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Party to the Hearing  
Principal, California Water Research

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

HEARING IN THE MATTER OF  
CALIFORNIA DEPARTMENT OF  
WATER RESOURCES AND UNITED  
STATES BUREAU OF RECLAMATION  
REQUEST FOR A CHANGE IN POINT OF  
DIVERSION FOR CALIFORNIA WATER  
FIX

RESPONSE TO DWR'S OBJECTIONS TO  
"EVALUATION OF TESTIMONY ON  
RELIABILITY OF THE MODELING"  
AND MOTION TO ACCEPT BRIEF INTO  
HEARING RECORD

**DWR's OBJECTIONS TO**

**"EVALUATION OF TESTIMONY ON THE RELIABILITY OF THE MODELING"**

The attorneys for the California Department of Water Resources submitted a response on July 22, 2016 objecting to acceptance of the brief I submitted to the Board and Hearing parties on July 12, 2016, entitled "Evaluation of Testimony on the Reliability of the Modeling." The response was entitled "CALIFORNIA DEPARTMENT OF WATER RESOURCES' RESPONSE TO CALIFORNIA WATER RESEARCH'S EVALUATION OF TESTIMONY RELATED TO MODEL RESULTS," and contained the following objections to my submission:

It is unclear whether this submission is an objection, a request for official notice, or submission of evidence. Regardless of what category it falls into, the Board should disregard it for the

following reasons. If it is an objection, it does not cite any laws or rules to support its reasoning. If it is a request for official notice, it does not meet the standards of Title 23, California Code of Regulations, Section 648.2. If it is a submission of evidence, it does not comply with the structure and deadlines for submission of evidence in the Board's prior orders.

(February 11, 2016, March 4, 2016, and April 25, 2016 Board Rulings.)

The following respond to DWR's objections.

### **MOTION TO ACCEPT BRIEF INTO HEARING RECORD**

This is a quasi-judicial hearing, and it has not previously been necessary to make a formal motion for acceptance of briefs on technical issues in the hearing into evidence. However, to address the issues raised in DWR's objections to my submitted brief, I hereby make a motion that the brief I submitted on July 12, 2016, entitled "Evaluation of Testimony on the Reliability of the Modeling," be accepted into the Hearing record, on points and authorities discussed below. I also incorporate by reference my July 19, 2016, "Motion To Introduce Foundational Evidence Into the Hearing Record," which also addressed DWR's objections to my submitted brief.

### **BACKGROUND**

My brief, "Evaluation of Testimony on the Reliability of the Modeling," documents that there are significant conflicts between the foundational testimony on the reliability of the modeling and the peer reviews that are referenced, but were not included in Petitioners' submitted exhibits. This brief is not intended to be testimony, and is limited to the following technical issues that are relevant to the consideration of objections to the modeling evidence:

- 1) Providing standard definitions of model calibration, verification, validation, and accreditation from a widely used technical reference document, which are relevant to consideration of objections.

- 2) Providing relevant information from the report by the Board's 2012 scientific and technical panel on "Analytical Tools for Evaluating Water Supply, Hydrodynamic and Hydropower Effects in the Delta." The information includes relevant requests by DWR's own modellers for appropriate calibration, verification, validation, and accreditation for the BDCP computer models, which were the basis for the later WaterFix computer models.
- 3) Comparison of submitted written testimony with relevant excerpts from the peer reviews referenced in the testimony, and compares statements about testing and calibration with relevant recommendations by the Board's 2012 scientific and technical panel.

I hereby request that if any of these sections are held to be ineligible for acceptance at this phase of the hearing, that they be stricken separately, rather than the entire brief. As documented below, I believe that all of the above sections constitute essential technical information which would not otherwise be available to the Board for reference during consideration of objections to the modeling.

### **TIMELINESS**

The brief and this motion are timely for consideration of objections to modeling evidence. The June 10, 2016 ruling by the Hearing Officers stated:

In addition, this ruling hereby relaxes the requirement so that only objections that, if valid, would preclude petitioners' witnesses from testifying must be submitted by the extended deadline. At a minimum, *any motions to disqualify any of petitioners' witnesses, or to exclude a witness's testimony, in whole or in part*, must be filed and served on petitioners and the other parties by 12:00 noon on July 12, 2016. The parties are strongly encouraged, but not required, to submit any other procedural or evidentiary objections by the July 12, 2016 deadline. For example, objections concerning petitioners' exhibits, or objections that go to the weight that should be afforded petitioners' testimony or exhibits, but not their admissibility, may be made after the July 12, 2016 deadline, although we would prefer to receive all objections in writing by 12:00 noon July 12, 2016. [Deadline Extension Requests, Policy Statements, Format Of Petitioners' Case-In-Chief, Parties' Participation, And Other Procedural Matters, p. 2]

This brief would tend to exclude modelling exhibits, not testimony, and so is timely.

### **POINTS AND AUTHORITIES**

Based on arguments by attorneys for the Protestants, including PCFFA/IFR, I believe that the Supreme Court decision interpreting Evidence Code 801(b) and 802, *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 is relevant to consideration of objections to the computer modeling evidence. As explained in my July 19, 2016, “Motion to Introduce Foundational Evidence Into the Hearing Record,” trial court in Sargon had an eight day hearing on whether to accept scientific evidence. [p. 8, footnote at 21]. For this reason, I believe that acceptance of briefs on technical information presented by the Petitioners in support of the modeling is relevant and necessary, prior to consideration of objections to that evidence.

In order for there to be a fair hearing under the California Code of Civil Procedure §1094.5, I also believe this essential technical information needs to be available when considering objections to Petitioners’ computer modeling evidence. The Boards’ October 30, 2015 Notice of Petition and Hearing appears to preclude submission of the information during rebuttal:

Rebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party's case-in-chief, and *it does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence*. It also does not include repetitive evidence. Cross-examination of rebuttal evidence will be limited to the scope of the rebuttal evidence. [p. 35]

The reason for this procedural rule is unclear, but clearly it cannot waive evidentiary statutes governing the hearing or party rights under the Administrative Procedure Act (APA.) The APA does confer on each party the rights to call and examine witnesses, to cross-examine opposing witnesses, impeach any witnesses, introduce exhibits, and rebut evidence, (Govt Code 11425.10(a), 11513 (b).) The rule also cannot waive rights to due process under Article 1 Section 7 of the California Constitution, or the 14<sup>th</sup> Amendment to the U.S. Constitution.

Based on the above considerations, I believe that the information in this brief needs to be considered by the Hearing Officers before the exhibits with model results, which were submitted by the Petitioners on May 31, 2016, are accepted into evidence.

If this information is not considered before the model results are accepted into evidence, I believe the burden of proof shifts to the Protestants to show that the modelling evidence has errors. I believe this may be highly prejudicial because there have also been major issues with timely disclosure by Petitioners of appropriate information on model testing, calibration, and technical review. The problems were documented in my letter sent to the Board, the Petitioners' attorneys, and the Hearing parties on June 9, 2016, entitled "Incomplete or missing information on CALSIM II modeling in submitted evidence." The Petitioners' attorneys have still not answered the questions in that letter.

### **OBJECTION TO INCORPORATION BY REFERENCE**

At the time I submitted the brief, the correct procedure for submitting evidentiary documents in support of briefs was not clear. Therefore I attempted to incorporate the evidentiary documents by reference in the section, "Peer Review and Other Relevant Documents." This issue was discussed in my motion, "Motion To Introduce Foundational Evidence Into the Hearing Record."

However, as discussed below, I believe I have since found the relevant guidelines for the hearing. Therefore, to address DWR's objections to the sections of the brief incorporating the supporting evidentiary documents by reference, I will be submitting a letter correcting this section of the brief, and serving the evidentiary documents on the Hearing parties. In addition, I will formally submit the document I attached to the brief, the Department of Defense "Instruction 5000.61 on DoD Modeling and Simulation (M&S) Verification, Validation, and Accreditation (VV&A)", into evidence.

## **BOARD'S RULINGS AND HEARING SCHEDULE**

DWR states that the brief does not meet the schedule set in the Board's prior rulings. The Board rulings only cover submittal of evidence for testimony by the Protestants. The February 11, 2016 ruling states, "Any procedural requirements not addressed below remain as stated in the Hearing Notice. "

The October 30, 2016, Notice of Petition and Hearing does cover the submission of legal arguments and briefs in Enclosure D, item 10(d):

**Closing Statements and Legal Arguments:** At the close of the hearing or at other times, if appropriate, the hearing officers may allow oral closing statements or legal arguments or set a schedule for filing legal briefs or written closing statements. If the hearing officers authorize the parties to file briefs, an electronic copy of each brief shall be submitted to the State Water Board, and shall be served on each of the other participants on the service list. A party shall not attach a document of an evidentiary nature to a brief unless the document is already in the evidentiary hearing record or is the subject of an offer into evidence made at the hearing. [p. 36]

**STATEMENT OF SERVICE**

**CALIFORNIA WATERFIX PETITION HEARING  
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

**MOTION TO ACCEPT  
“EVALUATION OF TESTIMONY ON RELIABILITY OF THE MODELING”  
INTO HEARING RECORD**

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated July 25, 2016, posted by the State Water Resources Control Board at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

I certify that the foregoing is true and correct and that this document was executed on July 29, 2016.

Signature:



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