit 57, please.

8 MR. BRODSKY: I think it's actually 62. I had
9 a little labeling problem.

10 MR. BERLINER: Okay. Are we off by five?

11 MR. BRODSKY: I'm not sure now. Let's see.

12 MR. BERLINER: No. It's not 62.

13 MR. BRODSKY: Maybe it is 57. I think you're
14 right. You're looking for my testimony, right?

15 MR. BERLINER: No. I'm looking for the quote
16 from the -- yeah. 57 would be your --

17 MR. BRODSKY: Well, that is my testimony.

18 MR. BERLINER: -- 60?

19 MR. BRODSKY: Yeah. There it is.

20 BY MR. BERLINER:

21 Q. If we could go to page 5, starting line 18. So
22 this is an excerpt from the August 26, 2014, letter that
23 you quoted. And I'm assuming you quoted this because
24 you want the Water Board to be aware of certain things.
25 And so you took an excerpt out of the -- out of the

1 letter.

2 A. Right. The one that says that the new North
3 Delta diversions, quote, "Would improve the water
4 quality for agricultural and municipal water agencies
5 that receive water exported from the Delta. Water
6 quality could worsen for farmers and municipalities that
7 divert water directly from the Delta." Okay. So, yeah,
8 I want the board to know that.

9 Q. Sure. But you only took part of the paragraph.

10 A. Well, I -- I excerpted fairly. And the entire
11 letter is attached and included as an exhibit, and the
12 Board can read the entire thing in context. I mean, I
13 believe that's a fair excerpt.

14 Q. Well --

15 A. I go to great pains to treat the record fairly.

16 Q. Yeah. I guess that's kind of my point. Let's
17 go to Exhibit 20 -- I'm hoping the number is right --
18 Exhibit 26, which would be the letter itself.

19 A. Yes.

20 Q. Yes. And let's go to page 2 of the letter. So
21 the first sentence you excerpted --

22 A. Where are we now?

23 Q. The paragraph that starts, "We also note that
24 while CM-1."

25 A. Okay.

1 Q. But then you didn't include the rest of it,
2 which indicates what they're concerned about, which --
3 which they state specifically. And my concern is that
4 the Board needs to know what the context is if we're
5 telling the Board that EPA has a concern. Why didn't
6 you quote the rest of the paragraph?

7 A. I quoted that very fairly. That's a very fair
8 treatment of the letter. The Board can look at what I
9 excerpted and they can read that paragraph and they can
10 decide for themselves that I'm not misrepresenting the
11 record.

12 HEARING OFFICER DODUC: Enough. Enough. You
13 have made your point, Mr. Berliner. Please move on.

14 BY MR. BERLINER:

15 Q. So are you aware what the EPA recommended as a
16 result of this paragraph?

17 A. In terms of their more detailed recommendations
18 later on?

19 Q. Yeah.

20 A. I don't remember. I don't recall what their
21 specific recommendation was.

22 Q. Okay.

23 A. I do know generally that the EPA has been
24 consistent in saying that we need more fresh -- more
25 seaward freshwater flow.

1 Q. Well, in here, they -- they recommended that
2 issues concerning bromide, mercury, and selenium
3 concentrations be addressed. And I know you've reviewed
4 the recirculated draft EIR. I assume you've reviewed
5 the water quality chapter. So are you aware that these
6 issues have been addressed in that document?

7 A. I don't believe -- I mean, my most recent
8 review of the RD EIRS has been some time ago when I
9 prepared comments for the Army Corps of Engineers. But
10 in my petition, I laid out -- in my protest here, I laid
11 out how I thought there were qualitative assumptions in
12 there. And where they said they were addressing things
13 that they weren't really adequately addressing them.
14 And I laid that out in the -- in the actual body of the
15 protest. I don't remember the specifics right now.

16 Q. That's fair enough. It was -- just for your
17 reference, it was in Chapter 8.

18 A. Okay.

19 Q. All right. Let's move on. In your testimony,
20 you referred to the Asian clam, otherwise known as
21 Corbicula fluminea?

22 A. Yes.

23 Q. And I'm just going to call it the Asian clam.

24 HEARING OFFICER DODUC: Thank you.

25 BY MR. BERLINER:

1 Q. So you contended that the Asian clam clogged
2 storm drains in Discovery Bay; is that right?

3 A. Yes.

4 Q. And what evidence do you have of that?

5 A. That I was told that by -- by Reclamation
6 District 800 personnel.

7 Q. And in your testimony -- and if you need me to
8 pull it up, we can.

9 A. Okay.

10 Q. You indicated that very cold water events can
11 inhibit the growth or spread of the Asian clam. Do you
12 recall that?

13 A. Yes.

14 Q. What do you mean by "very cold water events"?

15 A. Well, I don't have a parameter for you. I know
16 that I looked that up and there was some USGS postings
17 and some other postings on the web dealing with the
18 Asian -- the clam and its problems, problems it creates.
19 And that colder temperatures can inhibit it. I don't
20 have a degree range for you. I believe Mr. Ringelberg
21 testified about the clam as an expert. And I'm also
22 basing my contentions here on his expert advice and
23 testimony.

24 Q. Well, I -- you have a section in your testimony
25 that's entitled, "California WaterFix Will Impair Flood

1 Control in Discovery Bay."

2 A. Right.

3 Q. And you say, "CW" -- "CWF will tend to reduce
4 very cold water events in Discovery Bay, exacerbating
5 the Asiatic clam problem." What evidence do you have
6 for that?

7 A. Well, that's in my qualitative -- that the
8 Sacramento River water is colder. And when you're
9 diverting that at the North Delta diversions, rather
10 than letting it flow through the Delta that that's --
11 you're not going to have that cooling effect.

12 Q. Are you familiar with the work by Wim Kimmerer
13 that concludes that Sacramento temperatures have a
14 negligible, if any, effect on Delta temperature?

15 A. Well, I know Wim. I haven't -- I haven't
16 reviewed any specific reports.

17 Q. You might ask him to give you his 2004 report.

18 A. I'll do that.

19 Q. Do you know what the hospitable range is for
20 temperatures for the Asian clam?

21 A. No, I do not.

22 Q. And --

23 A. Maybe I should hire him as an expert for my
24 rebuttal case.

25 Q. Good luck. I think he's been hired.

1 You also indicated that -- in that same
2 testimony that higher nutrient levels caused by the
3 WaterFix will also encourage the growth of the Asian
4 clam population. What kinds of nutrients are you
5 referring to?

6 A. You know, I'm not so sure about that. You have
7 nutrients -- the nutrient load from the San Joaquin
8 River is agricultural return flow. So you have a higher
9 nitrogen load from the fertilizer and so forth. I'm not
10 so sure that the Asiatic clam -- what did I say? Can we
11 take a look at that?

12 Q. Actually, I can read it to you if --

13 A. What page is it on?

14 Q. It is on page 13, and it's the second paragraph
15 below the title of that section. Or just above that.
16 It's the -- the sentence reads, "Higher nutrient levels
17 caused by CWF will also encourage growth of Asiatic clam
18 populations." Go up just above the second paragraph,
19 that last sentence of the first paragraph.

20 A. That, I'm not sure about in terms of the -- in
21 terms of the -- in terms of the nutrient levels for the
22 clam. Mr. Ringelberg did conclude that CWF would --
23 could exacerbate the clam problem. And the main point
24 of my testimony was that, well, we already do have a
25 clam problem there and they do cause flooding. That, I

1 know.

2 Q. Do you recall Mr. Ringelberg identifying any
3 specific temperatures or temperature range that would
4 promote Asiatic clams?

5 A. I do not.

6 Q. Since we've got your testimony open, if we
7 could scroll to page 12. And here, you contended that
8 higher levels of nutrients coming from the San Joaquin
9 that would not otherwise be diluted by the Sacramento
10 water that would be taken into the north -- North Delta
11 diversion would result in the development of toxic
12 blue-green algae.

13 A. So what I've observed is that we have an *Egeria*
14 *densa*, which is a water weed, and the State treats for
15 that intermittently. And when they don't treat for that
16 and the *Egeria densa* is there, it reduces the
17 circulation and we have a lower dissolved oxygen and a
18 higher nitrogen. And then we see -- I see that
19 blue-green algae then come in and come on top of the
20 *Egeria densa*. Those are my observations. And based on
21 that and then also on what the experts said,
22 Mr. Ringelberg and Mr. Burke, that the nutrient load
23 would -- the increased nutrient load would encourage the
24 growth of these invasive species, including the --
25 including the algae. But that's the way I've seen the

1 algae come about. It's connected to the other weeds.

2 Q. And -- and do you understand that certain
3 algae might respond to nitrogen and/or to nitrates and
4 others might respond to ammonia and so there are
5 different factors that would come into play?

6 A. Well, I don't -- I'm not in a position to
7 dispute that.

8 Q. Okay.

9 A. I'm not a chemist or a toxicologist. I do know
10 from common sense and from what I've observed is that if
11 we have less circulation and poor water quality, we are
12 going to get more weeds and that the algae comes with
13 the weeds. That's what I've seen. I don't know that I
14 can explain the chemistry to you.

15 Q. And by the same token, you don't understand the
16 chemistry or nutrient balance that's required for the
17 growth of microcystis, correct?

18 A. The microcystis, there was quite a bit about
19 that in the EIR. And I believe that the EIR -- I'd have
20 to go back and look at it. But I believe that it --
21 they were concerned that microcystis was going to be an
22 adverse effect. I believe I read that.

23 Q. Do you recall reading that the recirculated EIR
24 explains that the contributing factor is ammonia from
25 the Sacramento River?

1 A. I believe that it was tied to the restoration
2 projects, that that's where they thought -- I remember
3 that was a part of it. I do not recall reading the part
4 about the ammonia that you were referring to. I think
5 it was tied -- they felt that it might be a -- a
6 negative environmental impact that was actually tied to
7 and caused by part of the restoration project.

8 Q. What do you mean by "restoration projects"?

9 A. Well, originally in the BDCP there was all the
10 habitat restoration.

11 Q. Got it. So you don't recall that in -- in the
12 Water Quality Chapter 8, they discussed that it was
13 ammonia coming from the Sacramento River generally
14 associated with water treatment plant discharges?

15 A. No, I do not.

16 Q. Doesn't refresh your memory?

17 A. No.

18 Q. So you also contended that the WaterFix doesn't
19 propose additional flows into the Delta. But isn't it
20 true that under alternative 4AH4, spring outflow is
21 increased above D-1641?

22 A. Well, I believe I was quoting from the E -- EPA
23 letter there that said the WaterFix does not propose
24 additional flows. Is that where you're reading from?

25 Q. Yes.

1 A. So I was quoting the EPA's opinion on that.

2 Q. But that's not your opinion; is that right?

3 A. It is my opinion. I mean, I don't -- you're
4 talking about -- which one is -- Boundary 2 is the
5 one -- the high flow and Boundary 1 is low flow? Or is
6 it vice versa?

7 Q. Right. No. You're right.

8 A. So Boundary 2. In some cases at the Boundary
9 2, you know, there could be more flow. But that's not
10 what's going to happen, and that's not what is being
11 proposed. If we wanted to put some operating rules in
12 for those bypasses, then that claim might be credible.

13 Q. Well, did you understand -- strike that.

14 Are you aware that actual outflows actually
15 exceed regulatory requirements?

16 A. You mean currently today?

17 Q. Yes.

18 A. Well, I mean, at times they do. At times in
19 the drought, they don't. When you say we're meeting
20 regulatory requirements or exceeding regulatory
21 requirements, well, I'm not allowed to ask you
22 questions.

23 I don't know how you're counting -- how you're
24 counting TUCPs when those outflow requirements are
25 suspended. But there are times when during TUCPs and

1 other times the outflow is less than what it says in
2 D-1641. And there are times when it is much greater. I
3 mean, that DWR-411 that Mr. Leahigh used as an example
4 of when you could take a big gulp in the winter time, I
5 think you had outflow there of like 200,000 cubic feet
6 per second, which is, you know, wildly beyond what is
7 required.

8 Q. And one of the other documents that you relied
9 on in your testimony was the Independent Science Review.

10 A. For the Delta ISB, Independent Science Board?

11 Q. Exactly. The 2016 Independent Science Review,
12 do you recall you excerpted from that?

13 A. Well, are you speaking about the Aquatic
14 Science Peer Review or the Delta Independent? The Delta
15 Independent Science Board did a review of the EIRS.

16 Q. This is your Exhibit No. 1, I think, focused on
17 the BA.

18 A. I think that's the Aquatic Science Peer Review.

19 Q. So do you recall that?

20 A. I recall that document.

21 Q. Okay. So again, I was a little concerned, if
22 you will, about the excerpts that you -- that you made
23 from there because that same Panel that you excerpted
24 from to promote a general, "Hey, there is going to be
25 changes in the Delta as a result of the WaterFix," which

1 was a general observation that they made, you also,
2 though, didn't quote them on various things that they
3 were charged to look at, such as the models and the
4 analytic methods that were used and various assumptions
5 that were used in the BA and their findings that the
6 models were best available science and that the adaptive
7 management approach was the appropriate approach. And I
8 was a little concerned that you didn't cite those, and
9 I'm wondering why.

10 HEARING OFFICER DODUC: Ms. Meserve?

11 MS. MESERVE: Excuse me. I'm not hearing there
12 being questioning. What I'm hearing is testimony from
13 the cross-examiner, and I don't think that's
14 appropriate.

15 BY MR. BERLINER:

16 Q. I'm asking him why he didn't quote other
17 sections of the Panel's review --

18 A. Right.

19 Q. -- in an effort to represent what the Panel was
20 considering to the Board.

21 A. Right. So first of all, what I quoted was the
22 Panel saying repeatedly that there will be substantial
23 changes to Delta hydrodynamics. And this is more than a
24 little bit. This is a big change to the way water is
25 flowing in the Delta. And when I questioned Mr. Leahigh

1 on that, he was not willing to admit that, and that --
2 that troubles me deeply that he would be that dishonest.

3 I quoted them and excerpted from them
4 accurately. As far as the overall import of that
5 Aquatic Science Peer Review was that there were too many
6 unknowns and too much uncertainty and that regardless of
7 their specific comments about the modeling, that was not
8 enough to know that we could proceed with WaterFix
9 safely. And they said specifically that anything be
10 done, be done under the precautionary principle, which
11 is if you have any doubt about whether it's going to
12 cause environmental harm, then you don't do it. And
13 you're not following that. So you're not following the
14 Aquatic Science Peer Review.

15 Q. That's your understanding of what their
16 recommendation was?

17 A. That's what I read. They said that we should
18 proceed under the precautionary principle.

19 Q. Did you -- did you also recall reading that
20 they recommended that the adaptive management approach
21 was the appropriate approach?

22 A. Well, I think everybody agrees that adaptive
23 management is a good thing, but we don't have adaptive
24 management. We have a plan to someday develop an
25 adaptive management plan maybe.

1 They also said -- I believe it was them or the
2 Delta ISB -- that that adaptive management plan should
3 be complete and in place before the project is approved.
4 And that is not the direction you're proceeding in.

5 Q. Well, do you recall that the Panel recommended
6 proceeding with the biological opinion and that the
7 biological opinion adopted an adaptive management
8 approach?

9 A. Well, I don't recall specifically, but I
10 wouldn't -- that wouldn't surprise me. But there is
11 still no adaptive management plan, and you're years away
12 from having one. So you're not proceeding according to
13 that recommendation, and you're not proceeding according
14 to the precautionary principle that they said was
15 important because there's so much uncertainty.
16 Regardless of your modeling and what best available
17 science, there is an enormous amount of uncertainty
18 that's not being resolved.

19 Q. So it's your understanding that the Independent
20 Science Review said, "Do not proceed because of the
21 precautionary principle," right?

22 A. No. They didn't say that. They said you
23 should proceed using the precautionary principle.
24 And -- and I don't believe you're doing that. "You"
25 meaning DWR. I don't mean you personally. The

1 Petitioner.

2 Q. Yeah. I wasn't taking it personally.

3 A. Okay. And I don't think that has any bearing
4 on what I quoted them for. What I quoted them for and
5 my main point that I'm driving at over and over again is
6 that those North Delta diversions are going to cause a
7 different Delta because they're going to radically alter
8 flows. And there's no question that what I quoted them
9 for, unequivocally that's what they said. And if they
10 said other things in the document that you like that's
11 okay, too. But what I quoted them for absolutely
12 supports the point I was making. And the BA says that,
13 too, that it's going to radically alter Delta flows; but
14 your witness wouldn't admit that.

15 Q. All right. You and other members of the panel
16 testified that the -- the Petitioners hadn't produced a
17 source water analysis or a fingerprint analysis.

18 A. Well, I believe that came up on
19 cross-examination. I didn't testify to that.

20 Q. That wasn't part of your discussion?

21 A. No. I believe that came up in --

22 HEARING OFFICER DODUC: Mr. Jackson's
23 cross-examination of Mr. Burke. I was paying attention,
24 Mr. Jackson.

25 MR. JACKSON: That's all that counts.

1 BY MR. BERLINER:

2 Q. Are you aware that there was a fingerprint
3 analysis conducted?

4 A. Well, I know that there is -- somewhere I
5 recall seeing something on how the split was going to
6 go, how much through the Cross-Delta channel and how
7 much down the Sacramento River and how much Georgiana
8 Slough. I vaguely recall seeing an exhibit like that.
9 I'm not sure if that's what you're referring to, but
10 that's what I know about it.

11 Q. I'm actually specifically referring to
12 Appendix B for the supplemental modeling that was part
13 of the recirculated draft EIR.

14 A. I don't know. I haven't testified -- none of
15 my witnesses testified about anything to do with a
16 fingerprint analysis, not part of our case-in-chief.

17 Q. And you have no independent knowledge?

18 A. Of whether it was done or not?

19 Q. Other than what you just said.

20 A. No, I do not.

21 MR. BERLINER: If I could have just a minute to
22 check my notes. I don't have any further questions.

23 HEARING OFFICER DODUC: Any other
24 cross-examination of Mr. Brodsky? Going once, twice.
25 Ms. Meserve?

1 MR. BRODSKY: Did I affirm my testimony? I
2 affirmed my testimony, written testimony is true, if I
3 forgot to do that earlier.

4 MS. MESERVE: Good afternoon, Mr. Brodsky.
5 Osha Meserve for Land and the Protestants and others

6 MR. BRODSKY: Good afternoon, Ms. Meserve.

7 HEARING OFFICER DODUC: Your topic areas,
8 Ms. Meserve?

9 MS. MESERVE: Oh, I'm sorry. I just have,
10 like, two questions about the bypass flow.

11 HEARING OFFICER DODUC: Okay.

12 MS. MESERVE: It will be brief.

13 CROSS-EXAMINATION BY MS. MESERVE:

14 Q. You testified, Mr. Brodsky, that a 7,000 bypass
15 flow criteria should apply to the operational rules all
16 year; is that correct?

17 A. No.

18 Q. What did you testify?

19 A. I testified that during July through September,
20 the only required bypass is 5,000 and that's inadequate.
21 And that there should be protective bypass rules in
22 place during July through September. And I gave an
23 example of something like the December-through-April
24 Level 1 pumping as the kind of rule, but I didn't
25 suggest any specific numbers.

1 Q. If the bypass flow requirement was increased as
2 along the lines you've suggested, is it your testimony
3 that that would help prevent injury to Discovery Bay?

4 A. It would help prevent Discovery -- to prevent
5 injury to Discovery Bay and other users in the Central
6 and South Delta.

7 Q. Do you have any basis for it preventing all
8 injury to legal users of water?

9 A. I don't think that in itself would prevent --
10 come anywhere near preventing all injury to legal users
11 of water.

12 MS. MESERVE: That's all I have.

13 HEARING OFFICER DODUC: Mr. Brodsky, do you
14 wish to redirect yourself?

15 MR. BRODSKY: No.

16 HEARING OFFICER DODUC: I have been waiting all
17 day to say that.

18 MR. BRODSKY: No. I don't think I missed
19 anything.

20 HEARING OFFICER DODUC: All right. Thank you
21 very much. Then we will expect your list of exhibits
22 with corrections.

23 MR. BRODSKY: Okay.

24 HEARING OFFICER DODUC: By noon next Wednesday.

25 MR. BRODSKY: Okay. And then are we going to

1 do housekeeping now?

2 HEARING OFFICER DODUC: Yes. And now we're
3 going to talk about scheduling.

4 Mr. Jackson, you are up tomorrow. And I expect
5 we will -- there will be quite a bit of
6 cross-examination for CSPA.

7 MR. BERLINER: Yes.

8 HEARING OFFICER DODUC: How many hours do you
9 anticipate? Actually, Mr. Mizell or Mr. Berliner, come
10 up to the microphone because we're going to go through a
11 list of all the remaining parties.

12 MR. BERLINER: Remind me again how many
13 witnesses you had.

14 MR. JACKSON: Nine. I was planning on putting
15 them up as one panel, and you can have at them that way.

16 HEARING OFFICER DODUC: So, Mr. Jackson, you
17 are anticipating around two hours for your direct.

18 MR. JACKSON: Around two hours for -- I just
19 looked at my notes. I got them to promise to try to get
20 it done in 2 hours and 10 minutes with my 20 minute
21 opening statement.

22 HEARING OFFICER DODUC: Okay.

23 MR. JACKSON: That would be 2 hours and 30
24 minutes.

25 HEARING OFFICER DODUC: So we'll plan on

1 spending all morning for your direct. Then we'll start
2 with cross-examination by the Department of Water
3 Resources. How much time do you anticipate?

4 MR. BERLINER: If we could have maybe three
5 minutes to get an answer to the question.

6 HEARING OFFICER DODUC: Well, why don't we do
7 this? We will take a short 10-minute break because I
8 think we'll be wrapping up pretty soon. And I will ask
9 all of you to go down your list and give me estimates
10 for cross-examination and direct as appropriate for not
11 only CSPA, but also Restore the Delta, PCFFA,
12 Ms. De Jardins, North Delta C.A.R.E.S, Snug Harbor, I
13 think, and Clifton Court. So when we come back, let's
14 just sort of plan out the next two weeks. Thank you.
15 We will resume at 3:10.

16 (Off the record.)

17 HEARING OFFICER DODUC: All right. We are
18 going to start, like I said, tomorrow with Mr. Jackson
19 and his group. We will spend the morning with his
20 direct. So cross-examination of CSPA?

21 MR. MIZELL: For the moment, we're anticipating
22 for those nine witnesses, three to three-and-a-half
23 hours.

24 HEARING OFFICER DODUC: Three-and-a-half hours?

25 MR. MIZELL: At the maximum, yes.

1 HEARING OFFICER DODUC: Okay. Anyone else
2 anticipating cross-examination of Mr. Jackson's group?

3 MS. SHEEHAN: I am. Becky Sheehan for State
4 Water Contractors. We would like to reserve 30 minutes
5 for the group.

6 HEARING OFFICER DODUC: Anyone else?

7 MR. HERRICK: John Herrick, South Delta
8 parties. I would anticipate maybe 30 minutes, also.

9 HEARING OFFICER DODUC: All right.

10 MR. KEELING: Tom Keeling, the San Joaquin
11 County Protestants, no more than 15 minutes.

12 MR. WALTERS: Hans Peter Walters, San Luis &
13 Delta-Mendota Water Authority, 30 minutes. Hopefully,
14 we can reduce that. There should be some overlap with
15 some of the other parties.

16 HEARING OFFICER DODUC: Okay. Anyone else?
17 That takes us to four, five, roughly five-and-a-half,
18 six hours of cross-examination. So that means we will
19 take you over into Friday as well. And we will end
20 Friday with your -- conclusion of your case-in-chief,
21 Mr. Jackson.

22 MR. JACKSON: My witnesses are all here for
23 both Thursday and Friday, and that will not be a
24 problem.

25 HEARING OFFICER DODUC: Perfect. Then the

1 following week or next week, I guess starting on
2 Thursday the 8th, we will begin with Restore the Delta.
3 Restore the Delta has requested two-and-a-half hours of
4 direct. DWR, anticipated cross?

5 MR. MIZELL: We will anticipate about two hours
6 of cross-examination that day.

7 HEARING OFFICER DODUC: Okay. Anyone else for
8 cross of Restore the Delta?

9 MS. SHEEHAN: Hi. Becky Sheehan, State Water
10 Contractors. We would like to reserve 30 minutes.

11 MR. WALTERS: Hans Peter Walters, San Luis &
12 Delta-Mendota Water Authority, 15 minutes.

13 MR. HERRICK: John Herrick, South Delta
14 parties. Maybe 10 minutes. But I'd like to say that my
15 witness, my lone witness is available that date. And
16 if -- I haven't contacted Restore the Delta yet. But if
17 possible, I could put them on first that day, if that's
18 flexible. But I'll confirm that with Restore the Delta.

19 HEARING OFFICER DODUC: Okay.

20 MR. KEELING: John Keeling with San Joaquin
21 County Protestants. I have about 15 minutes for Restore
22 the Delta.

23 HEARING OFFICER DODUC: Okay.

24 MR. JACKSON: Michael Jackson for the CSPA
25 parties. To be safe, 40 minutes.

1 HEARING OFFICER DODUC: Okay.

2 MR. JACKSON: There is some meat there.

3 HEARING OFFICER DODUC: Ms. Meserve, you are
4 the last one I think.

5 MS. MESERVE: Hello. I'm thinking it is
6 probably like 15 minutes per party of the ones we have
7 discussed just in general. I don't have a lot of cross
8 in mind yet, but I will listen and update as needed.

9 HEARING OFFICER DODUC: All right. So that
10 should take Thursday and perhaps going into Friday, as
11 well. Mr. Jackson, were you able to get ahold of
12 Mr. Volker?

13 MR. JACKSON: Mr. Volker. They are moving
14 their office, and their phones are down. My
15 understanding is that he -- well, I guess we're pretty
16 much through the 8th -- that the 9th is the day that he
17 is in a previously scheduled Federal mediation in San
18 Diego and is available the next week.

19 HEARING OFFICER DODUC: All right. And
20 Ms. De Jardins had requested to -- well, she's part of
21 his -- his witness. But she, in her own right as a
22 party, has requested to go after PCFFA. Okay. And I
23 would assume that Group 39 and 41 would like to go on
24 the same day or close to each other so that they don't
25 get split up over the week -- the weekend, given their

1 travel commitments. So what I am thinking at this point
2 is we will just spend Thursday and Friday with Restore
3 the Delta. And then we will start the following Tuesday
4 with Ms. Womack, whom I promised to have her testimony
5 and case-in-chief. That would be on the 13th. All
6 right. And that should not take too long. Her
7 requested direct is 30 minutes.

8 What are the anticipated cross-examination for
9 Clifton Court, Inc.?

10 MR. MIZELL: For the Department of Water
11 Resources, we anticipate 15 at the very maximum,
12 depending upon what her oral testimony is, 30 minutes.
13 But really probably on the lower end of that.

14 HEARING OFFICER DODUC: Okay. Anyone else?

15 MS. SHEEHAN: Becky Sheehan with the State
16 Water Contractors. Possibly 5 or less.

17 HEARING OFFICER DODUC: Okay. And then we will
18 get to PCFFA.

19 MR. BRODSKY: On the 14th or --

20 HEARING OFFICER DODUC: No. That will be on
21 the 13th. I don't expect Clifton Court to take more
22 than two hour -- one hour at the most. So I will expect
23 Group 38 and 37, PCFFA and Ms. De Jardins to be ready on
24 the 13th, as well. They have requested about
25 two-and-a-half, two-and-a-quarter hours for direct.

1 What do you anticipate for cross, Mr. Mizell?

2 MR. MIZELL: For PCFFA, we anticipate 30
3 minutes. For Deirdre, in her second set of testimony,
4 depending upon its crossover, we would reserve another
5 30 minutes. But we will look for efficiencies.

6 HEARING OFFICER DODUC: Okay. Anyone else
7 participate in cross?

8 MS. SHEEHAN: Becky Sheehan with State Water
9 Contractors. It's really hard for us to say. I was
10 going to say 15 minutes for PCFFA and 15 minutes for
11 Deirdre but probably less, just doing the best I can as
12 far as estimating.

13 HEARING OFFICER DODUC: I am not going to hold
14 you rigidly to these estimates. I just want to get a
15 planning for planning purposes.

16 MR. WILLIAMS: Phillip Williams for Westlands.
17 We would like to reserve 30 minutes for PCFFA, but that
18 is subject to coordination with other Protestants.

19 HEARING OFFICER DODUC: Anyone else? You don't
20 have to, Mr. Jackson.

21 MR. JACKSON: Where are we in terms of -- I
22 have a vision of this finishing the first round by the
23 15th.

24 HEARING OFFICER DODUC: That is the plan.

25 MR. JACKSON: And so do I have enough time for

1 20 minutes?

2 HEARING OFFICER DODUC: 25?

3 MR. JACKSON: Yeah. As you're adding it up.

4 Actually, it was only 20 I asked for, but you were being
5 so generous that I took the 5. So are we still on that
6 schedule?

7 HEARING OFFICER DODUC: Yes. So I think,
8 again, on the 13th, we will start with Group No. 43,
9 Clifton Court. Then we will go to 38, PCFFA, and then
10 37, Ms. De Jardins. That will probably take us into the
11 13th and the 14th. Then we will get to Group 39 and 41,
12 which will be the 14th and 15th is my guess. And then I
13 will have to -- at this point, do you have any update
14 to -- that you can share with us regarding your
15 discussion with Brentwood and Antioch?

16 MR. MIZELL: I'm aware that the negotiations
17 are ongoing and that progress is being made, but the
18 specifics, I'm not at liberty to talk about.

19 HEARING OFFICER DODUC: Okay. Mr. Herrick, did
20 you have anything to add?

21 MR. HERRICK: Without getting ahead or
22 anything, isn't it the case that the Exchange
23 Contractors are trailing or is that up in the air or
24 cancelled?

25 HEARING OFFICER DODUC: They are at the end.

1 MR. HERRICK: Okay. Thank you.

2 MR. BRODSKY: So Groups 39 and 41, they asked
3 me to represent them on direct. And so you said that
4 that's going to be on the 14th would be --

5 HEARING OFFICER DODUC: My guess, it will be
6 the 14th, yes. I somehow don't think we will get to
7 them on the 13th because we have Ms. Womack as well
8 as -- oh, wait a minute. You were saying 39 and 40.
9 Okay. We will have Ms. Womack, 32 -- I'm sorry -- 38
10 and 37. So the earliest I expect we will get to 39 and
11 41 is the 14th is my guess right now. But all that
12 could change.

13 Mr. Williams?

14 MR. WILLIAMS: Regarding cross-examination
15 order for PCFFA, ma'am, if -- subject to the parties'
16 approval, I'd like to request the ability to go out of
17 order.

18 HEARING OFFICER DODUC: In what way,
19 Mr. Williams?

20 MR. WILLIAMS: Moving Westlands to the left in
21 front of other petitioners, subject to their approval.

22 HEARING OFFICER DODUC: Okay. All right. I
23 think we have a pretty good handle on at least the
24 remainder of the cases-in-chief. We still have some
25 outstanding questions with respect to Brentwood,

1 Antioch, and the San Joaquin River Exchange Contractors.
2 With the last one, I think the ball is in our court to
3 respond to a motion filed by the Department.

4 Any other housekeeping question?

5 MR. JACKSON: It is not a question. I have
6 always wanted to say this. So since we are breaking
7 earlier, CSPA has absolutely no objection to letting
8 Westlands going -- go early.

9 HEARING OFFICER DODUC: Well, I was going to
10 grant that anyway, but thank you for your blessings.
11 All right.

12 MR. BERLINER: That might be -- that might be a
13 first, Michael, that you agree with Westlands.

14 HEARING OFFICER DODUC: I don't know that. I
15 think you're still behind Mr. Brodsky and his comment
16 about the Board. I think that's my favorite quote from
17 today. I want that made into a T-shirt, I think.

18 All right. With that, then we will reconvene
19 at 9:00 o'clock tomorrow, and Mr. Jackson will present
20 his case to you. Thank you all.

21 (Whereupon, the hearing was closed at
22 3:19 p.m.)

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CERTIFICATE OF REPORTER

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I, Elizabeth A. Willis-Lewis, a Certified Shorthand Reporter, hereby certify that the foregoing proceedings were taken in shorthand by me at the time and place therein stated, and that the said proceedings were thereafter reduced to typewriting, by computer, under my direction and supervision;

I further certify that I am not of counsel or attorney for either or any of the parties to the said proceedings, nor in any way interested in the event of this cause, and that I am not related to any of the parties thereto.

DATED: December 7, 2016

ELIZABETH A. WILLIS-LEWIS, CCRR, RPR
Certified Shorthand Reporter
License No. 12155