

1 Spencer Kenner (SBN 148930)
James E. Mizell (SBN 232698)
Emily M. Thor (SBN 303169)
2 **DEPARTMENT OF WATER RESOURCES**
Office of the Chief Counsel
3 1416 9th St., Room 1104
Sacramento, CA 95814
4 Telephone: 916-653-5966
E-mail: jmizell@water.ca.gov
5

6 Attorneys for California Department of Water
Resources
7

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 AND STATE WATER
CONTRACTORS, INC. JOINT
MOTION TO STRIKE TESTIMONY OF
SOUTH DELTA WATER AGENCY ET
AL. WITNESS MR. BURKE

16 The California Department of Water Resources (“DWR”) and the State Water
17 Contractors, Inc. (“SWC”) make this motion to strike portions of Mr. Burke’s testimony and
18 exhibits on the basis that they are outside the scope of rebuttal. Indeed, Mr. Burke does
19 not offer any citations or reference to the Petitioners Part 2 testimony he is rebutting in any
20 of the section provided below. The Hearing officers have determined the appropriate scope
21 of rebuttal to include testimony that rebuts testimony provided by Petitioners in Part 2 cases
22 in chief and testimony regarding changes from the Final EIR/S to the Draft Supplemental
EIR/S. (See June 18, 2018 Ruling, pgs. 1-2.)

23 DWR and the SWC provide this summary list and corresponding strike out of
24 SDWA-323 Revised (see Exhibit A) to summarize the portions to strike for the reasons
25 detailed in this motion:

- 26 • Testimony related to Boundary 1 and Boundary 2
 - 27 ○ SDWA-323 Revised pg. 4:14 through 5:2
 - 28 ○ SDWA-323 Revised 29:12 first sentence through line 16

- 1 ○ SDWA-323 Revised pg. 35:27 sentence starting with Granted through pg.
- 2 36:2
- 3 ○ SDWA-324 Slide 6 3rd bullet
- 4 ● Testimony related to DSM2 bathymetry
- 5 ○ SDWA-323 Revised opinions 2 and 3 on page 5
- 6 ○ SDWA-323 Revised pg. 16:28 to pg. 28
- 7 ○ SDWA-323 Revised pg. 32 lines 5-7, lines 13-15, and lines 20-24
- 8 ○ SDWA-323 Revised pg. 36:8-12
- 9 ○ SDWA-323 revised errata pdf pages 4-9
- 10 ○ SDWA-324 Slide 2 opinions 2 and 3
- 11 ○ SDWA-324 Slide 3 second sentence of bullet 2
- 12 ○ SDWA-324 Slide 5 second bullet
- 13 ○ SDWA-324 Slides 16-24
- 14 ○ SDWA-324 Slide 30 conclusion 4
- 15 ○ SDWA-324 Errata pdf pages 4-9
- 16 ● Testimony related to DSM2 in Predictive Mode
- 17 ○ SDWA-323 Revised pg. 29:18 through 30:25
- 18 ○ SDWA-324 Slide 5, bullet 3
- 19 ○ SDWA-325
- 20 ● Testimony related to DSM2 time steps
- 21 ○ SDWA-323 Revised pg. 5:23-26
- 22 ○ SDWA-323 Revised pg. 36:16-22
- 23 ○ SDWA-324 Slide 3, bullet 3
- 24 ○ SDWA-324 Slide 31 Conclusion 6

25

26 **I. Testimony related to DSM2 bathymetry:**

27 A large portion of Mr. Burke’s testimony is dedicated to comparing bathymetry in the

28 DSM2 model to some undisclosed bathymetry study. Petitioners did not provide direct

1 testimony in Part 2 about the bathymetry used in DSM2 modeling. In fact, for each DSM2
2 run relied on by Petitioners in Part 1 and Part 2 there has been no change to the
3 bathymetry used by the model, nor was bathymetry specifically discussed. For this reason,
4 rebuttal testimony on this topic is outside the scope of the Part 2 rebuttal phase.
5 Furthermore, the testimony is of limited value as it compares a mere 1000 feet of
6 bathymetry data to draw conclusions about a 10 mile section on Middle River. Finally,
7 there are no changes contemplated within the Draft Supplemental EIR/S that implicate
8 Boundary 1 or Boundary 2.

9
10 On that basis DWR and the SWC move to strike the following:

- 11 ○ SDWA-323 Revised opinions 2 and 3 on page 5
- 12 ○ SDWA-323 Revised pg. 16:28 to pg. 28
- 13 ○ SDWA-323 Revised pg. 32 lines 5-7, lines 13-15, and lines 20-24
- 14 ○ SDWA-323 Revised pg. 36:8-12
- 15 ○ SDWA-323 revised errata pdf pages 4-9
- 16 ○ SDWA-324 Slide 2 opinions 2 and 3
- 17 ○ SDWA-324 Slide 3 second sentence of bullet 2
- 18 ○ SDWA-324 Slide 5 second bullet
- 19 ○ SDWA-324 Slides 16-24
- 20 ○ SDWA-324 Slide 30 conclusion 4
- 21 ○ SDWA-324 Errata pdf pages 4-9.

22
23 **II. Testimony related to Boundary 1 and Boundary 2:**

24 In several places in Mr. Burke's testimony he refers to Boundary 1 and Boundary 2
25 analysis and draws opinions related to those boundaries without citing to Petitioners' case
26 in chief. The Petitioners did not present any modeling evidence about Boundary 1 or 2 in
27 their Part 2 case in chief, and instead all the modeling results were based on the CWF H3+
28 Project. Furthermore, there are no changes contemplated within the Draft Supplemental

1 EIR/S that implicate Boundary 1 or Boundary 2. It is improper rebuttal testimony to draw
2 conclusions based on modeling scenarios that were not presented in Part 2 of the
3 Petitioners' case in chief. For that reason, DWR and the SWC move to strike the following:

- 4 ○ SDWA-323 Revised pg. 4:14 through 5:2
- 5 ○ SDWA-323 Revised 29:12 first sentence through line 16
- 6 ○ SDWA-323 Revised pg. 35:27 sentence starting with Granted through pg.
7 36:2
- 8 ○ SDWA-324 Slide 6 3rd bullet

9
10 **III. Testimony related to DSM2 time steps:**

11 In Mr. Burke's opinion 7 he offers no citation or reference to the Part 2 testimony he
12 is rebutting. Furthermore, there are no changes contemplated within the Draft
13 Supplemental EIR/S that address the DSM2 time step. Instead he makes a broad
14 conclusion about the use of DSM2 time steps and for this reason the following testimony
15 should be struck:

- 16 ○ SDWA-323 Revised pg. 5:23-26
- 17 ○ SDWA-323 Revised pg. 36:16-22
- 18 ○ SDWA-324 Slide 3, bullet 3
- 19 ○ SDWA-324 Slide 31 Conclusion 6

20
21 **IV. Testimony Related to Using DSM2 in a Predictive Mode:**

22 Starting on page 28, Mr. Burke discusses using DSM2 in a predictive mode. Again,
23 Mr. Burke offers no citation or reference to Petitioners Part 2 case in chief for what he is
24 rebutting. Furthermore, there are no changes contemplated within the Draft Supplemental
25 EIR/S that discuss the use of DSM2 in predictive mode. Instead Mr. Burke provides a new
26 opinion wholly unrelated to Part 2 direct testimony submitted by Petitioners. For this reason
27 the following portions of Mr. Burke's testimony and exhibits should be struck:

- 28 ○ SDWA-323 Revised pg. 29:18 through 30:25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- SDWA-324 Slide 5, bullet 3
- SDWA-325

V. CONCLUSION

For the reasoning found above, the testimony of Mr. Burke should be struck.

Submitted August 20, 2018.



(James "Tripp" Mizell)