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6 PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS
and INSTITUTE FOR FISHERIES RESOURCES
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8
9 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

10 HEARING REGARDING PETITION FILED BY) PACIFIC COAST FEDERATION OF
THE DEPARTMENT OF WATER) FISHERMEN’S ASSOCIATIONS’ AND
11 RESOURCES AND U.S. BUREAU OF) INSTITUTE FOR FISHERIES
RECLAMATION REQUESTING CHANGES IN) RESOURCES’ SUPPLEMENTAL
12 WATER RIGHTS FOR THE CALIFORNIA) RESPONSE TO OBJECTIONS TO
WATERFIX PROJECT) WRITTEN TESTIMONY AND EXHIBITS
13)
_____)

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15 Protestants Pacific Coast Federation of Fishermen’s Associations and Institute for Fisheries
16 Resources (collectively, “PCFFA”) hereby respond to the California Department of Water Resources’
17 (“DWR’s”) Master Objections to Protestants’ Cases-in-Chief Collectively, DWR’s Objections to
18 Testimony and Exhibits Submitted by PCFFA, et al. (Group 38) and Motion to Strike, and San Luis &
19 Delta-Mendota Water Authority’s (“SLDMWA’s”) Objections to Part 1B Parties’ Cases in Chief. Per
20 this Board’s September 28, 2016, direction, PCFFA previously responded to “objections to Part 1B cases
21 in chief that concern whether testimony or exhibits are within the scope of Part 1B.” PCFFA hereby
22 responds to the balance of DWR’s and SLDMWA’s objections.

23 **I. DWR’S MASTER OBJECTIONS TO PROTESTANTS’ CASES-IN-CHIEF**
24 **COLLECTIVELY**

25 PCFFA previously responded to DWR’s objections about the relevance of PCFFA’s testimony in
26 light of the scope of Part 1 of the hearing. This Board required other parties – but *not* PCFFA – to revise
27 their testimony in light of these relevance objections. This Board thus rejected DWR’s objections and
28 determined that PCFFA’s testimony is relevant. For this reason, DWR’s objections to PCFFA-8,

1 PCFFA-9, PCFFA-10, PCFFA-14, PCFFA-20, PCFFA-21, PCFFA-58, PCFFA-59, PCFFA-61, PCFFA-
2 62, PCFFA-63, PCFFA-64, PCFFA-66, PCFFA-67, PCFFA-68, and PCFFA-69 on relevance grounds
3 should be overruled. *See* DWR’s Objections to PCFFA Case in Chief (“DWR PCFFA Objs.”), Table:
4 Objections to PCFFA et al. Exhibits and Testimony.

5 DWR raised three other “master objections” to protestants’ evidence. DWR’s Master Objections
6 to Protestants’ Cases-in-Chief (“Master Objections”) at 16:5-19:16. As appropriate, PCFFA responds to
7 these objections in its responses to DWR’s specific objections below.

8 DWR’s first master objection, that “protestants submitted legal arguments as testimony” (Master
9 Objections at 16:5-17:9), does not appear to apply to PCFFA because, unlike with other parties, it is not
10 mentioned in DWR’s specific objections. Regardless, PCFFA’s testimony is about factual matters, and
11 thus has “bearing on the facts to be determined” (Master Objections at 16:16-18), so to the extent DWR’s
12 master objection is intended to apply to PCFFA’s testimony, it is meritless.

13 Second, DWR’s objects to “policy statements and unsupported factual arguments [that it claims]
14 are not evidence.” Master Objections at 17:10-18:2. PCFFA discusses in section II(F) below why the
15 testimony of Stephan C. Volker complies with this Board’s rules about the submission of policy
16 statements.

17 DWR’s third master objection claims that “some exhibits were not submitted properly.” Master
18 Objections at 18:3-19:16. PCFFA responds to DWR’s objections about the submission of particular
19 exhibits in section II(A) below.

20 **II. DWR’S OBJECTIONS TO PCFFA’S CASE IN CHIEF – PART 1B**

21 DWR raises specific objections to certain aspects of PCFFA’s case-in-chief. *See generally* DWR
22 PCFFA Objs. As noted above, PCFFA already successfully responded to DWR’s objections about the
23 scope of its testimony. DWR PCFFA Objs. at 5:13-7:2; *see* PCFFA’s Response to Objections to Written
24 Testimony and Exhibits (“PCFFA Response”) at 4:27-7:9. PCFFA’s responses to the rest of DWR’s
25 objections are set forth below.

26 **A. All PCFFA Exhibits Have Been Properly Authenticated and Are Relevant**

27 DWR argues that four exhibits – PCFFA-21, PCFFA-58, PCFFA-59, and PCFFA-61 – lack “an
28 adequate foundation” because the “four exhibits are not self-authenticating” and supposedly “there is no

1 testimony that lays the necessary foundation regarding the preparation or content of these documents.”
2 DWR PCFFA Objs. at 3:24-4:7. These objections lack merit. Each of the four documents was
3 authenticated by the written testimony of a witness, and, to the extent any party doubts the veracity of the
4 witnesses’ statements that they have personal knowledge that the documents are what they purport to be,
5 parties are free to cross-examine PCFFA’s witnesses.

6 DWR first objects to PCFFA-21. Stephan C. Volker affirmed that he has personal knowledge that
7 this document is what it purports to be in his authenticating declaration. PCFFA-84 at 1:16-19, 2:21-22.
8 A “document is authenticated when sufficient evidence has been produced to sustain a finding that the
9 document is what it purports to be. As long as the evidence would support a finding of authenticity, the
10 writing is admissible.” *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321 (disputes about authenticity
11 generally affect the weight of evidence, not its admissibility); *see also Landale-Cameron Court, Inc. v.*
12 *Ahonen* (2007) 155 Cal.App.4th 1401, 1409 (“Although a more elaborate authentication could have been
13 presented . . . , counsel . . . sufficiently authenticated the documents . . . when he declared that they were
14 true and correct copies of documents sent by and received from prior counsel”). Additionally, PCFFA
15 will further authenticate this document with the testimony of witnesses, pursuant to Title 23, California
16 Code of Regulations section 648.4(d). Finally, PCFFA authenticated this document during Mr. Benjamin
17 Eichenberg’s cross-examination of Mr. Eric Reyes on August 26, 2016. Mr. Eichenberg explained that
18 he obtained the document from DWR’s website, and DWR’s witness verified that he produced such
19 spreadsheets. Mr. Eichenberg used this straightforward document to discredit DWR’s untenable excuse
20 for failing to provide the Board with modeling data: that DWR’s underlying modeling evidence was so
21 impenetrable as to be useless to the Board. There has been ample testimony that PCFFA-21 is the
22 document it purports to be and it is therefore admissible.

23 Next, DWR objects to PCFFA-58 and PCFFA-59, on the basis that they lack foundation because
24 they are handwritten notes that were not properly authenticated. Wrong. Patricia Schifferle testified that
25 she has personal knowledge that these notes are authentic (PCFFA-82 at 1:16-19, 4:12-14), and will
26 testify to that effect during PCFFA’s presentation of its case-in-chief. That is enough. *Jazayeri*, 174
27 Cal.App.4th at 321; *Landale-Cameron*, 155 Cal.App.4th at 1409. If DWR has any questions about the
28 preparation of these notes, it is free to question Ms. Schifferle during her oral testimony.

1 DWR objects to PCFFA-61 for the same reasons it objected to the three other exhibits. But as
2 with PCFFA-58 and PCFFA-59, Ms. Schifferle satisfied the authentication requirements because she
3 testified she has personal knowledge that the exhibit is a true and correct copy of what it purports to be.
4 *Jazayeri*, 174 Cal.App.4th at 321; *Landale-Cameron*, 155 Cal.App.4th at 1409. If asked, Ms. Schifferle
5 will testify that she obtained this document from the United States Fish and Wildlife Service on March
6 24, 2014. Petitioners are free to question Ms. Schifferle about the authenticity of this document in person
7 if they wish to do so.

8 In addition to the objections addressed above, DWR argues that thirteen other documents lack
9 foundation. DWR PCFFA Objs, Table: Objections to PCFFA et al. Exhibits and Testimony. Yet each of
10 these documents has been authenticated by Stephan C. Volker (PCFFA-84) and Deirdre Des Jardins
11 (PCFFA-81). *See* PCFFA-84 at 1:16-2:23 (authenticating PCFFA-8, PCFFA-9, PCFFA-10, PCFFA-14,
12 PCFFA-20); PCFFA-81 at 6:28, n. 8 (authenticating PCFFA-62), 7:23-26 n. 9 (authenticating PCFFA-
13 63), 8:22-28, 9:27-28 nn.11-15 (authenticating PCFFA-65, PCFFA-66, PCFFA-67), 10:24-28 n. 16
14 (authenticating PCFFA-68), and 11:23-25 n. 17 (authenticating PCFFA-69). Mr. Volker and Ms. Des
15 Jardins testified that each was a true and correct copy of what it purports to be. *Id.* DWR’s objections
16 therefore lack merit.

17 **B. Deirdre Des Jardins Is Qualified to Testify as an Expert**

18 DWR claims that Ms. Des Jardins’s expert opinion testimony should be disregarded because she
19 does not have specific experience with the CALSIM II and DSM2 modeling systems, or “development of
20 global climate change models or applications of such models to particular locations or contexts.” DWR
21 PCFFA Objs. at 7:22-26; *see also* DWR PCFFA Objs. at 7:12-15. But “work in a particular field is not
22 an absolute prerequisite to qualification as an expert in that field.” *Osborn v. Irwin Memorial Blood*
23 *Bank* (1992) 5 Cal.App.4th 234, 274. Instead, “[t]he determinative factor is whether the expert ‘has
24 sufficient skill or experience in the field so that his or her testimony would be likely to assist the [fact
25 finder] in the search for the truth.’” *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1319 (quoting
26 *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38, brackets omitted). Here, Ms. Des Jardins’ experience with
27 the development and application of computational models in the physical sciences qualifies her to testify
28 about the inadequacies of DWR’s chosen models. PCFFA-81 at 2:8-20; PCFFA-75. Ms. Des Jardins

1 research and experience with the Santa Fe Institute for Complex Systems and Computational Mechanics
2 Research Group, the NASA Ames Research Center, the Bioinformatics Research Group at the University
3 of California, Santa Cruz, and the Center for Nonlinear Studies at the Los Alamos National Laboratory
4 provided her with the expertise necessary to testify on these matters. PCFFA-75; PCFFA-81 at 2:8-25.
5 Further her background in applied mathematics allows her to comprehend and synthesize the
6 mathematical concepts underpinning DWR’s modeling assumptions. *Id.* Likewise, Ms. Des Jardins’
7 experience and research addressing the impacts of climate change, salinization, and growth on
8 California’s water supply is also “likely to assist . . . in the search for truth.” *Chavez*, 207 Cal.App.4th at
9 1319. DWR’s objection to Ms. Des Jardins’ testimony - and related request that her testimony and
10 exhibits be excluded – must be overruled.

11 **C. Deirdre Des Jardins’ Testimony about Sea Level Rise Is Reliable**

12 DWR objects that Ms. Des Jardins’ testimony about sea level rise is “inaccurate[]” and should be
13 excluded. DWR PCFFA Objs. at 8:24-9:16. DWR is incorrect. DWR claims that “nowhere . . . does the
14 [Independent Science Board; “ISB”] suggest that sea levels will rise by 2 meters, let alone 2 meters by
15 2030, as Ms. Des Jardin[s] claims.” DWR PCFFA Objs. at 9:8-9. In fact, while it is true that Ms. Des
16 Jardins inadvertently substituted 2030 for 2100 in her testimony (PCFFA-81 at 5:20-22; *see* PCFFA’s
17 Notice of Errata to PCFFA-81 at 1:19 [correcting this error]), it is indisputable that the ISB found that sea
18 levels could rise by up to two meters by 2100. On internal pages 2 and 3 of PCFFA-8, the ISB stated that
19 when the IPCC estimated that sea levels will rise by about one meter by 2100, IPCC “explicitly chose not
20 to incorporate” increases in ice sheet melting “into their . . . projections.” The ISB further stated that “ice
21 sheets may add as much as 1m to sea level rise by 2100.” PCFFA-8 at 3. When this one meter increase
22 is added to the baseline one meter IPCC projection, the result is an estimate of two meters of sea level
23 rise by 2100. *See id.* Indeed, the ISB was at pains to note that the IPCC one-meter projection “should be
24 viewed, at best, as minima for planning purposes” because of its failure to incorporate the additional one
25 meter of sea level rise from ice sheets. *Id.* DWR’s claim that “nowhere . . . does the ISB suggest that sea
26 levels will rise by two meters” is unsupportable. DWR PCFFA Objs. at 9:8.

27 More fundamentally, DWR’s objection misses the point of Ms. Des Jardins’ testimony. Ms. Des
28 Jardins focused on how DWR’s assumption that sea levels would rise by only up to *one* meter by 2100

1 had no academic basis. PCFFA-81 at 5:11-9:16. Indeed, as Ms. Des Jardins noted, relevant literature
2 suggests that the ISB’s forecast of two meters of sea level rise by the end of the century may be an
3 underestimate because the rate of ice sheet melting appears to be increasing exponentially. PCFFA-81 at
4 8:18-9:9 (citing PCFFA-67’s forecast of up to *several meters* of sea level rise in 50-100 years). A minor
5 typographical error does not detract from the fact that Ms. Des Jardins’ testimony about sea level rise is
6 accurate, as in her testimony that DWR’s modeling assumptions are inadequate.

7 **D. Deirdre Des Jardins’ Testimony Is Relevant and a Reasonable Use of the Board’s
8 Time**

9 DWR argues that Ms. Des Jardins’ testimony “would unduly consume the Board’s time” because
10 it is supposedly “irrelevant to Part 1.” DWR PCFFA Objs. at 9:19-10:7. Nothing could be further from
11 the truth. As PCFFA already argued – successfully – Ms. Des Jardins’ testimony is relevant and will aid
12 this Board in resolving the issues presented by the change petition. Her testimony about inaccurate
13 modeling assumptions directly implicates petitioners’ claim that the proposed change petition will not
14 injure any legal users of water under any modeled estimate of future conditions. *See* PCFFA Response at
15 7:10-8:7. This Board agreed with PCFFA when it refused to exclude Ms. Des Jardins’ supposedly
16 irrelevant testimony. This related objection must also be rejected.

16 **E. Deirdre Des Jardins’ Testimony Is Within the Scope of PCFFA’s Notice of Intent**

17 DWR argues that “[t]o the extent” Deirdre Des Jardins’ testimony “is outside the scope” of
18 PCFFA’s Revised Notice of Intent to Appear in these proceedings, “it must be excluded and stricken.”
19 DWR PCFFA Objs. at 10:10-19. But as DWR itself notes, her testimony “focuses on the modeling
20 testimony provided by DWR experts.” *Id.* at 10:15-16. Because this falls within the scope of PCFFA’s
21 Notice of Intent to Appear (“NOI”) filed February 26, 2016 – which stated she would testify about,
22 among other things, “climate change, modelling of SWP & CVP operations and modelling limitations” –
23 DWR’s objection must be overruled. DWR PCFFA Objs. at 10:17-19 (quoting PCFFA’s Revised Notice
24 of Intent); *see* NOI at 1.

25 **F. Stephan C. Volker’s Testimony Is Proper**

26 DWR argues that Stephan C. Volker’s testimony – oral presentation of a policy statement – is
27 contrary to the Board’s orders about the presentation of evidence because Mr. Volker did not submit a
28 written policy statement. DWR PCFFA Objs. at 10:19-11:8. DWR is incorrect. The Board ruled on

1 October 20, 2016, that parties could present policy statements either in writing *or* orally at the beginning
2 of their case-in-chief. Moreover, Title 23 of the California Code of Regulations, section 648.1(d)
3 provides that even *non*-parties may submit policy statements to the Board “either orally or in writing.”
4 Accordingly, DWR’s objection must be overruled.

5 **III. SLDMWA’S OBJECTIONS TO PART 1B PARTIES’ CASES-IN-CHIEF**

6 SLDMWA raises four objections in its Objections to Part 1B Parties’ Cases-in-Chief (“SLDMWA
7 Objs.”). Each lacks merit.

8 **A. Deirdre Des Jardins Is Qualified to Testify as an Expert**

9 SLDMWA objects to Ms. Des Jardins testimony “on the grounds that it is an inadmissible
10 lay person opinion” SLDMWA Objs. at 56:24-26 (quote), 56:27-57:5. As discussed above in
11 section II(B), PCFFA-75 and PCFFA-81 provide sufficient foundation for Ms. Des Jardins’ qualifications
12 to testify regarding the topics of climate change, hydrology, sea level rise, and whether DWR’s models
13 have appropriately accounted for these factors. *Chavez*, 207 Cal.App.4th at 1319. SLDMWA’s objection
14 and motion to strike on this ground must be overruled.

15 **B. Deirdre Des Jardins’ Testimony Is Not Inadmissible Hearsay**

16 SLDMWA argues that “portions of the [Ms. Des Jardins’] testimony that are quotes or
17 descriptions of opinions of experts are hearsay evidence,” and for that reason moves to strike her
18 testimony outright. SLDMWA Objs. at 57:6-10. This argument is unavailing.

19 First, SLDMWA fails to specifically identify the statements that it claims to be hearsay. This
20 failure itself is grounds to overrule the objection. Without specificity about what “portions of the
21 testimony” SLDMWA would have the Board erroneously ignore, its objections must be denied.
22 SLDMWA’s concerns amount to nothing more than blanket objections without any legal support.

23 Second, Government Code section 11513(d) allows the use of hearsay evidence in this proceeding
24 “for the purpose of supplementing or explaining other evidence.” In other words, an expert witness may
25 rely on hearsay evidence to form her opinion and therefore may summarize the information on which she
26 relied in her testimony. Govt. Code § 11513(d); 23 C.C.R. § 648.5.1; Evid. Code § 801(b). Here, Ms.
27 Des Jardins’ proposed testimony regarding the contents of the relevant authenticated exhibits that PCFFA
28 has proffered with its case-in-chief supplements and explains her own expert opinion. Under

1 Government Code section 11513(d), Ms. Des Jardins’ “quotes or descriptions of opinions of experts” are
2 not only admissible, but necessary to understand the basis for her expert opinion. Govt. Code § 11513(d);
3 Evid. Code § 801(b); Witkin, California Evidence, 4th ed., vol. 1, §§ 30, 35 pp. 560-561, 566-567. As an
4 expert, Ms. Des Jardins is permitted to explain to the fact-finder how she reached the basis of her opinion,
5 and therefore SLDMWA’s hearsay objections to her testimony must be overruled. *Id.*; *see also People v.*
6 *Sanchez* (2016) 63 Cal.4th 665, 685-686.

7 The “quotes or descriptions of opinions of experts” contained in Ms. Des Jardins’ testimony form
8 the basis for her opinion. Govt. Code § 11513(d); 23 C.C.R. § 648.5.1; Evid. Code §§ 801(b). For these
9 reasons, Ms. Des Jardins’ testimony is admissible expert opinion and SLDMWA’s baseless hearsay
10 objection should be overruled.

11 **C. Patricia Schifferle’s Testimony Is Proper**

12 SLDMWA raises a catch-all objection to all of the authenticating statements in the testimony of
13 Ms. Schifferle. SLDMWA argues that Ms. Schifferle’s statements that she has personal knowledge that
14 the documents are what they purport to be is inadequate because Ms. Schifferle did not explain the exact
15 source of each of the documents. But doing so is not required; Ms. Schifferle’s testimony is itself
16 sufficient to establish the authenticity of PCFFA’s exhibits. *Jazayeri*, 174 Cal.App.4th at 321; *Landale-*
17 *Cameron*, 155 Cal.App.4th at 1409. If SLDMWA has any questions about the provenance of any
18 particular document, it is free to ask Ms. Schifferle those questions during cross-examination.

19 **D. Patricia Schifferle’s Testimony Is A Reasonable Use of the Board’s Time**

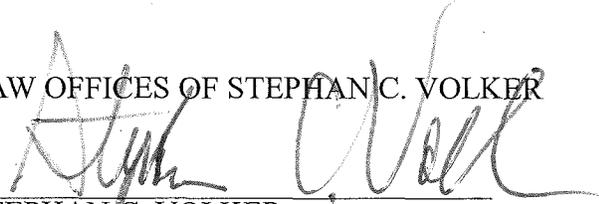
20 SLDMWA argues that Ms. Schifferle’s testimony should be excluded because it is irrelevant and
21 would unnecessarily consume this Board’s time. SLDMWA Objs. at 57:26-58:16. PCFFA already
22 demonstrated how the exhibits to which SLDMWA objects are relevant to the subject of this proceeding.
23 PCFFA Response at 8:10-9:1. As PCFFA discussed at length, issues related to environmental impacts
24 and financing are relevant because environmental impacts and funding will affect the future form of the
25 California WaterFix and thus affect whether the proposed change petition will injure any legal users of
26 water. PCFFA Response at 4:23-5:24, 8:15-9:1. This Board refused to accept SLDMWA’s argument
27 that Ms. Schifferle’s testimony was irrelevant and its objection that her testimony would unduly consume
28 the Board’s time must also be overruled.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the objections of DWR and SLDMWA are meritless and must be
3 rejected.

4 Dated: December 9, 2016

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PACIFIC COAST FEDERATION OF FISHERMEN'S
ASSOCIATIONS and INSTITUTE FOR FISHERIES
RESOURCES

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