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8	BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD				
9					
10	HEARING IN THE MATTER OF	CALIFORNIA DEPARTMENT OF			
11	CALIFORNIA DEPARTMENT OF WATER RESOURCES AND UNITED STATES	WATER RESOURCES' OBJECTIONS TO TESTIMONY AND EXHIBITS			
12	BUREAU OF RECLAMATION REQUEST FOR A CHANGE IN POINT OF	SUBMITTED BY PACIFIC COAST FEDERATION OF FISHERMANS			
13	DIVERSION FOR CALIFORNIA WATER FIX	ASSOCIATIONS, ET AL. (GROUP 38) AND MOTION TO STRIKE			
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INTRODUCTION

California Department of Water Resources ("DWR") submits the following objections to the written testimony and exhibits submitted by Pacific Coast Federation of Fishermen's Associations, et. al. ("PCFFA"), and concurrently moves to strike the same written testimony and exhibits.¹

PCFFA's testimony and exhibits consist of substantive written testimony from one witness, eighty-six (86) exhibits for which there is an additional authenticating witness offered, and an declaration from PCFFA's counsel. (PCFFA-81, PCFFA-82, and PCFFA-83.) The written testimony is from Deirdre Des Jardins, an environmental consultant, and consists of Ms. Des Jardins' opinions regarding future climate change in connection with DWR's modeling for the proposed changes. Her testimony is entirely removed from any alleged injury to water uses and removed from any alleged water right. PCFFA offers no testimony or evidence connecting Ms. Des Jardins' opinions to any alleged injury or water right. Instead, her testimony exists in a vacuum; her personal opinions regarding the adequacy of DWR's modeling. Such issues are irrelevant to and beyond the scope of this Part 1 proceeding, they are also beyond Ms. Des Jardins' expertise.

Where applicable, DWR cites to its concurrently-filed Objections to Protestants' Cases-In-Chief Collectively ("Master Objections"), which also provide a common Statement of Facts and Legal Standards for DWR's separate response to Protestants' cases-in-chief. The Master Objections are, therefore, incorporated by reference herein.

OBJECTIONS

A. Certain Exhibits Submitted By PCFFA et al. Lack Foundation, Are Not Information On Which A Responsible Person Can Rely, And Do Not Conform to the Board's Requirements For Exhibits.

PCFFA, et al., fails to provide an adequate foundation for four exhibits -

¹ DWR reserves the right to make additional evidentiary/procedural objections to evidence and exhibits submitted by Protestants in support of their cases-in-chief.

PCFFA-21, PCFFA-58, PCFFA-59, and PCFFA-61 – that PCFFA seeks to introduce into evidence. (See DWR's Master Objections.) Under Government Code § 11513(c), the Board has discretion to hear only evidence that is the sort of evidence on which responsible persons are accustomed to rely. These four exhibits are not self-authenticating and there is no testimony that lays the necessary foundation regarding the preparation or content of these documents. Responsible persons are not accustomed to relying on such unauthenticated documents.

PCFFA-21 is a multi-tab excel spreadsheet that is merely identified in the authenticating declaration of attorney Stephen Volker by its file name ("Trend_Report_110411_BDCP_NAA_V1"), as "the document[] [it] purport[s] to be." (PCFFA-84, pp. 1-2.) PCFFA offers no supporting witness to testify regarding the preparation of Exhibit PCFFA-21, nor the validity of the underlying data therein. Therefore, no foundation has been (or will be) laid to establish this exhibit as evidence on which a responsible person would rely.

PCFFA-58 and PCFFA-59 are handwritten documents, which the Declaration of Patricia Schifferle titles "Notes, Reclamation FOIA Response April 2016 Re: BDCP CWF" and "Notes, Reclamation FOIA Response April 2016 Re: BDCP CWF, part 2". (PCFFA-82, p.4.) There is no identification of the author, the date of preparation, nor testimony explaining the content of these handwritten documents provided. (*Id.*) As there is no testimony or other evidence indicating the nature or reliability of these documents, and as the documents do not self-identify themselves, no foundation has been (or will be) laid to establish these exhibits as evidence on which a responsible person would rely.

PCFFA-61 is another Excel spreadsheet identified merely by the title "USACE Response to Comments, July 2, 2013". (PCFFA-82, p. 4.) PCFFA provides no supporting testimony establishing the foundation for admission of this spreadsheet, much less the underlying data. Therefore, no foundation has been (or will be) laid to establish this exhibit as evidence on which a responsible person would rely.

B. Testimony of Deirdre Des Jardins (PCFFA-81).

Ms. Des Jardins offers a handful of "recommendations" to the Board regarding how global climate change should be better accounted for by DWR's modeling. Notably, Ms. Des Jardins' testimony merely recommends adjustments she thinks will improve DWR's modeling in connection with the WaterFix, she does not reject DWR's modeling entirely. However, her "recommendations" are not connected to any alleged injury or water right, or even any water use, the absence of which renders the opinions irrelevant to Part 1. Ms. Des Jardins' recommendations also are not the type of information on which a responsible person would rely in connection with Part 1 (i.e., determining the effects of the Petition (proposed points of diversion) on human uses of water, including associated legal users of water), and are not offered by a witness qualified to provide such expert testimony.

1. Ms. Des Jardins' Testimony Is Not Tied to Any Alleged Injury Or Water Right And Therefore Is Not Relevant to Part 1.

The scope of Part 1 was expressly defined in the October 30, 2015 Notice of Petition to address issues of whether the proposed points of diversion will "in effect initiate a new water right," "cause injury to any municipal, industrial or agricultural uses of water, including associated users of water," including whether the changes will "alter water flows in a manner that causes injury" or "alter water quality in a manner that causes injury," and if the proposed changes *will cause injury*, what conditions should the Board including in any approval to avoid injury. (October 30, 2016 Notice of Hearing, p. 11; see also DWR's Master Objections.)

Ms. Des Jardins' testimony provides absolutely no factual evidence or opinion testimony stating whether the proposed points of diversion will create a new water right or cause injury to anyone. Nor does PCFFA seek to introduce any evidence or testimony that applies Ms. Des Jardins' testimony to show an alleged injury or water right in its case in chief. (See PCFFA-82 [testimony of Patricia Schifferle] and PCFFA-83 [testimony of Stephan C. Volker].) The recommendations of Ms. Des Jardins stand alone in a

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vacuum as PCFFA's sole substantive witness.

Her testimony is merely an academic exercise, cherry-picking select aspects of how she believes DWR and the U.S. Bureau of Reclamation can improve their incorporation of climate change into the modeling for the proposed diversion sites. (See e.g., PCFFA-82, p. 17-18 [summarizing her conclusions].) For example, she recommends that "[t]he Board should require DWR to submit modelled operations using the Q2 drier, warmer scenario . . ." but points to no injury or even effects from the petitioned proposed points of diversion that would be shown with the requested Q2 scenario. (PCFFA-81, pp. 3:9-5:10, 17:17-18.) Ms. Des Jardins' testimony does not claim failure to apply the Q2 scenario will have any cognizable impact on PCFFA, for whom her testimony was purportedly submitted, or anyone else. The same is true for each of Ms. Des Jardins' other recommendations: that DWR should submit models using an 18-inch scenario for sea level rise, in addition to its existing 6-inch scenario (PCFFA-81, pp. 5:12-9:16, 17:24-18:6); that DWR submit a sensitivity analysis at 1.4 meter sea level rise (*ibid.*); that DWR should produce more historical data regarding water supply and water quality (PCFFA-81, pp. 13:26-15:6, 18:7-9); and, that DWR should produce further calibrating reports for the CALSIM model. (PCFFA-81, pp. 15:8-17:7, 18:10-16.)

Tellingly, the written "Part 1 Opening Statement" submitted by counsel for PCFFA, also does not reference Ms. Des Jardins' testimony in support of any alleged injury or new water right. (PCFFA—83, p. 27). Because PCFFA fails to tie Ms. Des Jardins testimony to any alleged injury to human uses of water, Ms. Des Jardins' academic

² PCFFA's Opening Statement includes argument that DWR's experts' testimony fails to meet the standards required under *People v. Kelly* (1976) 17 Cal.3d 24, 30, and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014. (PCFFA-83, pp. 25-27.) The *Kelly/Frye* line of cases does not apply to administrative proceedings before the Board, as the Board is not concerned with the risk that a lay-jury will be unduly prejudiced by the misleading aura of certainty which often envelops a new scientific process, obscuring experimental nature. (C.f., *People v. Mitchell* (2003) 110 Cal.App.4th 772, 783 ["*Kelly* analysis is limited to situations where it will 'forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate."] [internal citations omitted].)

recommendations are outside the scope of Part 1, and are therefore objectionable and the testimony and corresponding exhibits should be stricken.

2. Ms. Des Jardins Is Not Qualified To Testify Regarding the Effects On Water Flow or Water Quality Due to Global Climate Change, Or Otherwise.

The Board is not constrained by Evidence Code § 720 to admit expert testimony; however, Government Code § 11513(c) does require that evidence be admitted only if "it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Additionally, under Evidence Code § 801, the Board may exclude the opinion of a witness who lacks *relevant* special knowledge, skill, experience, training and education on which to form his or her opinion regarding matters known to or made known to him or her. (Evidence Code § 801(b).)

Ms. Des Jardins is an environmental consultant working on behalf of environmental advocacy groups; however, by her own testimony she has no academic or professional training in the fields of hydrology, engineering, atmospheric science, or the management of large-scale water systems. (PCFFA-81, p. 1:18-2:25; see also PCFFA-75, pp. 1-2, 5 [statement of qualifications for Ms. Des Jardins].) She received a bachelor's degree in applied mathematics from the University of California, Santa Cruz in 1992, and started but did not complete a doctorate program in Computer Science at the University of California, Santa Cruz. (PCFFA-81, p. 2.) Her testimony emphasizes her work on modeling at the Los Alamos National Laboratory, though that work was done as an undergraduate more than 25 years ago. (PCFFA-75, p. 2.)

Significantly, Ms. De Jardins does not claim to have any education or experience with the development of global climate change models or application of such models to particular locations or contexts. Ms. Des Jardins also does not claim to have <u>any</u> training or experience in using the two modeling systems at issue – CALSIM II and DSM2 – nor any experience in developing hydrologic-models. (PCFFA-75, pp. 1-5.) Her statement of qualifications do not indicate that she has ever attended any training classes for either model or attended any modeling forums or the DSM2 User Group meetings.

In her testimony, Ms. Des Jardins does not claim the modeling methodology applied by DWR is wrong or flawed, she merely opines that DWR should apply more conservative figures in accounting for global climate change. (See e.g., PCFFA-81, pp. 4:16-23, 5:12-16, 9:10-16.) However, she lacks any expertise, through training or experience, in applying global studies on climate change to a specific water project like the SWP or CVP to provide such expert opinion testimony.

Further, given her lack of experience in developing hydrologic models, and lack of training on the CALSIM II and DSM2 models, Ms. Des Jardins' opinions regarding the adequacy of those hydrologic models is not "the sort of evidence on which responsible persons are accustomed to rely in . . . conduct[ing] . . . serious affairs." (Gov. Code § 11513(c).) As she is not qualified as an expert on the CALSIM II or DSM2 models, her factual testimony that the CALSIM II and DSM2 models have not been validated is merely cumulative and unduly consumes the Board's time. The facts regarding CALSIM II's and DSM2's validation do not require Ms. Des Jardins' factual testimony, which she offers by merely citing others' work discussing the validation of those models. (PCFFA-81, p. 15:8-16:3.)

Ms. Des Jardins presents no expertise or familiarity with the specific models about which she testifies, and she has no evidenced experience or training in applying global climate change forecasts or models to hydrologic models for water projects such as the CVP or SWP. Her expert opinion testimony should be excluded, with the corresponding exhibits.

3. Ms. Des Jardins' Testimony Regarding Rising Sea Levels Lacks Foundation and Is Unreliable.

As a foundation to Ms. Des Jardins' testimony, she claims that DWR has not sufficiently accounted for sea level rise forecasts set forth by various bodies and studies. She claims that the Independent Science Board ("ISB") cautioned "in their 2007 guidance that ice sheet melting could result in as much as 2 meters of sea level rise by

2030." (PCFFA-81, p. 5:20-22.) In support, she cites page 5 of Exhibit PCFFA-8, and states that the cited text "cautions of an additional meter of sea level rise from ice sheet melting." (*Id.*) Ms. Des Jardins' claims are wrong, and she inaccurately describes the ISB's findings.

The ISB's 2007 memo states that "instability of ice sheets will likely contribute significantly to future sea level rise, with the potential for very rapid increases up to a meter (39.4) **by 2100** from ice sheets alone." (PCFFA-8, p. 5 [emphasis added].)

Nowhere in the ISB memo does the ISB suggest that sea levels will rise by 2 meters, let alone 2 meters **by 2030**, as Ms. Des Jardin claims. (*Id.*) At most, the ISB memo cautions that a base sea level rise may be over a meter (100 cm, or 39 in.) "this century," and that by 2100 (the end of this century) ice sheet melting may produce a meter of sea level rise. (PCFFA-8, p. 5-6.)

Ms. Des Jardins' erroneous claim that "ice sheet melting" will produce two meters of sea level rise "by 2030" is entirely unsupported, and is not testimony on which responsible persons can rely. This errant and unreliable testimony is objected to, warrants exclusion, and should be stricken, together with the corresponding exhibits.

4. The Board Should Exclude Ms. Des Jardins' Testimony Under Government Code Section 11513(f), as the Testimony Will Unduly Consume the Board's Time.

It is within the discretion of the Hearing Officers to exclude testimony whose "probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." (Gov. Code § 11513(f).) As Ms. Des Jardins' academic opinions about future climate change are unconnected to any alleged injury or water right and thus irrelevant to Part 1, her opinions are also not probative to the Board's determinations and will unduly consume the Board's time. (See PCFFA-82, p. 9-13 [regarding DWR's ensemble of 112 models].) This is especially so because Ms. Des Jardins' opinions are based on complex data sets, modeling structures, and scientific studies that, when explained even to the experienced Board, will unduly occupy the Board's time. In essence, Ms. Des Jardins' testimony seeks to require the DWR to

restate the justifications for its multiple, different modeling processes to the Board, simply because she recommends adjustments to (not rejection of) those models without any showing of actual need.

Because Ms. Des Jardins testimony is not in support of an allegation by PCFFA of injury to human uses of water, entertaining such academic discussions unduly consumes the Board's time, especially in this Part 1 proceeding. Her testimony should not be admitted, and should be stricken.

5. Ms. Des Jardins' Testimony Incorporates Separate Testimony that Is Objectionable And Beyond the Scope of PCFFA's Notice of Intent.

At the conclusion of her written testimony on behalf of PCFFA, Ms. Des Jardins incorporates "by reference" the written testimony she submitted, as a party herself, for her own case in chief. (PCFFA-81, p. 17:4-7.) DWR is separately filing objections to Ms. Des Jardins' testimony in her own case in chief, and those objections are incorporated by reference herein.

Further, Ms. Des Jardins' testimony in her own case in chief focuses on the modeling testimony provided by DWR experts. To the extent such testimony is outside the scope of her Noticed testimony for PCFFA, which was noticed as: "[w]ater availability & permits, climate change, modelling of SWP & CVP operations and modelling limitations," it must be excluded and stricken.

C. Having Failed to Present Written Testimony In Advance, Attorney Stephan C. Volker's Request For One Hour of Testimony Is Objectionable And Should Be Denied.

The Board's October 30, 2015 Notice of Petition made expressly clear that "[e]ach party proposing to present testimony on factual or other evidentiary matters at the hearing **shall** submit such testimony in writing." (Notice of Petition of Oct. 30, 2015, p. 33 [emphasis added].) The only potential exception to this requirement is a witness adverse to a party, willing to testify only in response to subpoena or alternative arrangement. (*Id.* at n. 16.)

California WaterFix hearing California Department of Water Resources and U.S. Bureau of Reclamation

The Public Hearing will commence on

Thursday, October 20, 2016

PARTICIPANT: PCFFA et al.

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Table: Objections to PCFFA et al. Exhibits and Testimony **Exhibit Description** Objections September 6, 2007 Letter from Mike PCFFA-8 Healey to John Kirlin Re: Projections of Sea Level Rise for the Delta Lacks Foundation and Relevance May 15, 2014 Letter from Delta Independent Science Board to Randy PCFFA-9 Fiorini Re: Review of the Draft EIR/EIS for the Bay Delta Conservation Plan Lacks Foundation and Relevance National Oceanic and Atmospheric PCFFA-Administration Technical Report: Global 10 Sea Level Rise Scenarios for the United States National Climate Assessment Lacks Foundation and Relevance Michael Anderson 2009 Presentation, PCFFA-Future California Droughts in a Climate 14 Change World Lacks Foundation and Relevance A Strategic Review of CalSim II and its Use for Water Planning, Management, PCFFAand Operations in Central California (2003) 20 Peer Review) Lacks Foundation and Relevance PCFFA-Lacks Foundation, Indicia of Reliability Trend Report 110411 BDCP NAA V1 21 and Relevance PCFFA-Notes, Reclamation FOIA Response April Lacks Foundation, Indicia of Reliability 2016 Re: BDCP CWF 58 and Relevance PCFFA-Notes, Reclamation FOIA Response April Lacks Foundation, Indicia of Reliability 59 2016 Re: BDCP CWF, part 2 and Relevance PCFFA-USACE Response to Comments, July 2, Lacks Foundation, Indicia of Reliability 2013 61 and Relevance March 2013, Revised Administrative Draft, PCFFA-Bay Delta Conservation Plan, Appendix 62 2.C. Climate Change Implications and **Assumptions** Lacks Foundation and Relevance Sutterley, T. C., I. Velicogna, E. Rignot, J. Mouginot, T. Flament, M. R. van den Broeke, J. M. van Wessem, and C. H. PCFFA-Reijmer, Mass loss of the Amundsen Sea 63 Embayment of West Antarctica from four independent techniques, 41 Geophys. Res. Lett. 8421-8428 Lacks Foundation and Relevance United States Army Corps of Engineers, PCFFAtable of regionally corrected sea level rise estimates for Port Chicago. August 16, 64

Lacks Foundation and Relevance

ET. AL. CASE IN CHIEF - PART 1B

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