



**42 N. Sutter Street, Suite 506
Stockton, CA 95202
(209) 475-9550
www.restorethedelta.org**

July 12, 2016

Via email: CWFhearings@waterboards.ca.gov

Tam Doduc, Hearing Chair
Felicia Marcus, Hearing Officer
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

**Subject: Objections to Evidence and Witnesses submitted by Petitioners
 California Department of Water Resources and United States Bureau
 of Reclamation for their California WaterFix Case-in-Chief**

Dear Hearing Officers and Hearing Staff:

Thank you for the time extension granted by the Hearing Officers in their June 10 ruling. The extra time provided by the ruling has aided Restore the Delta in reviewing and evaluating testimony and evidence submitted by the Petitioners on May 31.

Restore the Delta joins with California Sportfishing Alliance, California Water Impact Network, and AquAlliance (CSPA et al) to object to all written testimony and exhibits submitted by the Petitioners for their California WaterFix case-in-chief. We incorporate by reference their letter in full expressing objections to witness testimony and to evidence. We itemize Restore the Delta's specific objections to evidence in Attachment 1 to this letter. And we agree with CSPA et al that testimony and exhibits Petitioners submitted do not contain sufficient evidence to support a conclusion of no injury to other legal users of water, including human beneficial uses identified in prior rulings by the Hearing Officers. We agree with CSPA et al, too, that the Petition should be dismissed for failure to supply information necessary to evidentiary proceedings evaluating a change in point of diversion for the proposed WaterFix project.

To avoid redundant argument, Restore the Delta also adopts arguments and legal positions stated by protestants Central Delta Water Agency, South Delta Water Agency, San Joaquin County Protestants, Sacramento Valley Water Users, and the Pacific Coast Federation of Fishermen's Association. We also join with protestants Friends of

the River, Sierra Club, Environmental Water Caucus, and Planning and Conservation League in requesting disqualification of twelve witnesses and their testimony put forward by Petitioner California Department of Water Resources. We identify each of these twelve witnesses and his or her one sentence of proposed “testimony” in Attachment 2 to our letter.

Petitioners clearly understood the April 25, 2016, ruling by the Hearing Officers as they did file proposed substantive testimony for seven witnesses. As to Petitioners’ twelve other witnesses, all that Petitioners included in their “testimony” was one sentence stating that the witness helped review, or contributed information to, someone else’s testimony.

Restore the Delta moves to disqualify from testifying each of the witnesses identified in Attachment 2 out of an abundance of caution. It is possible, but unknown to us at this time, that Petitioners will attempt to elicit additional testimony from any or each of the above witnesses beyond what we present in Attachment 2.¹ We believe this would violate Title 23 of the California Code of Regulations, which states, “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, our motion seeks to exclude their testimony in whole or in part. Protestants were entitled to receive proposed testimony, if any, from each of the above witnesses by May 31, 2016. Instead, no specific, substantive proposed testimony was provided for any of the these twelve witnesses.

Allowing any of these twelve witnesses to testify would also violate the Hearing Officers’ April 25, 2016, Ruling requiring receipt and service of witnesses’ proposed testimony by May 31, 2016. Admitting their testimony 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 start of the Hearing—would violate our due process rights. Admission of any testimony from these witnesses would also be prejudicial to Protestants and must be excluded pursuant to 23 Cal. Code Regs § 648.4(e).

Restore the Delta reserves all rights to object to additional evidence Petitioners may put forward for Part 1 proceedings, as well as for Part 2, which of course has yet to begin. Thank you for considering our objections to evidence and witness testimony. We look forward to your ruling on these matters.

¹ Using one example (to avoid belaboring what may be a non-issue depending on the intent and Hearing conduct of petitioners), the first of the 12 witnesses listed above is Steve Centerwall. His proposed “testimony” submitted on May 31, 2016 was: “I testify that I helped review the written testimony of Jennifer Pierre.” He should be disqualified from testifying. If he is not disqualified from testifying, any testimony from him during the Hearing should be excluded. If his testimony is not excluded in whole, it should be excluded in part, to exclude him from providing any testimony other than what was provided on May 31: “I testify that I helped review the written testimony of Jennifer Pierre.” The same relief is requested as to each of the eleven other witnesses listed above.

Sincerely,

 Barbara Barrigan-Parrilla Executive Director	 Tim Strohane Policy Analyst
--	--

- Attachments:
1. Restore the Delta's Objections to Evidence
 2. Restore the Delta's Request for Disqualification of Witnesses Service Certificate to CWF Service List

Attachment 1
Restore the Delta's Objections to Evidence

Exhibit Number	Exhibit Description	Strike Testimony Requested	Objection(s) Description
DWR-301, pp. 22-23	Isohaline maps of maximum salinity intrusion, 1921-1943, 1944-1990.	DWR-53 (Sergent), 14:3-26.	<p>1) Both maps in this exhibit fail to specify whether the isohalines are annual, monthly, or daily maxima for salinity intrusion, and provide no date during the year on which they actually occur. Assumes facts not in evidence.</p> <p>2) Maps are not relevant to preventing injury or harm to legal users of water in the Delta based on operation of Petition facilities.</p> <p>We request that Hearing Officers strike this exhibit and related witness testimony, since DWR-322 provides the date of maximum salinity intrusion for 1924 through 1931, Table 85, p. 159.</p>
		DWR-61 (Leahigh), 11:21-24, 12:1-6.	<p>This witness testimony refers to a draft ICF report not now in evidence that addresses interior south Delta salinity sources, and states that a final report is due during "summer 2016." Petitioner had a deadline for submitting exhibits and failed to meet it. We ask that the Hearing Officers disallow reference to this report in Mr. Leahigh's testimony on grounds that it is not timely submitted as evidence.</p>
DWR-117	Draft Adaptive Management Framework for the California Water Fix and 2008/2009 Biological Opinions on the combined operations of the Central Valley Project and State Water Project	DWR-51 (Pierre), 16:2.	<p>1) This exhibit shows incomplete staff work, lacks clear authorship, and does not describe accurate or complete account of scientific tasks that must be undertaken to address both listed species issues and the initial and permanent operations of Petition facilities. It lacks relevance to Petition facilities' operation that would affect potential for injury to legal users of water.</p> <p>2) Funding for this adaptive management framework is not identified in the exhibit either, showing a lack of due diligence in implementing this element of the Petition's overall program.</p> <p>We request that Hearing Officers strike this exhibit and related witness testimony.</p>

Attachment 1
Restore the Delta's Objections to Evidence

Exhibit Number	Exhibit Description	Strike Testimony Requested	Objection(s) Description
DWR-406, -407, -408, -409, and -410	California Statewide 4-year Precipitation Sums; Sacramento Valley Calendar Year Data (1895-2015); Sierra Snowpack v. Winter Temperature (1950-2015); Eight River 4 Year Average Water Year Runoff (1909-2015); Eight River 3-Year Average April-July Runoff (1909-2015)	DWR-61 (Leahigh), 13:16-26, 14:1-24, 15:1-8.	1) Assumes facts not in evidence concerning how Petitioners actually managed their water systems. Witness Leahigh blames operational challenges of the recent drought years only on natural conditions of precipitation, runoff, and temperature, but system management also involved decisions made by water managers concerning allocation decisions, reservoir releases, and fishery management concerns, across several years which are not submitted to evidence. 2) DWR-408 includes no legend and its y-axis units are unlabeled. 3) DWR-409 and DWR-410 appear to rank order the Eight River Index record of runoff, but labels only Water Year 2015 while omitting from rank ordering all other years; the x-axis on each of these exhibits is unlabeled, omitting facts that would give context to this exhibit as evidence. We ask that Hearing Officers strike these exhibits and related testimony.
DWR-411	Conceptual CWF Operation (12/1/15 - 4/30/16) (Operational Criteria for Scenario H3)	DWR-61 (Leahigh), 18:10-25, 19:15-26.	1) This exhibit fails to clarify whether "additional CWF Diversion" of 1.2 MAF is calculated at the point in time at which it is illustrated under the red dotted line of Total North and South Delta diversions, or whether it is the entire area under the red dotted line. 2) Factual basis for modeling not submitted to evidence. 3) CalSIM II has not been validated or calibrated adequately. We ask that Hearing Officers strike this exhibit and related testimony.
DWR-412	Daily Average EC at Bacon Island (12/1/15 - 4/30/16) (Operational Criteria for Scenario H3)	DWR-61 (Leahigh), 18:26-27, 19:1-14.	This exhibit is not relevant to issues of injury and harm because it presents isolated results for 5 months at Bacon Island which is not a site of water quality objective monitoring and enforcement in D-1641 or the 2006 Water Quality Control Plan. (See DWR-405, which shows no compliance point at or near Bacon Island.) We ask that Hearing Officers strike this exhibit and related testimony.

Attachment 1
Restore the Delta’s Objections to Evidence

Exhibit Number	Exhibit Description	Strike Testimony Requested	Objection(s) Description
DWR-4 (slides 19-21, 24-26, 36, 37), -401, -402, -403, and -413	D-1485 Bay-Delta Exceedance Metrics (Joint SWP/CVP responsibility); D-1641 Bay-Delta Exceedance Metrics (Joint SWP/CVP responsibility); Municipal, Industrial and Agricultural Water Quality Standards for D-1485 and D-1641; D-1641 Interior South Delta Water Quality Standards	DWR-61 (Leahigh), 8:22-26, 9:23-26, 10:20-28, 11:1-24, 12:1-6.	For the period in which Petitioners have actually been responsible for water quality objective compliance or face pain of enforcement, these exhibits exaggerate their compliance rate. For example, D-1641 did not actually require Petitioners’ compliance with interior South Delta agricultural water quality objectives until 2005. We object to inclusion of D-1485 “compliance” periods, since compliance at that time was not mandatory. Only the regulated period for individual compliance points during which compliance and enforcement were active is relevant to Petitioner’s compliance record. Slides summarizing these compliance exhibits in DWR-4 should be excluded. We ask that Hearing Officers strike exhibits and related witness testimony.
DWR-511	Draft DWR memorandum from Parviz Nader-Tehrani, Erik Reyes, Francis Chung, and Tara Smith, to Cathy Crothers, dated 8/22/2013, concerning CalSim II and DSM2 Modeling for BDCP (16 years versus 82 years)	DWR-66 (Nader-Tehrani), 4:7-9.	<ol style="list-style-type: none"> 1) Memorandum is a draft. It is not authenticated with a departmental author signature or other indication that the document is finalized and has been transmitted to its recipient. It appears to us to be true and correct only to the extent that it is a draft. 2) Its analysis of relative merits of 16-year versus other durations of time series data for DSM2 modeling is not peer-reviewed, nor is the purpose of drafting the memo clear. Input data to DSM2 derives from CalSIM II output, and thus relies on modeling software that is neither validated nor calibrated. 3) There is no explanation of its relevance to SWRCB-3, SWRCB-4, and SWRCB-5. These documents and their associated modeling likely supersedes the observations or relevance of this memorandum to the record of this hearing, as does CCWD’s subsequent comments in 2014 and 2015 on these three SWRCB exhibits. We ask Hearing Officers to strike this exhibit and related testimony.

Attachment 1
Restore the Delta’s Objections to Evidence

Exhibit Number	Exhibit Description	Strike Testimony Requested	Objection(s) Description
DWR-513	Figures W1 through W5, pp. 11-15.	DWR-66 (Nader-Tehrani), 9:4-26, 10:1-15.	<p>1) Figures W1 through W5 do not address injury potential at the local scale based on water levels; it assumes facts not in evidence that water levels on other channels in the Delta would behave similarly without so demonstrating.</p> <p>2) Figures W1 through W5 reveal modeled stage results that become negative in a probability of exceedance presentation. The y-axis for stage in feet provides negative stage results; we understand the parameter of stage to reflect water level above a stream bed as benchmark with a stage of 0 reflecting no water level in the stream bed; it strikes us that a negative stage must pertain to some other benchmark that is at best unspecified in these figures.</p> <p>We ask Hearing Officers to strike these exhibits and related testimony.</p>
DWR-514	Table 2, p. 3	DWR-71 (Munevar), 9:2-17.	<p>Witness makes conclusory remarks “suggesting a close fit between simulated and actual values” in CalSIM II modeling based on this table, without the underlying modeling results and assumptions for this table being disclosed. Use of CalSIM II to provide results summarized in this exhibit has not been validated and calibrated to scientific standards and best practices. We request that Hearing Officers strike this table and witness’s related conclusory remarks from testimony.</p>
DWR-515	Series of tables detailing modeling assumptions for No Action Alternative, H3, H4, and Boundary 1 and 2 scenarios, plus operating and flow criteria assumptions for modeling purposes.	DWR-71 (Munevar), 14:19-21.	<p>Modeling testimony lacks any clear explanation of how Boundary 1 and Boundary 2 scenarios were developed or are likely to represent actual operation of the projects. Table 2 of DWR-515 (north Delta diversion bypass flow criteria) states that the parameters described are for modeling purposes, and that actual operations are based on real-time monitoring of hydrologic conditions and fish presence/movement. There is no demonstration from these limited explanations of modeling assumptions that they will resemble actual operations that would not injure legal users of water in the Delta. Without adequate explanation of the modeling testimony that is relevant to the question of harm to legal users of water, we request that Hearing Officers strike the exhibit and related witness testimony.</p>

Attachment 2
Restore the Delta's Requests for Disqualification of Witnesses

Witness Name	Specific Testimony
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) Piraroban, 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."

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 to Evidence and Witnesses submitted by Petitioners California Department of Water Resources and United States Bureau of Reclamation for their California WaterFix Case-in-Chief, with attachments.

To be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated July 11, 2016, posted by the State Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/Table1ServiceList07112016.txt

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.

I certify that the foregoing is true and correct and that this document was executed on July 12, 2016.



Signature:

Name: Barbara Barrigan-Parrilla

Title: Executive Director

Party/Affiliation: Restore the Delta

Address: Restore the Delta
42 N. Sutter Street, Suite 506
Stockton, CA 95202
barbara@restorethedelta.org