BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the matter of Hearing re California WaterFix Petition for Change

The City of Stockton ("Stockton" or "City") objects to the written testimony and many of the exhibits submitted by the California Department of Water Resources (DWR) and United States Bureau of Reclamation (Reclamation) (collectively, "Petitioners") as part of their case in chief for Part 1A of the California WaterFix petition for change proceeding. The testimony and exhibits do not provide evidence that is competent to support the conclusion reached by Petitioners' witnesses that California WaterFix (Project) will not injure other legal users of water, and in particular that it will not injure...
Stockton. For these reasons, and as more particularly described herein and as
described in the objections of the Sacramento Valley Water Users, which Stockton joins,
Stockton respectfully requests that the State Water Resources Control Board (State
Water Board) exclude portions of the testimony of specific witnesses and the
accompanying exhibits relied on by these witnesses.
I. BACKGROUND

Stockton is a municipal corporation in San Joaquin County, California, with a
population of approximately 300,000. A significant portion of the City is within the
Sacramento-San Joaquin River Delta (Delta). The City's primary source of potable
drinking water derives from diversions from its Delta Water Supply Project (DWSP)
Water Treatment Plant (WTP), which diverts from the Delta at the southwest tip of
Empire Tract pursuant to a State Water Board-issued permit that provides for diversion
of up to 33,600 acre-feet per year at a rate up to 317 cubic feet per second for municipal
and industrial purposes (Permit No. 21176, issued on Application 30531A). The City
also has other current and future interests in the right of use of Delta water, including
uses under Application 30531B (for 92,300 acre-feet per year with the point of diversion
at the DWSP), as well as other Delta surface and groundwater resources that may be
affected, directly or indirectly, by the proposed petition for change. In addition, the City
owns and operates a wastewater collection system and the Stockton Regional
Wastewater Control Facility (RWCF), which discharges treated effluent to the
San Joaquin River after extensive treatment including tertiary filtration, and nitrification
for ammonia removal. Because the City's ability to divert water at the DWSP is linked to
the amount of wastewater it may discharge from the RWCF, changes in flows or water
quality that affect the City's operation of the RWCF also affect the City's ability to
exercise its water right. The well-being of the City, its residents, and economy thus is
inextricably linked to the Delta, the quantity and quality of Delta water supplies, and the
Delta ecosystem.
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CITY OF STOCKTON'S OBJECTIONS TO WRITTEN TESTIMONY AND EXHIBITS SUBMITTED BY
PETITIONERS U.S. BUREAU OF RECLAMATION AND CALIFORNIA DEPARTMENT OF WATER
SERVICES
Starting in 2008, Stockton repeatedly has raised concerns to Petitioners regarding the effect on its water supply (and hence its water right) of potential water quality and supply changes caused by the Project. As those concerns have gone unanswered, Stockton timely filed a protest to Petitioners’ Petition for Change (Petition) to add points of diversion to water rights for both the State Water Project and Central Valley Project as necessary for the Project. The Petition seeks to add three new points of diversion from the Sacramento River in the north Delta to convey water to the south Delta for diversion and/or export. Both in their Petition and May 31, 2016 submittal of testimony supporting their case in chief, Petitioners assert that the Petition will not adversely affect legal users of water, including effects from changes in water quality. However, the Petition does not provide operating criteria or propose permit terms to support this assertion, and no information is provided in the petition to support these assertions with regard to the City’s drinking water supply.

Significantly, pursuant to the regulations governing this proceeding, and as emphasized in the State Water Board’s February 11, 2016 Pre-Hearing Conference Ruling (February 11 Ruling), Petitioners were required to submit information showing “any effects of the proposed change(s) on other known users of water, including identification in quantitative terms of any projected change in water quantity, water quality, timing of diversion or use, consumptive use of the water, reduction in return flows, or reduction in the availability of water within the streams affected by the proposed change(s).” (Cal. Code. Regs., tit. 23, § 794(a)(9) (emphasis added).) The State Water Board hearing officers directed Petitioners to provide this information in a “succinct and easily identifiable format.” (February 11 Ruling at p. 7.)

On May 31, 2016, Petitioners submitted written testimony and exhibits to support the Petition. Despite years of active participation by Stockton and multiple written requests that Petitioners analyze and identify the specific changes to water quality at the location of Stockton’s municipal water intake, Petitioners do not so much as mention Stockton in their testimony, nor do they even attempt to provide the required information...
that would address the issues raised by Stockton's protest (see e.g., DWR-324). Thus the conclusions offered in the written testimony are not supported by the necessary data or analysis, do not meet basic evidentiary standards, and otherwise do not satisfy the information requirements of the February 11 Ruling or the governing regulations.

II. OBJECTIONS

Detailed objections to Petitioners' evidence, and legal argument supporting those objections, have been filed by the Sacramento Valley Water Users (SVWU). Stockton shares the concerns raised by SVWU and joins in the SVWU's objections to evidence, in their entirety, and incorporates them by reference herein in full, on behalf of the City. In addition, Stockton submits the following objections relevant to the issues raised in Stockton's Protest.

A. Testimony of Jennifer Pierre (Exhibit DWR-51)

Stockton objects to the testimony of DWR witness Jennifer Pierre on the grounds that it offers improper expert opinion (legal issue), does not meet the evidentiary requirements of title 23 of the California Code of Regulations, section 794, and lacks foundation. Through the testimony of Ms. Pierre, Petitioners admit that initial Project operating criteria are not available; rather, Petitioners state, criteria will be developed sometime prior to operation of the Project. (DWR-51, at p. 10:6-7.) In the absence of initial operating criteria, Petitioners analyze effects on legal users of water by undertaking a boundary analysis. (DWR-51, at p. 10:2-16.) Petitioners contend that the boundaries are broad enough that any Project operations will have been evaluated with regard to effects on legal users of water. (DWR-51, at p. 10:11-14.) Stockton objects to this testimony on the grounds that the boundary analysis does not provide the kind of specificity with respect to Project operations that is necessary for Petitioners' experts to draw conclusions about effects on legal users of water, including Stockton. (See Cal. Code. Regs., tit. 23, § 794(a).) Moreover, even if sufficient information were provided to demonstrate that the boundary analysis adequately addressed potential water quality effects at Stockton's drinking water intake, the Petition does not include any permit
conditions that would ensure that Project operations would conform to the assumptions
in the boundary analysis, and thus any conclusions about the effects of legal users of
water based on this analysis lack foundation.

For these reasons, Stockton objects to the following testimony of Ms. Pierre and
associated exhibits:

- DWR-51, at pp. 10:8-16, 13:17-14:9
- DWR-114
- DWR-116

To the extent that other DWR or Reclamation testimony or exhibits rely on the
boundary analysis or conclusions regarding the import of that analysis as set forth in the
testimony of Ms. Pierre, Stockton also objects to that testimony. (E.g., Testimony of
Maureen Sergent, Exhibit DWR-53 Exhibit DWR-324; Testimony of Armin Munévar,
Exhibit DWR-71; Exhibits DWR-513, DWR-514, DWR-515; Testimony of Parviz Nader
Tehrani, Exhibit DWR-66).

B. Testimony of Maureen Sergent (Exhibit DWR-53)

Stockton objects to the testimony of DWR witness Maureen Sergent on the
grounds that it offers improper expert opinion (legal issue) and lacks foundation.

Ms. Sergent testifies that the information submitted with Petitioners’ case in chief
supports a finding that the Project will not injure legal users of water. (DWR-53, at
p. 3:2.) Stockton objects to Ms. Sergent’s testimony on the grounds that legal opinion
testimony concluding that legal users of water will not be injured by the change is
improper for an expert and should be excluded, and in any event she is not qualified to
testify as to the legal conclusion of whether the Project will result in injury to Stockton as

Stockton further objects to portions of Ms. Sergent’s testimony asserting that that
the Project will not result in injury to legal users of water (including her testimony that
Delta water quality changes will be “minor”) as lacking foundation, because it is based on
Project modeling and the testimony of Armin Munévar (DWR-71) and Parviz Nader-
Tehrani (DWR-66). That modeling and associated witness testimony lack foundation because, among other reasons, including those set forth by the SVWU in their objections, they rely on assumptions about future operating conditions that are not supported by proposed permit conditions and do not include evidence relating to actual water quality changes at the location of Stockton's drinking water intake.

Stockton also objects to Exhibit DWR-324, submitted by Ms. Sergent, on the grounds that it does not provide the information required by Section 794(a), including any information showing "effects of the proposed change(s) . . . including identification in quantitative terms of any projected change in water quantity, water quality, timing of diversion or use, consumptive use of the water, reduction in return flows, or reduction in the availability of water within the streams affected by the proposed change(s)" on Stockton, a known user of water. Petitioners rely on so-called "adaptive management" that is lacking in any substantive basis. (DWR-324, at pp. 5-6.) The lack of concrete information about how the Project may operate under the loosely described "adaptive management" process results does not permit anything more than speculation about future water quality downstream of the Project intakes, and thus a lack of foundation for conclusions about future effects on Stockton and other legal users of water.

Furthermore, instead of identifying "in quantitative terms" any projected change in water quality, quantity, or other matters required by the regulations, the Petitioners rely generally on the improper modeling testimony of Mr. Nader-Tehrani and Mr. Munévar to describe potential effects to users and real time operations. (DWR-324, at p. 8.) Nothing in DWR-324 remedies the lack of clarity regarding operational criteria, actual project effects, or mitigation that will be incorporated into the Project.

Based on the foregoing, Stockton specifically objects to the following testimony of Ms. Sergent and associated exhibit:

- DWR-53, at pp. 3:22-25, 8:14-21, 10:24-15:11, 24:5-28
- DWR-324
Because Ms. Sergent's opinion testimony and supporting exhibit DWR-324 lack foundation, do not make clear the underlying factual foundations for the opinion offered, and constitute improper expert testimony regarding a legal conclusion, and Stockton and others have objected to this testimony, the State Water Board must exclude it. (Evid. Code, § 803; Lockheed Litigation Cases (2004) 115 Cal.App.4th 558, 564; see also Ruling on Motions Filed in the Matters of Administrative Civil Liability Complaint Against Byron-Bethany Irrigation District and Draft Cease and Desist Order Against the West Side Irrigation District (BBID Ruling) (March 18, 2016) at pp. 4, 7 ("We will disregard any testimony that we find to be entirely conclusory or lacking foundation.").

B. Testimony of John Leahigh (Exhibit DWR-61)

Stockton objects to the testimony of DWR witness John Leahigh on the grounds that it offers improper expert opinion (legal issue) and lacks foundation.

Specifically, Stockton objects to Mr. Leahigh's testimony that the Project will be "as protective if not more, of existing beneficial uses" as lacking foundation, generally, and specifically with regard to Stockton. (DWR-61, at p. 17:5-11.) No information is provided in the testimony regarding the Project's effect on water quality at Stockton's drinking water intake, and thus there is no basis for the conclusion that the Project would be as protective, let alone more so, of Stockton's existing beneficial uses of water.

Stockton further objects to Mr. Leahigh's testimony that the Project will not result in injury to legal users of water during severe water shortages as improper expert testimony regarding a legal conclusion and lacking foundation. Petitioners admit that the modeling does not reflect how the Project would operate during severe water shortages, because Petitioners state they would file temporary urgency change petitions to modify operations during these shortages. (DWR-61, at p. 8; also see Biological Assessment § 3.7.2, at p. 3-214.) Petitioners provide no information about what might be contained in any approval of a temporary urgency change petition, and thus the conclusion that the Project will not injure any legal user of water is speculative and lacking foundation.
Based on the foregoing, Stockton objects to the following testimony of Mr. Leahigh and associated exhibits:


Because Mr. Leahigh's opinion testimony lacks foundation, does not make clear the underlying factual foundations for the opinion offered, and constitutes improper expert testimony regarding a legal conclusion, and Stockton and others have objected to this testimony, the State Water Board must exclude it. (Evid. Code, § 803; Lockheed Litigation Cases (2004) 115 Cal.App.4th 558, 564; see also BBID Ruling at pp. 4, 7 (“We will disregard any testimony that we find to be entirely conclusory or lacking foundation.”)).

C. Testimony of Armin Munévar (Exhibit DWR-71)

Stockton objects to the testimony of DWR witness Armin Munévar on the grounds that it offers improper expert opinion (legal issue) and lacks foundation. The written testimony of several Reclamation and DWR witnesses offers opinions based on computer modeling of various scenarios for the operation of the proposed new points of diversion. The assumptions and results of the computer modeling are presented in Mr. Munévar's testimony. For the reasons stated in the objections of the SVWU, in which Stockton joins, this evidence fails to meet the evidentiary standards of this proceeding, lacks foundation, and does not provide sufficient information to support Petitioners' conclusions that the Project will not injure legal users of water, and Stockton in particular, contrary to the purpose of Section 794(a) of the governing regulations.

Stockton thus specifically objects to the following testimony of Mr. Munévar and all exhibits relied on in that testimony, including Exhibits DWR-513, DWR-514, and DWR-515:

- DWR-513
Because Mr. Munevar's opinion testimony lacks foundation, does not make clear the underlying factual foundations for the opinion offered, and constitutes improper expert testimony regarding a legal conclusion, and Stockton and others have objected to this testimony, the State Water Board must exclude it and all opinion testimony based on that modeling. (See Objections to Testimony of Maureen Sergent and John Leahigh, supra, and Parviz Nader-Tehrani, infra.)

B. Testimony of Parviz Nader-Tehrani (Exhibit DWR-66)

Stockton objects to the testimony of DWR witness Parviz Nader-Tehrani on the grounds that it offers improper expert opinion (legal issue) and lacks foundation.

To the extent that the particular results from the modeling analysis that supports Mr. Munevar's testimony is lacking, and Mr. Tehrani's opinions rely on that modeling, Mr. Tehrani's opinions concerning the Project's impacts on water quality and water levels in the Delta lack foundation.

Based on the foregoing, Stockton objects to the following testimony of Mr. Nader-Tehrani and associated exhibits:

- DWR-66 in its entirety, and specifically, at pp. 2:10-3:19, 4:23-7:21, 8:7-11:18
- DWR-513
- DWR-514
- DWR-515

Because Mr. Nader-Tehrani's opinion testimony lacks foundation, does not make clear the underlying factual foundations for the opinion offered, and constitutes improper expert testimony regarding a legal conclusion, and Stockton and others have objected to this testimony, the State Water Board must exclude it and all opinion testimony based on that modeling. (See Objections to Testimony of Maureen Sergent, John Leahigh, and Armin Munevar, supra.)
III. CONCLUSION

Much of the witness testimony and associated exhibits submitted by Petitioners lack necessary foundation and is insufficient to provide the basis for necessary findings. Moreover, these witnesses' conclusions improperly rely on speculation and improper evidence, and/or contain legal conclusions inappropriate for an expert. For these reasons, the Stockton objects to the State Water Board's consideration of the evidence discussed herein as well as the evidence discussed in the objections of the SVWU.

Date: July 12, 2016
Respectfully submitted,
CITY OF STOCKTON

John M. Luebberke
City Attorney

Date: July 12, 2016
Respectfully submitted,
SOMACH SIMMONS & DUNN

Paul S. Simmons
Attorneys for the City of Stockton
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):

CITY OF STOCKTON'S OBJECTIONS TO WRITTEN TESTIMONY AND EXHIBITS SUBMITTED BY PETITIONERS U.S. BUREAU OF RECLAMATION AND CALIFORNIA DEPARTMENT OF WATER SERVICES

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 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/service_list.shtml:

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

Signature: 
Name: Michelle Bracha
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