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8 **BEFORE THE**
9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10 **HEARING IN THE MATTER OF CALIFORNIA**
11 **DEPARTMENT OF WATER RESOURCES**
12 **AND UNITED STATES BUREAU OF**
13 **RECLAMATION REQUEST FOR A CHANGE**
14 **IN POINT OF DIVERSION FOR CALIFORNIA**
15 **WATER FIX**

DWR OBJECTIONS AND
RESPONSES TO PATRICK
PORGANS/ASSOCIATES' MARCH 2,
2018 WRITTEN CROSS-
EXAMINATION QUESTIONS

16 The CA Department of Water Resources (DWR) submits the following written
17 objections and responses to the March 2, 2018 written cross-examination questions of
18 Patrick Porgans/Associates submitted for Panel 2 of Petitioners' Part 2 case-in-chief.

19 **I. QUESTION 1**

20 What studies, if any, have been done by the DWR or its' panel of experts on Delta
21 smelt near extinction? If so, have those studies been submitted as exhibits and accepted
22 by the CWF Teams; please provide the exhibit number and the date of the Hearing Officers
23 ruling.

24 **a. Objection**

25 (A) assumes fact not in evidence; (B) relevance/overly broad; (C) vague and
26 ambiguous as to "studies."

27 **b. Reasoning**

28 (A) facts supporting a claim of near extinction have not been submitted into evidence

1 in this hearing. While protestants may introduce such evidence in the future, the question
2 as phrased erroneously assumes this conclusion as fact rather than as opinion. (B) There
3 are many studies about Delta smelt and the experts may have participated in any particular
4 aspect of any given study. Further, the studies have been done for many years with relation
5 to the existing SWP/CVP and the broader Delta ecosystem under existing conditions, and
6 may have no relationship to the CA WaterFix's effects. (C) "Studies" could be interpreted
7 to mean only published scientific studies and not the analyses conducted to assess the CA
8 WaterFix. In order to best answer the question, a common understanding of what is meant
9 by "studies" is necessary, or an alternative word used.

10 **c. Revised Question**

11 What information, if any, has been developed or submitted by the DWR or its' panel
12 of experts on Delta smelt related to the CA WaterFix H3+, and has this information been
13 submitted as exhibits in this hearing?

14 **d. Answer**

15 Please see the written testimony of Dr. Greenwood for information used to evaluate
16 effects on Delta Smelt. Also, please see the Final EIR/S (in particular, Chapter 11), CA
17 WaterFix Biological Assessment (in particular, Chapter 6), U.S. Fish and Wildlife Service
18 CA WaterFix BiOp (in particular, Section 9.2.2) and ITP application (in particular, Chapter
19 4.1).

20 DWR submitted the testimony of Dr. Greenwood as exhibit DWR-1012. The Final
21 EIR/S, including Chapter 11, was submitted as exhibit SWRCB-102. The CA WaterFix
22 Biological Assessment, including Chapter 6, was submitted as exhibit SWRCB-104 and a
23 revised CA WaterFix Biological Assessment was submitted as exhibit DWR-1142. The
24 U.S. Fish and Wildlife Service CA WaterFix Biological Opinion was submitted as exhibit
25 SWRCB-105. The CA WaterFix Incidental Take Permit Application was submitted as
26 exhibit DWR-1036.

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II. QUESTION 2

What studies, if any, have been done by the DWR or its' panel of experts on Delta winter-run Chinook salmon declining populations? If so, have those studies been submitted as exhibits and accepted by the Hearing Officers ruling? If so, please provide the exhibit number and the date of the CWF ruling.

a. Objection

(A) Relevance/overly broad; (B) vague and ambiguous as to "studies."

b. Reasoning

(A) There are many studies about winter-run Chinook salmon and the experts may have participated in any particular aspect of any given study. Further, the studies have been done for many years with relation to the existing SWP/CVP and the broader Delta ecosystem under existing conditions, and may have no relationship to the CA WaterFix's effects. (B) Studies could be interpreted to mean only published scientific studies and not the analyses conducted to assess the CA WaterFix. In order to best answer the question, a common understanding of what is meant by "studies" is necessary, or an alternate word used.

c. Revised Question

What information, if any, have been done by the DWR or its' panel of experts on Delta winter-run Chinook salmon related to the CA WaterFix, and has that information been submitted as exhibits in this hearing?

d. Answer

Please see the written testimony of Dr. Greenwood for information used to evaluate effects on winter-run Chinook salmon in the Delta. Also, please see the Final EIR/S (in particular, Chapter 11), CA WaterFix Biological Assessment (in particular, Chapter 5), National Marine Fisheries Service CA WaterFix BiOp (in particular, Section 2.5) and ITP application (in particular, Chapter 4.3).

DWR submitted the testimony of Dr. Greenwood as exhibit DWR-1012. The Final EIR/S, including Chapter 11, was submitted as exhibit SWRCB-102. The CA WaterFix

1 Biological Assessment, including Chapter 5, was submitted as exhibit SWRCB-104 and a
2 revised CA WaterFix Biological Assessment was submitted as exhibit DWR-1142. The
3 National Marine Fisheries Service CA WaterFix Biological Opinion was submitted as exhibit
4 SWRCB-106. The CA WaterFix Incidental Take Permit Application was submitted as
5 exhibit DWR-1036.

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7 **III. QUESTION 3**

8 Were any of the panelist involved in conducting studies as to why the 1992 Central
9 Valley Project Improvement Act (CVPIA) Section 3406 (b)(1) Anadromous Fish Restoration
10 for doubling salmonid populations failed? If so, please explain. Were there any studies
11 regarding the failure of the Fish-Doubling Goals submitted as exhibits and accepted into
12 evidence by the Hearing Officers ruling? If so, please provide the exhibit number and the
13 date of the CWF ruling.

14 **a. Objection**

15 (A) relevance; (B) assumes facts not in evidence; (C) vague and ambiguous as to
16 “studies.”

17 **b. Reasoning**

18 (A) The 2008/2009 BiOps and the recent re-initiation of consultation is of an existing
19 standard and not a requirement of the CA WaterFix. (B) Facts supporting a claim that the
20 asserted fish-doubling goals have failed are not in evidence. While protestants may
21 introduce such evidence in the future, the question as phrased erroneously assumes this
22 conclusion as fact rather than as opinion. (C) Studies could be interpreted to mean only
23 published scientific studies and not the analyses conducted to assess the CA WaterFix. In
24 order to best answer the question, a common understanding of what is meant by “studies”
25 is necessary, or an alternative word used.

26 **c. Revised Question**

27 Do any of the panelists know if the 1992 Central Valley Project Improvement Act
28 (CVPIA) Section 3406(b)(1) Anadromous Fish Restoration was considered as part of the

1 biological analysis for the CA WaterFix?

2 **d. Answer**

3 The 1992 Central Valley Project Improvement Act (CVPIA) Section 3406(b)(1)
4 Anadromous Fish Restoration was considered implicitly through an evaluation of CA
5 WaterFix H3+ in comparison to the No Action Alternative, which includes the narrative
6 State Water Board D-1641 salmon protection water quality objective.

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8 **IV. QUESTION 4**

9 Was ICF or any other panelist a consultant for either the Bureau of Reclamation or
10 the DWR for the 2016 re-initiation of consultation for the long-term Operations Criteria and
11 Plan (OCAP)? If so, please explain ICF's or the panelist's level of involvement in the
12 operating criteria for the long-term OCAP.

13 **a. Objection**

14 Relevance. Outside the scope of this hearing.

15 **b. Reasoning**

16 The NOI for the 2016 re-initiation of consultation was circulated in January 2017.
17 The project description is still being developed. The re-initiation relates to the existing
18 2008/2009 BiOps and not the CA WaterFix and its BiOps.

19 **c. Revised Question**

20 Is any witness aware of the 2016 re-initiation of consultation for the long-term
21 Operations Criteria and Plan (OCAP)?

22 **d. Answer**

23 Yes.

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25 **V. QUESTION 5**

26 Since the 2006 re-initiation of consultation for the OCAP operating criteria have
27 there been specific studies that addressed the operating criteria relating to the decline in
28 pelagic or anadromous fish populations? If so, please explain.

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a. Objection

(A) Relevance; (B) vague and ambiguous as to “studies.”

b. Reasoning

(A) This is an existing OCAP and not CA WaterFix. The analysis is ongoing and no final reports are available. (B) see reasoning listed above.

c. Revised Question

Since the 2016 re-initiation of consultation for the long-term Operations Criteria and Plan (OCAP) are the witnesses aware of specific information addressing pelagic or anadromous fish populations that have been completed for that re-initiation of consultation?

d. Answer

We are unaware of any such information since 2016 for the re-initiation of consultation.

VI. QUESTION 6

Were there any studies conducted by the DWR, ICF, or its panel of expert witnesses regarding the relationship of the operating criteria and the decline of pelagic and anadromous species listed on the federal Endangered Species Act (ESA) or the California Endangered Species Act (CESA)? If so, were any such studies submitted as exhibits and accepted into evidence by a Hearing Officers ruling? If so, please provide the exhibit number and the date of the CWF ruling.

a. Objection

(A) assumes fact not in evidence; (B) vague/relevance; (C) over-broad.

b. Reasoning

(A) facts supporting a claim of a relationship between the CA WaterFix operating criteria and a decline of pelagic and anadromous species has not been submitted into evidence in this hearing. While protestants may introduce such evidence in the future, the question as phrased erroneously assumes this conclusion as fact rather than as opinion.
(B) Vague as to what operating criteria. If the question relates to the 2008/2009 BiOps and

1 the re-initiation of consultation, this is an existing standard and not a requirement of the CA
2 WaterFix. Vague as to studies. (C) There are many studies about pelagic and
3 anadromous species and the experts may have participated in any particular aspect of any
4 given study. Further, the studies have been done for many years with relation to the
5 existing SWP/CVP and the broader Delta ecosystem under existing conditions, and may
6 have no relationship to the CA WaterFix's effects.

7 **c. Revised Question**

8 Is there information for the CA WaterFix of which the witnesses are aware regarding
9 the CA WaterFix H3+ operating criteria and possible affects to ESA or CESA listed pelagic
10 or anadromous species that is submitted by Petitioners for this hearing?

11 **d. Answer**

12 Please see the written testimony of Drs. Greenwood and Wilder for information used
13 to evaluate effects on listed pelagic (Delta Smelt and Longfin Smelt) and anadromous
14 (Chinook Salmon, Steelhead, and Green Sturgeon) species. Also, please see the Final
15 EIR/S (in particular, Chapter 11), CA WaterFix Biological Assessment (in particular,
16 Chapters 5 and 6), U.S. Fish and Wildlife Service CA WaterFix BiOp (in particular, Section
17 9.2.2), National Marine Fisheries Service CA WaterFix BiOp (in particular, Section 2.5) and
18 ITP application (in particular, Chapter 4).

19 DWR submitted the testimony of Dr. Greenwood as exhibit DWR-1012 and the
20 testimony of Dr. Wilder as exhibit DWR-1013-signed. The Final EIR/S, including Chapter
21 11, was submitted as exhibit SWRCB-102. The CA WaterFix Biological Assessment,
22 including Chapter 5, was submitted as exhibit SWRCB-104 and a revised CA WaterFix
23 Biological Assessment was submitted as exhibit DWR-1142. The U.S. Fish and Wildlife
24 Service CA WaterFix Biological Opinion was submitted as exhibit SWRCB-105. The
25 National Marine Fisheries Service CA WaterFix Biological Opinion was submitted as exhibit
26 SWRCB-106. The CA WaterFix Incidental Take Permit Application was submitted as
27 exhibit DWR-1036.

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VII. QUESTION 7

Is ICF or any other panelist a consultant for either the Bureau of Reclamation or the DWR for the proposed operating criteria about the California WaterFix? If so, how familiar are you with the proposed operating criteria?

a. Objection

Asked and answered.

b. Reasoning

The consultant status of witnesses was asked by Mr. Keeling, and is directly stated in the witnesses' Statement of Qualifications. To the extent that any witness is familiar with the proposed operating criteria, it is directly stated in the written testimony and has been covered by many cross-examination questioners during the course of Panel 2. Furthermore, many consultant witnesses on Panel 2 are familiar with project. The familiarity with operating criteria was tested at length by other cross-examiners.

VIII. QUESTION 8

How does the proposed operating criteria compare to the 2006 re-initiation of consultation for the OCAP, as it pertains to ensuring the protection of listed species?

a. Objection

Relevance.

b. Reasoning

As stated above, the 2016 re-initiation of consultation for the 2008/2009 BiOps is not related to the CA WaterFix project in this hearing. Furthermore, no operating criteria has been identified for the 2016 re-initiation of consultation for the 2008/2009 BiOps as the NEPA process has only recently been initiated.

IX. QUESTION 9

How do the current operating criteria compare to the proposed operating criteria to ensure the effectiveness of Adaptive Management objectives, bearing in mind the dramatic

1 decline in both pelagic and anadromous species since 2006?

2 **a. Objection**

3 (A) assumes facts not in evidence; (B) vague and ambiguous as to “effectiveness of
4 Adaptive Management.” (C) Asked and answered through the questioning of Mr. Bezerra;
5 (D) Properly a question for Panel 3 and the witness for adaptive management.

6 **b. Reasoning**

7 (A) see the arguments made above regarding statements as to the degree of any
8 decline in pelagic and anadromous species since 2006. (B) The question does not set forth
9 the metrics by which the questioner is evaluating effectiveness, or what baseline the
10 questioner is using to compare CWF H3+, particularly given the fixation of previous
11 questions upon the 2016 reinitiation of consultation. (C). Mr. Bezerra asked some
12 questions regarding the adaptive management process but was largely referred to Panel 3.
13 (D) Panel 3 witness Dr. Earle has submitted testimony on adaptive management.

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15 **X. QUESTION 10**

16 Are any member of the panel familiar with a recent article authored by Dr. Peter
17 Moyle that indicates that certain species of salmonids are projected for extinction?

18 **a. Objection**

19 (A) Vague and ambiguous as to “recent article.” (B) Assumes facts not in evidence

20 **b. Reasoning**

21 (A) Witnesses cannot answer questions without being provided the article.
22 Witnesses are unable to determine familiarity with article that has not been sufficiently
23 described. (B) Although provided a footnote making statements as to the content of the
24 article, questioner has not indicated where in evidence witnesses may find the article.
25 Providing a footnote of alleged conclusions in the article is an inappropriate statement of
26 facts not in evidence.

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XI. QUESTION 11

What level of hands-on-experience do members of the expert panel have on the operation of either the State Water Project (SWP) or the federal Central Valley Project (CVP), i.e., are they senior or junior operators?

a. Objection

(A) Vague as to what is meant by “hands on.” (B) Asked and answered as each witnesses has provided their CV that explains their experience and identifies their job title. Unclear as to what is meant by senior or junior operator’s. Nevertheless, Aaron Miller has many years of experience operating the SWP and made a statement summarizing this experience at the outset of his verbal testimony summary.

XII. QUESTION 12

In regards to the expert witnesses’ testimony are they parties in the implementation and compliance of the Biological Opinion (BO), other than DWR personnel? If so, please explain. Are any of the panelist decision makers as it pertains to compliance with the BO or the Incidental Take Permits? Would any of the members of the panel be held responsible should the BO or the ITP be exceeded or violated? If so, please explain.

a. Objection

(A) Relevance or alternatively asked and answered; (B) Vague as to “parties to implementation.” Vague as to “held responsible.” Vague as to “decision-maker.” (C) Calls for a legal conclusion.

b. Reasoning

(A) The existence and scientific basis of these permits are relevant. The implementation of the U.S. Fish and Wildlife Service CA WaterFix BO or the National Marine Fisheries Service CA WaterFix BO, however, are not actions within the scope of this hearing. To the extent that the Hearing Officers find questions regarding the implementation informative, questions about the Department’s commitment to permitting requirements have been asked repeatedly throughout the hearing. (B) It is unclear as to

1 what the questioner means as to expert witnesses being “parties to implementation” since
2 the permits do not name any of the individuals who are witnesses in Panel 2. It is also
3 unclear as to what the questioner means when asking if witnesses to this hearing will be
4 “held responsible” or if they are “decision makers” for compliance purposes with these
5 permits. (C) To the extent the questioner seeks an interpretation as to which individuals
6 could be held legally responsible for compliance with these permits, that calls for a legal
7 conclusion.

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9 **XIII. QUESTION 13**

10 Has the DWR or the Bureau every been cited for violating the ESA "TAKE" limits
11 contained imposed in the BO or the ITP by either the state or federal fisheries agencies? If
12 so, please explain. Is it customary when the Project operators exceed the TAKE limits that
13 the parties re- institute consultation with the fisheries agencies?

14 **a. Objection**

15 Calls for a legal conclusion. Vague and Ambiguous as to “customary.” Assumes fact
16 not in evidence. Vague as to “cited.”