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

9 HEARING IN THE MATTER OF CALIFORNIA
DEPARTMENT OF WATER RESOURCES
10 AND UNITED STATES BUREAU OF
RECLAMATION REQUEST FOR A CHANGE
11 IN POINT OF DIVERSION FOR CALIFORNIA
WATER FIX
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**DEPARTMENT OF WATER
RESOURCES' OBJECTIONS TO,
AND MOTION TO STRIKE, THE
PART 2 TESTIMONY OF MARC DEL
PIERO, CSPA-208-CORRECTED AND
RELATED ORAL TESTIMONY**

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15 **INTRODUCTION**

16 Petitioner California Department of Water Resources ("DWR") submits these
17 objections to, and concurrently moves to strike, portions of the Part 2 testimony of Marc Del
18 Piero, CSPA-208-Corrected, and related oral testimony presented on April 25, 2018, on
19 behalf of protestants California Sportsfishing Protection Alliance et al.,¹ California Water
20 Impact Network, AquAlliance, Local Agencies of the North Delta and County of San
21 Joaquin et al.² (collectively "protestants").
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26 ¹ California Sportsfishing Protection Alliance, California Water Impact Network and
AquAlliance

27 ² County of San Joaquin, San Joaquin County Flood Control and Water Conservation
28 District and Mokelumne River Water and Power Authority.

1 **OBJECTIONS**

2 **I. TESTIMONY OUTSIDE THE SCOPE OF THIS PROCEEDING**

3 **A. Del Piero’s Testimony Continues to Present Argument Regarding CEQA**
4 **Compliance, an Issue Outside the Scope of this Proceeding**

5 As with Part 1, Mr. Del Piero’s written Part 2 testimony (CSPA-208-Corrected)
6 contains testimony regarding compliance with the California Environmental Quality Act
7 (“CEQA”), an issue the State Water Resources Control Board (“Board”) has repeatedly
8 ruled is outside the scope of this proceeding. (See October 3, 2017 Ruling, p. 3 and
9 January 4, 2018 Ruling, p. 4.) In its October 3, 2017 ruling (p. 3), the Board stated, “we
10 have ruled that the adequacy of DWR’s EIR for the WaterFix Project for purposes of CEQA
11 compliance is not a key hearing issue, and we directed the parties not to submit evidence
12 or argument on that issue.” On January 4, 2018, the Board again stated “[w] e have
13 reminded the parties repeatedly—most recently in our August 31, 2017 ruling—that the
14 issue of whether the FEIR/EIS for the WaterFix Project satisfies CEQA or NEPA
15 requirements is not a key hearing issue and that testimony on that issue will not be
16 admitted.”

17 While some of the testimony regarding CEQA compliance was struck by the Hearing
18 Officer’s ruling of January 4, 2018, CEQA compliance arguments, even if the word CEQA
19 was struck, remains. On these grounds, DWR respectfully requests that the following
20 testimony regarding CEQA compliance be struck: p.5:18-21, p.8:21-23, p.9:2-5, p.11:16-
21 24, p.13:5-25, p.18:1-3 and p.28:21-25.

22 **B. The Board has already ruled that Del Piero’s Testimony Regarding**
23 **Whether a Water Availability Analysis is Required is Outside the Scope**
24 **of this Proceeding.**

25 The Board has already ruled in Part 1 that testimony regarding whether Petitioners
26 were required to submit a water availability analysis with the Change Petition is outside the
27 scope of the current proceeding. (April 13, 2017 Ruling, p. 2; see also Rough Transcript for
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1 April 25, 2018, p. 57:7-22³.) In its April 13, 2017 ruling, the Board stated that:

2 Mr. Del Piero's testimony concerning the requirements of a water availability
3 analysis is outside the scope of the hearing. Although one of the key hearing
4 issues for Part 1 is whether the proposed changes would initiate a new right,
5 that issue does not extend to what would be required to support an application
6 for a new water right permit if a new water right permit were required for the
7 California WaterFix Project. (April 13, 2017 Ruling, p. 2.)

8 During cross examination of Mr. Del Piero's Part 2 direct testimony, the Board reiterated
9 this finding and struck Mr. Del Piero's oral testimony on the topic. (See April 25, 2018
10 Rough Transcript, p. 57.)

11 A water availability analysis is required by the California Water Code in support of
12 applications to appropriate. (See Water Code §§ 1200 et seq.) Indeed Mr. Del Piero
13 argues in Section 7 ["A Water Availability Analysis is Required"] of his Part 2 testimony that
14 "[a]s the Petition requests a new water right, a WAA was required." (CSPA-208-Corrected,
15 p. 27:14.) Such testimony regarding whether the Petition constitutes a new water right, and
16 thus required a water availability analysis, is not only a Part 1 issue but testimony regarding
17 a water availability analysis is outside the scope of the entire proceeding as the Board has
18 already ruled. Protestants, active participants since the beginning of this proceeding,
19 ignored the Board's ruling in Part 1 in submitting Section 7 of Mr. Del Piero's testimony.

20 For this reason, DWR respectfully requests that Section 7 of Mr. Del Piero's
21 testimony, pp. 27:13-29:10, be struck on the grounds that testimony regarding whether the
22 Petition constitutes a new water right is outside the scope of Part 2 and on the grounds that
23 testimony concerning the requirements of a water availability analysis specifically are
24 outside the scope of this proceeding entirely. DWR also requests that Mr. Del Piero's oral
25 testimony on direct and cross be similarly struck. After review of the rough transcript for
26 April 25, 2018, DWR requests that the following oral testimony regarding the requirements

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28 ³ Counsel for Local Agencies of the North Delta asked to be able to brief the issue of
whether the Water Availability Analysis is outside the scope of the proceeding. However,
the issue has already been ruled on by the Board and testimony struck in Part 1 based on
this ruling. DWR opposes any belated requests for reconsideration of the April 13, 2017
ruling here in Part 2.

1 of a water availability analysis be struck: pp. 20:15-17, 28:24-29:15, 34:16-35:2 and 41:12-
2 16.

3 **II. TESTIMONY OUTSIDE THE SCOPE OF PART 2**

4 **A. Del Piero’s Testimony That the Petition Constitutes a New Water Right** 5 **is Outside the Scope of Part 2 of this Proceeding.**

6 In Section 4 of his testimony, CSPA-208-Corrected pp. 21:15-24:11, Mr. Del Piero’s
7 “old paper and new pipes” is essentially an argument that the Petition is not a change
8 petition to an existing water right but rather a petition for a new water right, which is outside
9 the scope of Part 2 of this proceeding. Mr. Del Piero argues that the water rights permits at
10 issue contain “massive amounts of ‘paper water’” with insufficient “wet water.” Mr. Del
11 Piero confirms the gist of this argument page 22, line 19-20 stating: “Petitioners are asking
12 for a new water rights permit that will allow the SWP and CVP to increase the amount of
13 water diverted from the Delta by characterizing that increase, euphemistically and
14 deceptively, in terms of ‘improved reliability.’” As noted above in section I.B, later in his
15 testimony in Section 7, Mr. Del Piero claims that “[a] s the Petition requests a new water
16 right, a WAA is required.” (CSPA-208-Corrected, p. 27:14-15.)

17 The Water Board has unequivocally and repeatedly stated the key Part 1 and Part 2
18 hearing issues in this proceeding starting with the October 30, 2015 Notice of Petition and
19 Notice of Public Hearing and Pre-Hearing Conference to Consider the Petition. One of the
20 identified key hearing issues of Part 1 in this proceeding is “Will the changes proposed in
21 the Petition in effect initiate a new water right?” (October 30, 2015 Notice, p. 11.) Mr. Del
22 Piero himself submitted rebuttal testimony on this point in Part 1 in which he provided
23 testimony about “paper water” and claimed that the Petition is in effect a request for a new
24 water right. (See SJC-76R 2, Section III, pp. 9:18-13:16.) Merely referencing the public
25 trust does not convert the argument that the Petition constitutes a new water right into a
26 Part 2 issue.

27 For this reason, DWR respectfully requests that the following portions of CSPA-208-
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1 Corrected be struck: pp. 21:15-24:11. DWR also requests that the oral testimony from April
2 25, 2016 be similarly struck. From a review of the April 25, 2018 transcript, DWR requests
3 that the following oral testimony be struck on the same grounds: p. 24:5-10 and page 35:3-
4 37:3.

5 **B. Del Piero’s Testimony Regarding the No Injury Rule is Outside the**
6 **Scope of Part 2 of this Proceeding**

7 Mr. Del Piero also provides testimony in Section 5 of his testimony (CSPA-208-
8 Corrected, pp. 24:12-25:6) regarding the “no injury” rule, which applies to the Petitioners’
9 burden of proof to show that that the proposed change will not operate to the injury of *any*
10 *legal user of water* involved, as acknowledged by Mr. Del Piero in his testimony (Water
11 Code § 1702 [emphasis added]; CSPA-208-Corrected, p. 24:16-18.) Mr. Del Piero claims
12 that Petitioner relies on mitigation under CEQA to “less than significant levels” to
13 demonstrate that the petition would satisfy the “no injury rule.” Evidence regarding
14 Petitioners compliance with the “no injury rule” was expressly an identified key issue in Part
15 1: “Will the proposed changes cause injury to any municipal, industrial or agricultural uses
16 of water, including associated legal users of water?” (October 30, 2015 Notice, p. 11.)
17 Simply because Mr. Del Piero claims, without citation, that public trust resources are
18 recognized legal users of water does not transmute his testimony regarding compliance
19 with Water Code Section 1702 into a Part 2 issue. (See CSPA-208-Corrected, pp. 24:20-
20 21 and 24:24-26.)

21 For these reasons, DWR respectfully requests that Section 5 of CSPA-208-
22 Corrected, pp. 24:12-25:6 be struck. From a review of the April 25, 2018 transcript, DWR
23 requests that the following oral testimony be struck on the same grounds: pp. 55:10-56:14.

24 **III. Mr. Del Piero Lacks the Necessary Expertise to Provide Expert Testimony on**
25 **WaterFix Impacts and His Testimony on Impacts of the California WaterFix**
26 **Lack Foundation**

27 As disclosed by his testimony (CSPA-208-Corrected) and statement of qualifications
28 (CSPA-209), Mr. Del Piero is an attorney but he is not a biologist, hydrologist or water

1 quality specialist, and his expert testimony regarding biological and hydrologic impacts
2 should not be accorded the same weight as the testimony of the qualified scientific experts
3 who have testified in this proceeding. A person is qualified to testify as an expert if he has
4 special knowledge, skill, experience, training, or education sufficient to qualify him as an
5 expert. (Evidence Code § 720.) While Mr. Del Piero, a former Board member, is
6 unquestionably knowledgeable about applicable law, environmental issues and the history
7 of proceedings before the Board, his experience does not qualify him as a scientific expert.

8 This lack of specific expertise is demonstrated by Mr. Del Piero's conclusions
9 regarding actual impacts of the California WaterFix on public trust resources, fish or wildlife
10 which are wholly unsupported by citations to any evidence and, thus, lack foundation. (See
11 CSPA-208-Corrected, pp. 17:21-18:3.) When an expert's conclusions are based on
12 assumptions unsupported by the record, the conclusions have "no evidentiary value and
13 should be excluded." (*Pedefferri v. Seidner Enterprises* (2013) 216 Cal.App.4th 359, 375.)

14 For these reasons, DWR requests that these objections be considered when
15 evaluating the weight of such evidence with respect to Mr. Del Piero's testimony, CSPA-
16 208-Correct, at pages 17:21-18:3.⁴

17 **IV. Mr. Del Piero's Testimony is a Legal Brief Masquerading as Testimony and is**
18 **of little Relevance and Evidentiary Value Which Should Go to Its Weight**

19 Mr. Del Piero's testimony is a not-so-thinly disguised legal brief with express aim of
20 providing Mr. Del Piero's opinions to the Board on the interpretation of case law, statutes,
21 past Board decisions and standards under the law, including extensive case law analysis,
22 potentially applicable to this proceeding. (See e.g., pp. 10:1-13:9, 14:20-16:11.) For the
23 most part, Mr. Del Piero's testimony cannot be construed as providing relevant evidence to
24 the Water Board regarding the key hearing issues in Part 2 of this proceeding which involve

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26 ⁴ DWR is mindful of the Board's February 21, 2017 Ruling (p. 12.) overruling objections as
27 to *admissibility* based on expert qualifications, which stated that the Board will consider
28 witness qualifications in determining what weight to afford a witnesses' testimony. Due to
Mr. Del Piero's stature as a past Board member and the unsupported conclusions in his
testimony, DWR felt it important to lodge these objections as to his expert qualifications.

1 evidence concerning impacts of the California WaterFix to fish, wildlife, recreational uses or
2 other public trust resources, and whether the project is in the public interest. (Gov't Code §
3 11513(c); October 30, 2015 Notice, pp. 11-12 [identifying key hearing issues].)


4 DWR is cognizant of the Hearing Officer's February 21, 2017 Ruling that evidentiary
5 objections to testimony containing legal conclusions goes to the weight and not the
6 admissibility, of the evidence. Accordingly, DWR, for the record, lodges an objection to the
7 testimony of Mr. Del Piero, CSPA-208-Corrected, on the grounds that the testimony is
8 almost entirely comprised of legal conclusions masquerading as evidence, and provides
9 very little to no relevant evidence to the Board (Gov't Code Section 11513(c)), and asks
10 that the Board consider these objections in determining the proper weight to accord Mr. Del
11 Piero's Part 2 testimony.

12 **V. CONCLUSION**

13 For the foregoing reasons, DWR respectfully requests that the Board sustain its
14 objections and grant its motion to strike specified testimony.

15 Dated: April 26, 2018

CALIFORNIA DEPARTMENT OF WATER
RESOURCES

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19 James "Tripp" Mizell
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