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18 Conservation District, and Mokelumne River Water and Power Authority

19 [ADDITIONAL COUNSEL LISTED ON FOLLOWING PAGE]

20 **BEFORE THE**  
21 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

22 HEARING IN THE MATTER OF  
23 CALIFORNIA DEPARTMENT OF  
24 WATER RESOURCES AND UNITED  
25 STATES BUREAU OF RECLAMATION  
26 REQUEST FOR A CHANGE IN POINT  
27 OF DIVERSION FOR CALIFORNIA  
28 WATER FIX

**RESPONSE OF SAN JOAQUIN  
COUNTY AND CSPA, ET AL. TO  
DWR'S OBJECTION TO  
PROTESTANTS' PART 2 SUR-  
REBUTTAL EXHIBITS**

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Attorneys for California Sportfishing Protection Alliance,  
California Water Impact Network, and AquAlliance

1 The County of San Joaquin, San Joaquin County Flood Control and  
2 Water Conservation District, Mokelumne River Water and Power Authority, California  
3 Sportfishing Protection Alliance, California Water Impact Network, and AquAlliance  
4 (collectively, "Protestants") submit the following Response to DWR's Objection to  
5 Protestants' Request for Admission of Certain Part 2 Sur-Rebuttal Exhibits into  
6 evidence.  
7

8 **I. DWR'S OBJECTIONS TO EXHIBITS SJC-369 AND SJC-372 ARE**  
9 **WITHOUT MERIT AND SHOULD BE OVERRULED.**

10 DWR objects to Exhibits SJC-369 and SJC-372 on the ground that they relate to  
11 the San Joaquin River. (DWR Objection, p. 1.) DWR complains, also, that Exhibits  
12 SJC-369 and SJC-372 are "unrelated" to California WaterFix. (DWR Objection, pp. 1-  
13 2.)  
14

15 These objections are altogether irrelevant to Protestants' submission of Exhibits  
16 SJC-369 and SJC-372. Mr. Kier's Testimony was submitted in response to the  
17 testimony of Drs. Hanson, Hutton, and Acuña, all of whom testified as to selected post-  
18 2010 reports and studies that they claim undermine the Board's 2010 Delta Flow  
19 Criteria Report and the recommendations set forth therein. Mr. Kier's testimony  
20 underscored the extraordinary accomplishment represented by the 2010 Delta Flow  
21 Criteria Report and the Board's work in connection with that report, as well as his  
22 opinion that none of the post-2010 investigations contradict the basic finding of the 2010  
23 Delta Flow Criteria Report that substantially more Delta through-flow is needed to  
24 protect and recover Delta fisheries.  
25

26 In response to the post-2010 studies that DWR witnesses claim cast doubt on  
27 the findings and recommendations of the Board's 2010 Delta Flow Criteria Report  
28

1 (SWRCB-25), Mr. Kier appropriately referenced and submitted the studies and reports  
2 relied upon by the Board in the 2010 Delta Flow Criteria Report itself. (See Exh. SJC-  
3 364, p. 12: 9-12 and p. 14:5-11; see, also, p. 12:13 – 13:5.)

4  
5 Exhibits SJC-369 and SJC-372, of which DWR now complains, were submitted  
6 for that reason. They are expressly referenced by the Board in its 2010 Delta Flow  
7 Criteria Report as exhibits relied upon and cited therein. (See SWRCB-25, pp. 137 [pdf  
8 p. 150, citing DFG Exhibit 4 to the 2010 proceeding, which Protestants have submitted  
9 herein as Exhibit SJC-369] and p. 145 [pdf p. 158, citing the 2009 C. Mesick study  
10 which Protestants have submitted herein as Exhibit SJC-372].) These two exhibits are  
11 also cited expressly in the text of the Board's 2010 Delta Flow Criteria Report. For  
12 example, Exhibit SJC-369 [designated as DFG-4 in the 2010 proceeding] is cited at  
13 page 44 of the report:  
14

15 Information received during the informational proceeding links the  
16 abundance and habitat of several key species that live in, move through,  
17 or otherwise depend upon for their survival, the Delta and its ecosystem.  
18 DFG Exhibits 1 through 4 present information on the relationship between  
19 abundance and the quantity, quality, and timing of flow for the following  
20 species: (1) Chinook salmon, (2) Pacific herring, (3) longfin smelt, (4)  
21 prickly sculpin, (5) Sacramento splittail, (6) delta smelt, (7) starry flounder,  
22 (8) white sturgeon, (9) green sturgeon, (10) Pacific lamprey, (11) river  
23 lamprey, (12) bay shrimp, (13) mysid shrimp and a copepod, *Eurytemora*  
24 *affinis*, and (14) American shad.

25  
26 (SWRCB-25, p. 44 [pdf p. 57]<sup>1</sup>; see also, SWRCB-25, pp. 44, footnote 10 [explaining,  
27 "This section is largely drawn from DFG exhibits 1 through 4."].) The 2009 Mesick  
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<sup>1</sup> The fact that the Board expressly relied on SJC-369 (Exh. DFG-4 in the 2010 proceeding) should, in and of itself, dispose of DWR's objection. Protestants note, moreover, that in the passage quoted above, from page 44 [pdf p. 57] of the 2010 report, the study was cited to support a point that went well beyond any San Joaquin River-specific discussion.

1 study, too, is expressly relied upon in the text of the Board’s 2010 report. (See, e.g.,  
2 SWRCB-25, pp. 55-56 [pdf pp. 68-69]; p. 58 [pdf. 71].)

3 In short, the Board expressly relied on SJC-369 and SJC-372 in the 2010 Delta  
4 Flow Criteria Report. That fact – that the exhibits were accepted, considered, and  
5 expressly relied upon in the 2010 Report – stands without regard to whether discussion  
6 of Vernalis flows are part of *this* hearing.  
7

8 Further, in this proceeding, the San Joaquin Tributaries Authority (“SJTA”)  
9 recently made a motion to strike portions of the 2010 Delta Flow Criteria Report  
10 (SWRBC-25) concerning the merits of the Vernalis flow recommendations. The Hearing  
11 Officers denied that motion, stating:  
12

13 We have a motion from SJTA to strike portions of the exhibits in  
14 this hearing, comprising the 2010 Delta Flow Criteria Report. That motion  
is denied.

15 **Although we have ruled that the merits of the Vernalis Flow**  
16 **Criteria are not relevant to the California WaterFix Project, we do not**  
17 **find it necessary or appropriate to strike corresponding portions of**  
**the 2010 Delta Flow Criteria Report.**

18 **We do not need to go through the exercise of striking portions**  
19 **of the report in order to avoid reliance on those portions of the report**  
**that are not relevant to a decision on the Change Petition.**

20 In addition, the Delta Reform Act requires the State Water Board as  
21 a whole to consider the 2010 Report, not just the Hearing Officers, so it  
would not be appropriate to strike portions of the report.  
22

23 Although the Board must consider the entire report, we note that  
24 SJTA will not be prejudiced by this ruling if the Board’s final decision in this  
hearing does not require increased flows at Vernalis as a condition of any  
approval of the Petition.  
25

26 (August 29, 2018 Transcript, p. 1:22 – 2:17, emphasis added.)  
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28

1 The same observation holds here as well. The point of submitting Exhibits SJC-  
2 369 and SJC-372 into evidence has nothing to do with whether Vernalis flow  
3 recommendations are relevant to *this* hearing, and this is not an appropriate occasion  
4 upon which to begin excising references and material from the 2010 Delta Flow Criteria  
5 Report.

7 **II. DWR'S OBJECTIONS TO EXHIBITS SJC-370, SJC-371, SJC-370, SJC-  
8 373, SJC-382, SJC-383, SJC-387, AND SJC-388-395 ARE WITHOUT  
9 MERIT AND SHOULD BE OVERRULED.**

10 Similarly misplaced is DWR's objection to Exhibits SJC-370, SJC-371, SJC-373,  
11 SJC-382, SJC-383, SJC-387, and SJC-388-395 on the grounds that: (1) they constitute  
12 prior testimony of witnesses who were not offered as sur-rebuttal witnesses in *this*  
13 proceeding, or (2) that these exhibits are not self-authenticating for substantive content,  
14 represent hearsay, and/or do not comply with the affirmation requirement set forth in the  
15 March 27, 2018 Ruling in *this* proceeding. (DWR Objection, pp. 2-3.)

16 Again, each and every one of these exhibits was expressly relied upon and cited  
17 in the Board's 2010 Delta Flow Criteria Report. (See SWRCB-25 at p. 137 [pdf p. 150]  
18 [expressly referencing as exhibits cited in the Report SJC-370 [identified as CSPA Exh.  
19 1 in the 2010 proceeding], SJC-371 [identified as CSPA Exh. 7 in the 2010 proceeding],  
20 SJC-373 [identified as CWIN Exh. 2 in the 2010 proceeding], SJC-388 [identified as  
21 AR/NHI Exh.1 in the 2010 proceeding]; SWRCB-25 at p. 138 [pdf p. 151] [expressly  
22 referencing as exhibits cited in the Report SJC-383 [identified as TBI Exh. 1 in the 2010  
23 proceeding], SJC-387 [identified as DOI Exh. 1 in the 2010 proceeding], SJC-373  
24 [identified at CWIN Exh. 2 in the 2010 proceeding], SJC-389 [DFG Closing Comments  
25 in the 2010 proceeding]; and SWRCB-25 at p. 139 [pdf p. 152] [expressly referencing  
26 as exhibits cited in the Report SJC-390 [CSPA Closing Comments in the 2010  
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1 proceeding], **SJC-391** [CWIN Closing Comments in the 2010 proceeding], **SJC-392**  
2 [Contra Costa Water District Closing Comments in the 2010 proceeding], **SJC-393**  
3 [DWR Closing Comments in the 2010 proceeding], **SJC-394** [Environmental Defense  
4 Fund Closing Comments in the 2010 proceeding], and **SJC-395** [The Bay Institute’s  
5 Closing Comments in the 2010 proceeding].) Again, these exhibits are cited  
6 throughout the Board’s 2010 Delta Flow Criteria Report (using 2010 exhibit  
7 designations).

9           These exhibits were all admitted into the 2010 proceeding and expressly relied  
10 upon by the Board in the 2010 Report. DWR’s objections to the admissibility of some of  
11 these documents might conceivably have had a place in 2010, but objections now in  
12 2018 are utterly irrelevant. Protestants are not offering these documents as new  
13 evidence in this proceeding, but, rather, as documents upon which the Board relied  
14 (expressly) in its 2010 Delta Flow Criteria Report.

16           Finally, Exhibit SJC-381 is the conclusion of the 2010 Delta expert panel and,  
17 lest there be any doubt on that point, it is posted by the Board itself on the Board’s 2010  
18 Delta Flow Criteria website, at:  
19 [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/deltaflow](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/presentations/intro_6.pdf)  
20 [/docs/presentations/intro\\_6.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/presentations/intro_6.pdf).

22           That link (entitled “Five Key Points on Setting Delta Environmental Flows –  
23 Conclusion”) is directly accessible from the Board’s own Delta Flows Group Introductory  
24 Presentation page, which includes the following prefatory explanation:

25           On March 22 – 24 [2010], the State Water Resources Control Board held  
26 its Informational Proceeding to Develop Flow Criteria for the Delta  
27 Ecosystem. On the opening day of the proceeding, the State Water Board  
28 received a technical introduction by the Delta Environmental Flows Group.

1 Links to PDF copies of the Power Point presentations made during the  
2 technical introduction are provided below.

3 ([https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/deltaflo](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflo)  
4 [w/defg\\_presentation.shtml](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflo/w/defg_presentation.shtml).) The Delta expert panel's succinct summary, posted on the  
5 SWRCB's own 2010 Delta Flow Criteria Report website, plainly complies with the  
6 requirements for acceptance of evidence in this proceeding as those requirements have  
7 been applied to hundreds of other exhibits over the past 2+ years.  
8

### 9 III. EXHIBITS IDENTIFIED AS DUPLICATIVE

10 DWR notes that Exhibit SJC-514 (the 1999 FEIR for the 1995 Water Quality  
11 Control Plan) is the same document that has already been marked as SWRCB-32.  
12 (DWR Objection, p. 3.) Obviously, Protestants have no interest in larding this  
13 proceeding with duplicative exhibits, and we therefore appreciate DWR bringing this  
14 oversight to our attention.  
15

16 According to the SWRCB's File Transfer Protocol ("FTP") site, however, Exhibit  
17 SWRCB-32 has not yet been accepted into evidence. **Therefore, to avoid the**  
18 **duplication of which DWR complains, Protestants propose to (1) revise Mr. Kier's**  
19 **written Testimony (SJC-364) by adding a reference to SWRCB-32, and (2)**  
20 **withdraw Exhibit SJC-514 and, in its place, move Exhibit SWRCB-32 into**  
21 **evidence.** This should fully address DWR's objection to Exhibit SJC-514.  
22

23 DWR also objects to Exhibit SJC-516 on the ground that it "is duplicative of  
24 SWRCB-27 and SWRCB-28." (DWR Objection, p. 3.) Actually, Exhibit SJC-516 is  
25 duplicative of Exhibit SWRCB-28, which has not yet been accepted into evidence as a  
26 stand-alone exhibit, as well as of Appendix 1 ("Plan Amendment Report") included in  
27  
28



1 Exhibit SWRCB-27, which was accepted into evidence by operation of the Ruling of  
2 February 21, 2017. (See SWRCB FTP site entry for Exhibit SWRCB-27.)

3 Because the document marked as Exhibit SJC-516 is already in evidence as a  
4 part of Exhibit SWRCB-27, **Protestants propose to (1) revise Mr. Kier’s written**  
5 **Testimony (SJC-364) by adding a reference to SWRCB-27 and (2) withdraw**  
6 **Exhibit SJC-516.** This should fully address DWR’s objection to Exhibit SJC-516.

7  
8 Finally, DWR asks Staff to review for any other redundant exhibits. Protestants  
9 have no objection to that, of course. We ask only that if any “SJC-“ exhibits submitted  
10 with the Kier Testimony are found to be duplicative of exhibits already marked in this  
11 proceeding, Staff so inform Protestants (thereby facilitating submittal of a revised SJC-  
12 364 that reflects the correction) and, if the pertinent “SWRCB-“ or other already-marked  
13 exhibit has not yet been accepted into evidence, we ask that Staff update the FTP site  
14 to indicate that it now has been accepted into evidence.

#### 16 **IV. CONCLUSION**


17 For the foregoing reasons, DWR’s objections to Exhibits SJC-369, SJC-370,  
18 SJC-371, SJC-372, SJC-373, SJC-381, SJC-382, SJC-383, and SJC-387 and SJC-388-  
19 395 are without merit and should be overruled.

21 As for Exhibits SJC-514 and SJC-516, DWR correctly points out that those  
22 documents have already been marked as SWRCB-32 and SWRCB-27, respectively.  
23 Accordingly, Protestants propose to withdraw Exhibits SJC-514 and SJC-516 and  
24 request leave to submit a revised Exhibit SJC-564 (William Kier Testimony), which  
25 includes citations to SWRCB-32 and SWRCB-27. In connection therewith, Protestants  
26 move for admission of SWRCB-32 into evidence.  
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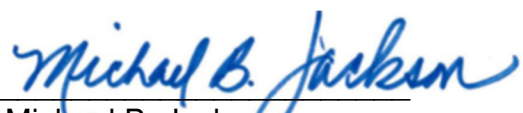
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