



July 11, 2016

CWFhearing@waterboards.ca.gov (via email)

Hearing Chair Tam Doduc
Hearing Officer Felicia Marcus
State Water Resources Control Board

Re: Hearing in the Matter of California Department of Water Resources and United States Bureau of Reclamation Request For A Change In Point Of Diversion For California WaterFix: Objections of the California Sportfishing Protection Alliance, California Water Impact Network and AquAlliance to Written Testimony and Exhibits Submitted by Petitioners; Joinder in Written Objections Submitted By Other Protestants

Dear Hearing Chair Doduc and Hearing Officer Marcus:

I. INTRODUCTION

The California Sportfishing Protection Alliance, the California Water Impact Network, and AquAlliance (hereinafter CSPA), object to all of the written testimony and exhibits submitted by the California Department of Water Resources and the United States Bureau of Reclamation (hereinafter DWR) in the matter of the California Water Fix petition for change in the point of diversion for DWR's proposed project in the San Francisco Bay/Delta. The testimony and exhibits do not contain sufficient evidence to support the conclusion of "no legal injury" to other water users in the Delta and specifically do not support a conclusion of no injury to the riparian rights of CSPA's riparian property located in Collinsville, California. DWR's testimony does not provide evidence that meets the requirements of the California Evidence Code, the California Code of Civil Procedure, or the California Code of Regulation Title 23, which governs this hearing.

In order to reduce repetition of arguments for this complicated hearing, CSPA hereby join in, adopt and incorporate by reference the motions to disqualify Petitioners' witnesses, motions to exclude Petitioners' witnesses' testimony, in whole or in part, and objections to Petitioners' witnesses' written testimony and exhibits, submitted by in the arguments and legal positions of the Central Delta and South Delta Water Agencies, the Sacramento Valley Water Users, the County of San Joaquin, the Pacific Coast Federation of Fishermen's Association, Restore the Delta, Save the California Delta Alliance, Local Agencies of the North Delta and the environmental coalition that includes Friends of the River, Sierra Club, Planning and Conservation League and Environmental Water Caucus.

The Petition should be dismissed for failure to supply information necessary to justify a decision to allow a change in point of diversion for the California WaterFix.

II. BACKGROUND

The State Board has previously ruled that all “exhibits based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models.” [Notice of Petition, at p. 33.] Further, in the Feb. 11 Ruling, at page 7, the State Board directed the DWR parties to provide the information required by California Code of Regulations, title 23, section 794(a). The DWR parties have failed to do so as is admitted by them in their proffered testimony (DWR 51 at p. 10:8-10.)

The petitioners admit that they presently “do not know the initial operation criteria” for their proposed project. Until they do, no one can know the effect of the new point of diversion on any projected changes in water quantity, water quality, timing of diversion and use, consumptive use of the water, reduction in return flows, or reduction in the flow past CSPA’s riparian property located in Collinsville. This location is below the new point of diversion for the new state diversions.

III. GENERAL PROCEDURAL OBJECTIONS

We reassert CSPA’s procedural objections that the hearing should not proceed until a final EIR/EIS has been issued and parties have had the opportunity to review and comment on the final EIR/EIS and until the State Water Board has completed its review and update of the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. Without the essential information from a final EIR/EIS, detailed information regarding operational criteria and the Bay-Delta Plan Update, the current proceeding unfairly and illegally shifts the burden of establishing injury from petitioners to protestants, while depriving protestants of critical information necessary to affirmatively establish injury.

It is petitioners that have the burden or proof to establish affirmative evidence of no injury. Petitioners included no information in their case in chief regarding specific impacts and/or injuries to water rights or harm to legal users of water and make only generalized unsubstantiated claims that any changes would not result in injury. Yet the State Water Board has essentially placed the burden on protestants to demonstrate injury without requiring petitioners to provide crucial information on how the projects will be operated. The Delta is already identified as “impaired” and incapable of supporting beneficial uses and its fisheries have collapsed to the point of likely extinction. Mere Compliance with water quality and flow standards that the State Water Board has already declared are inadequate and non-protective cannot establish a lack of injury to existing users of water. Yet petitioners have refused to identify specific operational criteria or address how project operations will prevent injury to existing water users. The thrust of their conceptual and speculative testimony and exhibits is that somehow they will comply with the existing inadequate standards. Switching the burden of proof from petitioners to protestants deprives protestants of due process rights.

IV. ARGUMENT

Administrative hearings are governed by the Water Code [Water Code §1075 et seq.] and SWRCB regulations [Cal. Code Reg., Title 23, sections 648 et seq., Evidence Code sections 801-805, and the Government Code]. Government Code §11513 identifies relevant evidence as “the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.” [Gov. Code §11513(c).] Both the petition and the proffered evidence filed in this matter fail to reach that legal standard for admissibility and the proposed evidence must be excluded.

CSPA objects to all testimony filed by DWR and the Bureau in this matter for the same reasons that the State Board rejected the prosecution's testimony in the Byron-Bethany Irrigation District case (BBID ruling). Here, the testimony of Armin Munévar (DWR-71) based upon DWR-514 fails to provide a legal foundation for his testimony for the reasons stated by the Sacramento Valley Water Users at pp. 4 and 5 of their objection, which is hereby incorporated by reference herein. As alleged in objection by SVWU, “Several of the Petitioners' key witnesses rely on the modeling testimony to support their opinions, particularly in opining that the project will not injure other legal users of water.” Those witnesses include DWR witnesses Jennifer Pierre, Maureen Sergent, Ray Sahlberg, and Ron Milligan. Their testimony as to effects on other legal users of water, including riparian water rights holders downstream of the new point of diversion such as CSPA, should be stricken from the record for failing to provide adequate foundation for any of the opinions about harm to other water users.

A. The proponents have not described the reservoir operations or the operating rules that their modeling simulates. Therefore, any claims in testimony about reservoir operations and their effect on other users of water lack foundation, and any opinions and conclusions based on modeling that claims to demonstrate the absence of effect, must be excluded.

DWR-3 states at Slide 8: “CWF does not change upstream operational criteria.” It is well established that it is not adequate to say that reservoir operations will not change without describing both the baseline operations and the proposed operations (County of Amador v. El Dorado County Water Agency 76 Cal.App. 4th 931).¹ Under CEQA, one cannot present the results without these descriptions. (*Ibid.*) At the pre-hearing conference, DWR and the Bureau appeared to suggest that they would reveal operations during their testimony, but they have not done so. Thus the project description and description of baseline conditions are deficient both under CEQA and for purposes in this hearing of determining effects to other users of water. The constantly shifting description of the project operation in the environmental documents (BDCP/WaterFix) for the tunnel project does not allow a sufficient analysis of potential alternatives, true impacts, and potential mitigation measures to determine whether any legal user

¹ “To properly analyze the environmental impacts of the proposed project, [defendants] must specify a specific water release schedule and operations plan for wet, dry and normal years. This schedule and operations plan must demonstrate the timing, location, and amount of water releases from the upper watershed lakes, and the resulting lake levels ...”

of water in the Central Valley would suffer legal injury from the proposed change in point of diversion.

Modeling simulations are only meaningful if they simulate actual operations; asserting that operations will follow model output without describing the underlying operations misuses the model. As stated by Armin Munévar,

The rule curve allows CalSim II to emulate judgment of the operators in balancing the north-of-Delta and south-of-Delta storage conditions. The rule curve could differ depending on the available SWP/CVP Delta diversion capacity during winter and spring months and the need to protect upstream carryover storage in the fall months. In the absence of any other operating criteria controlling the upstream reservoir releases or the Delta SWP/CVP diversions, different rule curves can result in differences in upstream reservoir release patterns and SWP/CVP Delta diversions. DWR-71, pp. 12:7-14.

Mr. Munévar thus appears to impeach his own testimony. A rule curve in a model provides no protections or assurances for other users of water. Even if one were to accept proponents' claims that CalSim II is appropriately used in comparative mode rather than absolute mode, there is no basis of comparison in reservoir operations in the model output presented because these operations are not described or defined.

B. DWR and the Bureau have not established foundation that the four modeled alternatives they present bracket the range of reservoir operations that may take place if the change in point of diversion is granted. Testimony based on this “boundary” modeling, and in particular the conclusion of Jennifer Pierre at p. 10:8-14 (exhibit DWR-51), must be excluded.

DWR and the Bureau's effort to use a “boundary analysis” as a workaround to defining project operations fails. DWR and the Bureau have established no basis for which permit conditions or other regulatory constraints would place operations within the “boundary conditions” that they have modeled. Though these modeled “boundary conditions” are new and were not previously analyzed under CEQA or NEPA, protestants have argued the even greater restrictions on exports would be needed to protect public trust resources than Boundary Condition 2, and that there are no proposed or evident constraints that would limit exports to Boundary Condition 1. In addition, the four alternatives have little apparent difference in end of year reservoir levels except for Oroville, and as noted above, the modeling provides no description or basis for why Oroville might be different.

DWR and the Bureau admit that under drought conditions, the reliability of model output is even more greatly diminished. Armin Munévar states in his testimony that operations including reservoir operations under drought conditions is not accurately reflected in modeling and would likely be different than what CalSim II shows: “When system wide storage levels are at or near dead pool, also described as stressed water supply conditions, the CalSim II model results should only be an indicator of stressed water supply conditions and should not necessarily be understood to reflect actually what would occur in the future under a given scenario.” DWR-

71, p. 12:15-19. Yet it is precisely under drought conditions that project operations are likely to have the greatest effects on other users of water.

Indeed, the only defining rule DWR and the Bureau present about reservoir operations is that the projects have discretion to operate the reservoirs as they see fit provided flow and regulatory requirements are met. For instance, DWR-3 at Slide 11 states: "DWR has sole discretion over Lake Oroville operations." The testimony of Armin Munévar, DWR-71, p. 19:6-9 states: "Under real-time operations, operators have greater flexibility than that included in the modeling. As such, the appropriate use of the modeling is to compare storage volume outcomes across the scenarios." There is nothing in the record to show that project operators cannot or will not exercise their discretion to decrease carryover storage at any time. On the contrary, DWR-4 states at slide 34 that the projects will "Increase opportunity to use existing water rights" including "Re-diversion of stored water during Balanced Conditions." DWR does not identify the source of the re-diverted stored water or the operations that would allow such "increase[d] opportunity" without reducing carryover storage in project reservoirs

C. The conclusion of Maureen Sergent (DWR-53, p. 11:10-13) is technically as well as legally deficient and must be excluded.

The Sacramento Valley Water Users describe the legal impropriety of an expert stating a legal conclusion under the guise of offering expert opinion. This is generally true of the testimony of Maureen Sergent. DWR-53, pp. 10-15. These are legal arguments appropriately made by counsel in opening or closing.

Though not cited by SVWU, Maureen Sergent's testimony (DWR-53) at p. 11:10-13 surely falls within this category: "Although there may be changes in SWP/CVP storage levels or releases (see Exhibit DWR-71, section V.C.), this would not injure other legal users because it is my understanding that such water users do not have a right to stored water releases from the SWP/CVP." However, it is also important to observe that this conclusion also lacks technical foundation that is fundamental to determining effects on legal users of water. The potential source of injury is not the loss by other users of water of ability to divert water stored by the projects to which other users of water have no right. Rather, the potential injury is in the availability of project stored water to meet other beneficial uses such as temperature and salinity control, which in turn makes less water available for all beneficial uses, including use by other users of water, particularly in subsequent years.

D. Testimony of Maureen Sergent (DWR-53 at p. 6:19-21 and p. 6:25-7:24) omits key legal facts and should be supplemented by those facts or else excluded.

Testimony of Maureen Sergent (DWR-53, p. 6:19-21 regarding DWR's 2009 petition for extension of time omits two pieces of vital information: first, that the Board never acted on that petition and, second, that petition request was only for five years (which have now passed). Both under the permit as it existed in 2009 and even under an assumed extension as requested in 2009, the permitted time period to put water to beneficial use has expired.

The testimony of Maureen Sergent at p. 6:25-7:24 regarding North Delta point of diversion authorized in D-1275 is not on point because 1) again, the permits have expired, and; 2) the point of diversion in D-1275 is different than the proposed points of diversion under WaterFix.

E. Certain testimony of Jennifer Pierre relating to collaborative science and adaptive management is inadmissible and must be excluded. There is no foundation offered upon which these opinions and conclusions regarding potential harm to existing legal users of water and future operations can be based because they are predicated upon speculation, conceptual frameworks, incomplete draft documents and uncertain future decision-making.

For example, Ms. Pierre's testimony states:

"I will also introduce real time operations (RTO) that are discussed in Mr. Leahigh's testimony; and discuss how following issuance of the amendments to the permits authorizing the change in point of diversion, the process adaptive management will be used to adjust operations in light of new science. DWR-51, p. 2:17-20.

"As such, DWR and Reclamation propose the CWF, with the fundamental purpose to make physical and operational improvements to the system that are necessary, as described in the EIR/EIS, to restore and protect ecosystem health, water supplies of the SWP and CVP south of the Delta, and water quality within a stable regulatory framework, consistent with statutory and contractual obligations." DWR-51, p. 5:19-23.

"Among the key changes made in 2015 are... (vi) incorporation of the decision tree concept in an adaptive management program;" DWR-51, p. 8:3-4.

"These criteria may change based on adaptive management." DWR-51, p. 10:7-8.

"The boundaries described in my testimony analyze possible adjustments that may be made to initial CWF operational criteria through the adaptive management framework. Each boundary is described below." DWR-51, p. 12:14-16.

"CWF proposes a robust program for collaborative science and adaptive management. (Exhibit SWRCB-3, pp. ES 37-39; SWRCB-5, Chapter 3.) The program anticipates coordination among DWR, Reclamation, USFWS, NMFS, DFW, as well as the State Water Board and public water agencies, as appropriate."

"Specifically, collaborative science and adaptive management will, as appropriate, develop and use new information and insight gained during the course of construction and operation of the CWF, and to inform and improve the following aspects of the program. Collaborative science and adaptive management will focus on:... Operation of SWP/CVP facilities within the Delta... Design of fish facilities, including the intake fish screens; and Habitat restoration and non-operational mitigation relative to in-Delta SWP/CVP operations..." DWR-51, p. 15:7-19.

The collaborative science and adaptive management process will also inform the design and construction of the fish screens on the new intakes.” DWR-51, p. 16:23-24.

The specific discussion on adaptive management and collaborative science begins at DWR-51, p. 14:21-27 and continues through p. 15:1-27 and p 16:1-28 to p. 17:1-3 and pages 14-17 are inadmissible and must be excluded because they are speculative. For example, as the design and engineering of the north Delta fish screens is far from complete and screens of this magnitude and type have never been constructed, there is no information on which to base any conclusion that they are feasible or will be protective.

DWR-117, titled *DRAFT Adaptive Management Framework for the California Water Fix (CWF) and BiOps (5-26-16)*, *Adaptive Management Framework for the California Water Fix (CWF) and 2008/2009 Biological Opinions on the combined operations of the Central Valley Project (CVP) and State Water Project (SWP)* is also inadmissible and must be excluded. This is a draft incomplete conceptual and speculative document regarding potential future decision-making by a number of agencies that are not petitioners in the WaterFix proceeding.

F. Certain testimony of John Leahigh, DWR-61, relating to the SWP/CVP record of compliance with water quality control plan objectives, collaborative science and adaptive management is inadmissible and must be excluded. There is no foundation offered upon which these opinions and conclusions regarding potential harm to existing legal users of water and future operations can be based because they are predicated upon speculation, erroneous legal assumptions and conclusions, draft documents and future decision-making.

For example, John Leahigh assumes that compliance with water quality objectives has relevance with respect to causing harm to existing senior users of water, that historical compliance predicts certainty regarding future operational compliance in a rapidly changing climate and that future decision-making guarantees a lack of harm to existing users of water.

Significant degradation and harm may occur even if water quality standards are met. As then State Water Board Division of Water Rights Chief Victoria Whitney communicated to DWR and Contra Costa Water District in 19 March 2004 regarding the Joint Point of Diversion, “Significant degradation may occur in the absence of violations of water quality objectives in cases where the degradation impairs a senior water right of water of a usable quality.” This was reiterated in Chief Whitney’s 28 July 2004 letter to DWR: “As I stated in my letter of March 19, 2004, significant degradation of water quality may occur in the absence of violation of water quality objectives in cases where the degradation impairs a senior water right of water of a usable quality. CCWD claims that any degradation in water quality impairs its ability to divert and use water under its water rights.” In so far as Mr. Leahigh’s testimony on pages 8 through 15 regarding the record of compliance with water quality standards is intended to address lack of harm to beneficial users or those who hold senior water rights, it should be excluded. **Section 1701.3 of the California Water Code is clear: the requirement is No Injury, not substantial Injury but, explicitly, No Injury.** The courts have interpreted the No-Injury requirement as no harm to any diverter, senior or junior.

For example, John Leahigh testifies:

“My testimony is submitted to explain the current operations of the SWP and CVP (collectively, SWP/CVP), the highly successful record of compliance with water quality standards in the Bay-Delta, and the anticipated manner of SWP/CVP operations following construction of the California WaterFix (CWF) to continue meeting current and any future standards applicable to the SWP/CVP.” DWR-61, p. 2:15-19.

“SWP/CVP operators have had a high degree of success in meeting all operative water quality standards since 1978. My opinion is that regulatory compliance with the CWF will be at least as good, if not better, as today given that CWF will add infrastructure flexibility to system operations. Even though rare instances of water quality exceedances have occurred, these instances have been due to factors beyond the SWP/CVP's reasonable control. DWR-61, pp. 7:23-27, 8:1-2.

To the extent that recent drought conditions suggest future SWP/CVP operations may require relaxing water quality standards to avoid exceedances, my testimony shows that historical hydrology over the last several drought years are truly unprecedented. Such extraordinary circumstances are best managed in the context of temporary adjustments as occurred pursuant to the Water Board's authority, as delegated to the Executive Director, to approve temporary urgency change petitions (TUCPs). DWR-61, p. 8:3-8.

“As discussed more completely in the modeling testimony, modeling simulations of compliance at these same key locations show exceedance rates to be higher than the historical record. The record of actual operations demonstrates that the SWP/CVP are able to respond to real-time conditions in a way that simulation models are unable to completely emulate.” DWR-61, p. 10:4-8.

“Based on my knowledge and experience it is my opinion that the SWP/CVP will continue to meet existing Delta water quality and fishery objectives and any additional regulatory requirements for the CWF at a similar success rate as demonstrated historically. Increased diversion flexibility afforded through the approval of the CWF would only enhance the capabilities of SWP/CVP to meet existing Bay-Delta requirements. As a result, the proposed CWF operations will continue to be as protective, if not more, of existing beneficial uses as described in D-1641.” DWR-61, p 17:5-11.

Mr. Leahigh opines that exceedances of standards don't count if those exceedances were authorized in a temporary urgency change petition. He states:

“The tabulation of SWP/CVP compliance record did not include exceedances of standards if approval was granted under orders by the State Water Board approving joint TUCPs filed by DWR and Reclamation to modify the SWP/CVP's obligation to meet the requirements. Notable recent examples of these modifications occurred during the past three years of exceptional drought.” DWR-61, p. 13:4-8.

However, virtually all of DWR's testimony is founded on the principle that the projects will first meet regulatory requirements. To the contrary, the draft Biological Statement states at §3.7.2 Proposed Future Drought Procedures that TUCP's are a planned part of future operations during drought conditions. In other words, DWR's plan to meet water quality standards is to convince the State Water Board to relax standards during drought. This approach fails to address harm or CWF's impacts to beneficial uses or senior users of water and to the extent it is intended to do so, it must be excluded as speculative, without foundation and contrary to the State Water Board's previous rulings on "harm" and California case law.

Mr. Leahigh suggests that DWR is not responsible for the numerous violations of south Delta water quality standards and cites a draft report that is not yet in evidence. Consequently, the testimony must be excluded until the evidence is introduced and all parties have had an opportunity to review it. Mr. Leahigh states:

"DWR has also been working with SDWA and State Board staff to investigate sources and patterns of high salinity in the south Delta. DWR contracted with consultant ICF, International, to investigate and evaluate these sources and patterns, and recommend alternative actions that might be taken to reduce salinity measures at the Old River at Tracy Road Bridge (P-12) compliance station. The draft report indicates that higher salinity water from upstream ends of tidal sloughs Paradise and Sugar Cuts appear to be the dominant sources of increased salinity observed at (P-12). A final report will be available in summer 2016 on DWR's temporary barriers web site at <http://baydeltaoffice.water.ca.gov/sdb/index.cfm>. The investigation of sources in the draft report of high salinity supports DWR and Reclamation's contention that exceedances of the south Delta objective at compliance station P-12 are the result of actions beyond their reasonable control." DWR-61, pp. 11:20-24, 12:1-6.

Mr. Leahigh misquotes State Water Board Cease & Desist Order WR 2010-0002 regarding compliance with south Delta salinity standards. He states in footnote 10 of page 11 of his testimony:

"In 2010, the State Water Board modified the compliance schedule of the 2006 CDO in recognition that the NMFS 2009 BiOp prohibited DWR from constructing permanent, operable gates in the southern Delta. These gates were part of a proposed multi-barrier program to improve water levels and circulation in the south Delta and was a central component of DWR and Reclamation's plan to meet the south Delta salinity objectives. The 2010 order extended the schedule of compliance until after review of the Bay-Delta WQCP and subsequent water right proceeding to implement any updated south Delta salinity objectives. The update of the south Delta objectives and water rights implementation proceeding have not yet occurred." DWR-61, p 11:25-28.

However, Order WR 2010-0002 actually states,

"Notwithstanding the foregoing, if as a result of the State Water Board's review of the 2006 Bay-Delta Plan, the Board adopts an order or decision modifying DWR's or USBR's responsibility for meeting the interior southern Delta salinity objective, then

DWR and USBR shall submit a revised, detailed plan and schedule to the Executive Director for compliance with the Board's order or decision. The plan shall include planned completion dates for actions that will ensure compliance with the Board's order or decision and shall specify the date by which compliance will be achieved. *For purposes of this paragraph, the pending proceeding to consider changes to the interior southern Delta salinity objectives and the associated program of implementation and any subsequent water right proceeding shall be deemed to have been completed if the State Water Board has not issued a final order in the water right proceeding by **January 1, 2013**, unless the Deputy Director for Water Rights determines that the water right proceeding has been initiated, is proceeding as expeditiously as reasonably possible, and will be completed no later than **October 1, 2014**.* Emphasis added. The Order states that the plan "shall provide for full compliance with DWR's and USBR's responsibility to meet the interior southern Delta salinity objective" and that "DWR and USBR shall implement the plan and schedule as approved by the Executive Director." Order 2010-0002, pp. 21-22.

More than three years after the deadline for submitting a plan to eliminate salinity violations in the south Delta, the DWR have failed to submit the required plan and is still objecting that they are responsible for any exceedances. Mr. Leahigh's mischaracterization of Order WR 2010-0002 and claims that DWR is not responsible for violations based upon an unseen draft report should be excluded.

Mr. Leahigh's testimony claims that CWF will add significant new flexibility to ensure continued compliance. He states, "The Project Description testimony by Ms. Pierre describes the proposed CWF, including adaptive management that could allow variation in operations. Even with the potential for some variation in operational criteria, the CWF will increase the options available to SWP/CVP operators to more effectively balance the Bay-Delta system in real-time to protect all beneficial uses of water whether for water supply, water quality, or fishery protection purposes." DWR-61, p 16:9-15. For the reasons state above, this testimony describing Ms. Pierre's testimony should be excluded.

Mr. Leahigh's summary conclusions (DWR-61, p. 20) are speculative, without foundation, unsupported, would better serve as a policy statement and should be excluded from testimony.

V. GENERAL OBJECTIONS TO TESTOMONY AND EXHIBITS BASED UPON THE USE OF CALSIM II AND DSM2 MODELING

Reliance on CalSim II modeling and related model output to other models such as DSM2 is ubiquitous throughout petitioners' testimony and exhibits. Modeling results are core to petitioners' claim that WaterFix operations will not harm or injure other legal users of water. Numerous parties commenting on the WaterFix DEIR/DEIS and recirculated RDEIR/SDEIS extensively criticized CalSim II and the models that utilized CalSim II output data. Petitioners have failed to respond to those comments.

CalSim II's peer-reviewers heavily criticized the model. The 2003 Strategic Review of CALSIM II stated:

There has not been a sufficiently systematic, transparent, and accessible approach to the development and use of hydrologic, water demand, capacity, and operational data for CALSIM II. . . . The administration of data development is fragmented, disintegrated, and lacks a coherent technical or administrative framework. Page 20.

Modelers sometimes make a distinction between the use of a model for absolute versus comparative analyses. In an absolute analysis one runs the model once to predict an outcome. In a comparative analysis, one runs the model twice, once as a baseline and the other with some specific change, in order to assess change in outcome due to the given change in model input configuration. The suggestion is that, while the model might not generate a highly reliable absolute prediction because of errors in model specification and/or estimation, nevertheless it might produce a reasonably reliable estimate of the relative change in outcome. The panel is somewhat skeptical of this notion because it relies on the assumption that the model errors which render an absolute forecast unreliable are sufficiently independent of, or orthogonal to, the change being modeled that they do not similarly affect the forecast of change in outcome; they mostly cancel out. This feature of the model is something that would need to be documented rather than merely assumed. Page 9.

A Strategic Review of CALSIM II and its Use for Water Planning, Management, and Operations in Central California, 4 December 2003.²

The Response by the Department of Water Resources and U.S. Bureau of Reclamation acknowledged numerous errors and observed:

The validity of data inputs impacts both model results and model credibility. The greatest concern is the validity of the hydrologic inputs and parameters. Concern is compounded by the current lack of complete documentation. Over the last two years DWR and Reclamation have attempted to document model inputs. Reclamation is currently documenting the current CalSim-II hydrology procedures. This effort needs to be extended and updated. Page 12

Peer Review Response: A Report by DWR/Reclamation in Reply to the Peer Review of the CalSim II Model Sponsored by the CALFED Science Program in December 2003, jointly reported by the Department of Water Resources and U.S. Bureau of Reclamation, August 2004.³

The 2006 Peer Review of the San Joaquin River component of CALSIM II found that:

² http://www.water.ca.gov/environmentalservices/docs/mntry_plus/Appendices%20-%20Volume%202/Appendix%20G.pdf

³ http://www.water.ca.gov/environmentalservices/docs/mntry_plus/Appendices%20-%20Volume%202/Appendix%20G.pdf

Documentation for the entire CalSim software and model should be improved to a level that sufficiently justifies assumptions and assesses the effects of major uncertainties on model results. Major elements of the system (e.g., groundwater) that are not well modeled by CalSim II, should be discussed in the documentation. A modest additional effort can address these concerns. Page 10

Currently no general guidance is available to indicate whether differences of 1 taf, 50 taf, 100 taf, or 500 taf are significant enough to rise above the level of error and noise inherent in the model [...] and

At a minimum, error analyses should be conducted, combining a sensitivity analysis of critical model results to some of the largest and least well supported model assumptions with an assessment of the likely range of error in these major model parameters and assumptions. Page 13

Review Panel Report, San Joaquin River Valley CalSim II Model Review, CalFed Science Program – California Water and Environment Modeling Forum, 12 January 2006.⁴

There have been no subsequent peer-reviews of CalSim II and petitioners have refused to respond to numerous requests for documentation of assumptions, testing or calibration: information essential for validating the model for any specific use. Various versions of CalSim II's modeling and assumptions have undergone numerous changes through development of the original EIR/EIS, the recirculated EIR/EIS and modeling conducted for the draft Environmental Assessment. Yet, Petitioners have refused to provide the detailed documentation that was specifically requested by the Pacific Coast Federation of Fishermen's Associations in order to evaluate CalSim II modeling.

Consequently, petitioners' reliance on CalSim II lacks foundation, is speculative and cannot meet any objective standard for determining the admissibility of scientific evidence in an adjudicatory hearing. Whatever CalSim II is, it is not "state of the art." The standard for determining the admissibility of scientific evidence under the "*Kelly-Frye*" standard, requires that the methodology and results of the scientific procedure be generally accepted by the relevant scientific community at the time the scientific evidence is offered into evidence. While the State Water Board may claim that the instant proceeding is an administrative hearing where explicit technical rules relating to evidence and witnesses are not required, CSPA reminds the Board that WaterFix and the re-plumbing of an impaired estuary whose fisheries are close to extinction is likely the most important decision the Board will ever decide and that virtually the entirety of proponents claims related to injury revolves around the results of CalSim II modeling. Given the gravity of the pendent proceeding, we believe there is no justification for not applying the *Kelly/Frye* rule in this hearing. As the court ruled in *Seering v. Department of Social Services*, *supra*, 194 Cal.App.3d 298:

"While it is true that an administrative hearing "need not be conducted according to technical rules relating to evidence and witnesses" and that hearsay is admissible in such a hearing (see Gov. Code, § 11513, subd. (c)), we conclude that the purpose of the Kelly-

⁴ http://science.calwater.ca.gov/pdf/calsim/calsim_II_final_report_011206.pdf

Frye rule will be served by applying it in this context. In *Amber B. and Christine C.*, the court was concerned that the trial judge in a dependency hearing might be misled by the “aura of infallibility” that may surround unproven scientific methods and might “ascribe an inordinately high degree of certainty” to the expert’s opinion. We see no reason why an administrative law judge in a proceeding to revoke a license, and later a trial judge reviewing the administrative record under the independent judgment standard, would be any less likely to be misled by the “aura of infallibility” with which the courts have been concerned. Consequently, we reject the contention that the Kelly-Frye rule should not apply in a proceeding such as this.” (194 Cal.App.3d at p. 310.)

Accordingly, we object to the use of testimony or exhibits related to or based upon CalSim II or models that rely upon CalSim II output because such testimony and evidence lack foundation, are speculative and cannot meet requirements of the *Kelly/Frye* rule.

VI. THE FOLLOWING WITNESSES SHOULD BE DISQUALIFIED BECAUSE THEY FAILED TO COMPLY WITH THE PROCEDURES SET FORTH BY THE STATE WATER BOARD

The Hearing Officer Ruling of April 25, 2016 specified that noon on May 31, 2016 was the deadline for receipt and service of petitioners’ case in chief, *including witnesses’ proposed testimony*, witness qualifications, exhibits, list of exhibits, and a statement of service for Part 1A of the hearing. Petitioners clearly understood the Ruling as they did file proposed testimony for 7 witnesses. As to 12 witnesses identified below, all that petitioners included in terms of “testimony” was a brief statement stating that the witness helped review someone else’s written testimony, or contributed information to someone else’s testimony. Each of these 12 witnesses is identified and his or her one sentence of proposed “testimony” is set forth as follows:

Consequently, the following witnesses should be disqualified from testifying. “It is the policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits.” 23 Cal. Code Regs § 648.4(a). In the event they are not disqualified, their testimony should be limited to the one sentence testimony they provided. Protestants were entitled to receive proposed testimony, if any, from each of the above witnesses by May 31, 2016. Instead, no substantive proposed testimony was provided for any of the following 12 witnesses.

Allowing any of these witnesses to testify would violate the April 25, 2016 Ruling requiring receipt and service of witnesses’ proposed testimony by May 31, 2016. Allowing their testimony would also deprive Protestants of due process by allowing admission of testimony in violation of the Ruling and in the absence of the opportunity for Protestants to have and review the proposed testimony, *including the witnesses’ opinions and the basis/reasons for their opinions*, well in advance of the commencement of the Hearing. Admission of any testimony from these witnesses would be prejudicial to protestants and must be excluded pursuant to 23 Cal. Code Regs § 648.4(e).

Steve Centerwall, DWR-52
“I testify that I helped review the written testimony of Jennifer Pierre.”

Michael Anderson, DWR-64

"I testify that I contributed information about the extreme conditions of recent years to the testimony of John Leahigh."

Eric Reyes, DWR-67

"I reviewed and contributed to the written testimony of Mr. Munevar. In particular, I was relied upon by Mr. Munevar for my particular expertise in modeling."

Michael D. Bryan, DWR-73

"I testify that I helped review the written testimony of Parviz Nader-Tehrani. Specifically, I was relied upon by Parviz Nader-Tehrani for my particular expertise in water quality."

Jamie Anderson, DWR-69

"I testify that I reviewed and contributed to the written testimony of Parviz Nader-Tehrani. In particular, I was relied upon by Parviz Nader-Tehrani for my particular expertise in Delta Modeling."

Tara Smith, DWR-70

"I testify that I reviewed and contributed to the written testimony of Parviz Nader-Tehrani. In particular, I was relied upon by Parviz Nader-Tehrani for my particular expertise in Delta Modeling."

Kristin White, DOI-6

"I have participated in the modeling testimony for this hearing by reviewing drafts and making comments on CVP-related matters."

Gwendolyn Buchholz, DWR-72

"I testify that I am closely involved in the creation of the BDCP/California WaterFix EIR/EIS."

Mark A. Holderman, DWR-62

"I testify that I can speak knowledgeably about the Department of Water Resources' Temporary Barriers Project."

Shanmugam (Praba) Pirarooban, DWR-54

"I testify that I contributed significantly to the engineering testimony of John Bednarski. In particular, I was relied upon by John Bednarski for my experience in the project's conceptual design."

Sergio Valles, DWR-58

"I testify that I contributed significantly to the engineering testimony of John Bednarski. In particular, I was relied upon by John Bednarski for my experience in the project's conceptual design."

Robert Cooke, DWR-60

"I testify that I can provide historical perspective on water contracts and Delta water transfer facility activities, SWP water rights, long-term water supply contracts, and SWP settlement agreements."

VII. CONCLUSION

The Petitioners' testimony and exhibits identified as DWR-3, pp. 8-9,16-17; DWR-4, p. 38; DWR-5, pp. 16-17, 28-82; Jennifer Pierre (DWR-51, pp. 2:17-20, 5:19-23, 6:25-7:24, 8:3-4, 10:7-16, 10:8-14, 12:14-16, 13:17-14:9, 14:21-17:3); Steve Centerwall (DWR-52); Maureen Sergent (DWR-53, pp. 3:22-25, 6:19-21, 8:13-21, 8:25-9:1, 11:10-13, 10:24-15:11, 17:23-18:4, 24:5-28); Shanmugam (Praba) Piraroban (DWR-54); Sergio Valles (DWR-58); Robert Cooke (DWR-60); John Leahigh (DWR-61, pp. 2:15-19, 5:23-25, 6:6-8, 7:18-22, 7:23-27, 8:1-2, 8:3-8, 10:4-8, 11:20-24, 11:25-28, 12:1-6, 13:4-8, 16:9-15,17:5-11, 17:23-25, 19:15-26, 20:6-18); Mark A. Holderman (DWR-62); Michael Anderson (DWR-64); Parviz Nader-Tehrani (DWR-66); Eric Reyes (DWR-67); Jamie Anderson (DWR-69); Tara Smith (DWR-70); Armin Munévar (DWR-71, pp. 2:19-23, 4:23-7:21, 8:7-11:18, 12:7-14, 71, 12:15-19, 15:5-24, 16:18-18:5, 19:6-9, 19:25-21:4); Gwendolyn Buchholz (DWR-72); Michael D. Bryan (DWR-73); DWR-114; DWR-115; DWR-116; DWR-117; DWR-324; DWR-513; DWR-514; DWR-515; Ray Sahlberg (DOI-4, pp. 6-7, 9 and DOI-5, pp. 14, 17, 18, Sahlberg Power Point); Kristin White (DOI-6) and Ron Milligan (DOI-7, p. 4) should be excluded and stricken from the record because they lack foundation and are based on facts not in evidence or inadmissible under the Evidence Code, Sections 801-805 and/or which are conclusory or speculative in nature or incomplete. The proffered opinion testimony is based on inadequate, unreliable, or speculative underlying factual assumptions, data and modeling. The testimony and evidence fails to satisfy the Notice of Petition's requirement that evidence "clearly identify and explain the logic, assumptions, development, and operation of the studies or models" relied upon. Insofar as this testimony relies on CalSim II modeling, it should also be excluded under the Kelly/Frye rule. The Petitioners also fail to provide the required information for their petition to be deemed complete as required by the California Code of Regulations, Title 23, section 794(a). For these reasons, the proffered evidence should be stricken from the record and the petition should be dismissed.

Respectfully submitted,

Bill Jennings, Executive Director
California Sportfishing Protection Alliance



Chris Shutes, Water Rights Advocate
California Sportfishing Protection Alliance



CSPA, CWIN, AquAlliance: Motion to Disqualify Certain WaterFix Petitioners' Witnesses and Testimony.
11 July 2016, Page 16 of 17.

Michael Jackson
Counsel to California Sportfishing Protection Alliance,
AquAlliance, and California Water Impact Network
/s/ Michael Jackson

cc: Service List as of 11 July 2016

STATEMENT OF SERVICE

CALIFORNIA WATERFIX PETITION HEARING Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

Objections of the California Sportfishing Protection Alliance, California Water Impact Network and AquAlliance to Written Testimony and Exhibits Submitted by Petitioners; Joinder in Written Objections Submitted By Other Protestants

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated 11 July 2016, posted by the State Water Resources Control Board at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

I caused a true and correct **hard copy** of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:

Method of Service: _____

I certify that the foregoing is true and correct and that this document was executed on 11 July 2016.

Signature:



Name: Bill Jennings
Title: Executive Director, California Sportfishing Protection Alliance, Board Member of California Water Impact Network and representing AquAlliance
Party/Affiliation: California Sportfishing Protection Alliance, California Water Impact Network and AquAlliance
Address: 3536 Rainier Ave., Stockton, CA 95204