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 9 RECLAMATION DISTRICT 108 et al

10 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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 13 In the matter of Hearing re California
 14 WaterFix Petition for Change

PROTESTANTS' OBJECTIONS TO DWR-1143 AND MOTION TO STRIKE

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INTRODUCTION

At the close of its Part 2 case-in-chief, the Department of Water Resources (“DWR”) offered into evidence the “Consolidated Operational Criteria and Criteria Source Chart” (DWR-1143, or “Consolidated Chart”), a document it characterized as a “summary” of operations criteria under the proposed California WaterFix H3+ scenario that was provided in response to a request from the Hearing Officers. DWR provided no foundation for this document, and made no witness available to probe the origin and veracity of the summary during cross-examination. More troubling, there are meaningful substantive differences between the Consolidated Chart and the source documents that it purports to summarize, and internal contradictions within the Chart itself. In particular, DWR-1143 characterizes spring outflow requirements in a manner that is inconsistent internally, inconsistent with the source documents it purports to summarize, and inconsistent with DWR’s sworn testimony under cross-examination. DWR has offered no explanation or basis for these inconsistencies and also has offered no testimony to support DWR-1143’s characterization of its amalgam of spring outflow requirements as operating criteria that would actually govern California WaterFix. The undersigned Protestants object to the admission of DWR-1143 and respectfully request that the Hearing Officers disregard its contents on the grounds that it constitutes hearsay that would not be admitted in a civil action, is impermissible surprise testimony, lacks foundation, and in any case, its probative value is substantially outweighed by the risk that its admission will result in undue consumption of time because of its inaccurate nature.

I. LEGAL STANDARD

Evidence in a hearing on a petition for change is admitted in accordance with Government Code § 11513. (Cal. Code Regs. tit. 23, § 648.5.1.) Pursuant to that standard, technical rules of evidence do not apply: instead, relevant evidence may be admitted if “it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.” (Gov. Code § 11513(c).)

Notwithstanding the flexibility of that rule, “[c]ertain basic requirements must be met to constitute substantial evidence upon which the State Water Board can rely.” (Feb. 21, 2017 Ruling Letter, p. 16.) In particular, “[d]ocuments and other exhibits must have some foundational support to be properly admitted. (*Id.* at p. 16, citing *Ashford v. Culver City Unified School Dist.*

1 (2005) 130 Cal.App.4th 344, 350; *see also id.* at p. 50 (declining to admit exhibits on the grounds
2 that “it is impossible to tell whether the exhibit is what it purports to be, or contains additional
3 information of unknown origin imbedded into the document.”.) Relevant hearsay evidence may
4 be used for the purpose of supplementing or explaining other evidence but over timely objection
5 is not sufficient in itself to support a finding unless it would be admissible over objection in civil
6 actions. (Gov. Code § 11513(d).) Surprise testimony, even when used to explain or validate
7 previously submitted testimony, is inappropriate and should be excluded. (Cal. Code Regs., tit.
8 23, § 648.4(a) (“It is the policy of the State and Regional Boards to discourage the introduction of
9 surprise testimony and exhibits.”); *id.* at subd. (e) (“Where any of the provisions of this section
10 have not been complied with ... the presiding officer may refuse to admit the proposed testimony
11 or the proposed exhibit into evidence; and shall refuse to do so where there is a showing of
12 prejudice to any part or the Board.”).) Finally, the hearing officer has “discretion to exclude
13 evidence if its probative value is substantially outweighed by the probability that its admission
14 would necessitate undue consumption of time.” (Gov. Code, § 11513(f).)

15 **II. THE CONSOLIDATED CHART IS NOT RELEVANT OR RELIABLE**
16 **EVIDENCE, AND MUST BE EXCLUDED**

17 On February 28, 2018, the Hearing Officers requested that Petitioners provide a summary
18 of the applicable operations for the CWF H3+ scenario. Five days later, Petitioners provided
19 DWR-1143. The value and credibility of that document in responding to the Hearing Officers’
20 request is difficult to ascertain: though the Consolidated Chart includes general citations to
21 documents already offered into evidence in this Hearing, DWR provided no information
22 regarding the selection and depiction of operations criteria in the document’s preparation, nor
23 were DWR witnesses available for cross examination on this document.

24 Protestants object to the admission of DWR-1143 on three primary grounds: it contains
25 inadmissible hearsay, surprise testimony, and lacking in foundation. At a more fundamental
26 level, DWR-1143 invites confusion and undue consumption of time, without offering probative
27 value in these proceedings. For all of these reasons, the exhibit should be rejected by the Hearing
28 Officers.

1 First, the Consolidated Chart is an out-of-court statement offered by DWR to prove the
2 truth of the matter asserted (namely, the CWF H3+ operating criteria), but neither the document
3 nor its authors have been tested in the course of cross-examination. In a prefatory note, DWR
4 explains that DWR-1143's included table "summarizes the new and existing water operations
5 criteria for CWF H3+ operational scenario adopted in the July 2017 CWF Certified Final EIR
6 (SWRCB-109, SWRCB-108)." That information is purportedly also "found within Table 3.3-1
7 located in Revised BA (DWR-1142), Table 3.3-1 of NMFS CWF BO Appendix A2 (SWRCB-
8 106), and Table 6.1-2 in the USFWS CWF BO (SWRCB-105)," but the Consolidated Chart does
9 not explain or supplement those materials. Indeed, in many places, the Consolidated Chart
10 merely references "[n]ew operational criteria used in CWF H3+," without detailing where and
11 how those criteria originated. While some language in the Consolidated Chart is derived from
12 various documents already admitted into the record or subject to cross-examination, others are
13 apparently DWR's interpretation of those legal requirements. (*Compare* DWR-1143 ("March
14 outflow targets are determined based on the Eight River Index and achieve the targets with export
15 curtailments down to a minimum of 1,500-cfs exports") *with* SWRCB-107, pp. 188-189
16 (Incidental Take Permit provision that annual reports from the permittee shall include a
17 "[d]escription of water obtained from willing sellers to contribute to achieving the outflow
18 targets" in March, April, and May to determine whether the Permittee complied with Condition of
19 Approval 9.9.4.3) *and* October 18, 2017 Clarification Memo at p. 2 (stating Condition 9.9.4.3
20 requires Permittee to use the linear relationships defined in Table B to the extent that "export cuts
21 down to a minimum of 1,500 cfs can achieve them.")) Hearsay statements such as these are
22 admissible, if at all, only to explain or supplement other evidence. (*See* Gov. Code § 11513(c);
23 *Buchanan v. Nye* (1964) 128 Cal.App.2d 582, 585 ("[T]he many possible deficiencies,
24 suppressions, sources of error and untrustworthiness, which lie underneath the bare untested
25 assertion of a witness, may be best brought to light and exposed by the test of cross-
26 examination."))

27 Second, the Consolidated Chart is not merely a summary of previously examined
28 operations criteria. Rather, it introduces new substantive evidence into the record in the guise of

1 summarizing prior testimony, and is therefore impermissible surprise testimony. (R.T. (Nov. 4,
2 2016) 4:8-25 (declaration and oral testimony purporting to authenticate and provide foundation
3 for previously submitted exhibits were surprise testimony submitted after the due date for the
4 parties' case-in-chief.)) The documents that DWR-1143 purports to cite are inconsistent on their
5 face when compared to the exhibit itself. For example, with regard to spring outflow, the
6 Consolidated Chart explains that pursuant to Section 5.3.2.3.2 *Effects of Spring Outflow* of the
7 CWF 2081(b) ITP application:

8 March outflow targets are determined based on the Eight River Index and achieve the
9 targets with export curtailments down to a minimum of 1,500-cfs exports; the March
10 outflow target is capped at 44,500 cfs at an Eight River Index of 4,217 TAF and
11 greater (Table 5.3-1 of the CWF 2081(b) ITP application and Table 6.1-4 of USFWS
12 CWF BiOp). For Apr-May, the 2009 NMFS BiOp action IV.2.1 (San Joaquin River i-
e ratio) will be used to constrain total Delta exports per current operational practices,
up to a maximum outflow target of 44,500 cfs (National Marine Fisheries Service
2009).

13 DWR cites “new operational criteria used in CWF H3+,” as modified in CDFW’s ITP Condition
14 of Approval 9.9.4.3 and “subject to the clarification letter provided by CDFW to DWR dated Oct
15 18, 2017,” as the source for these criteria. (DWR-1143, p. 6.) However, none of these sources
16 afford DWR the discretion to modify its spring outflow target calculations in this manner.
17 Condition 9.9.4.3 directs a single approach for setting outflow targets from March 1 through May
18 31. (SWRCB-107, Incidental Take Permit Condition 9.9.4.3, p. 188 (“Protective outflows from
19 March 1 – May 31 every year shall be determined by the use of a lookup table derived from a
20 linear relationship between the 50% exceedance forecast for the current month’s [Eight River
21 Index] and recent historic Delta outflow (1980 – 2016).”)) The clarification letter, too, makes
22 clear that although DWR would not be expected to actually meet its monthly outflow targets if it
23 reduces exports to the 1,500 cfs minimum, the Eight River Index formula, as set forth in Sub table
24 B of the ITP, applies. (SWRCB-107, October 18, 2017 Clarification Memo, p. 1.) The operative
25 regulatory requirement for longfin smelt protection is the ITP, the conditions of which are absent
26 from the April and May proposed spring outflow operational criteria.

1 Third, to the extent that a reasonable explanation for these differences exists, it is
2 impossible to ascertain because DWR has offered no foundation for the document or information
3 regarding its preparation, and parties are barred from testing its contents through cross-
4 examination. Bald citations to other documents, particularly given that DWR-1143 is
5 inconsistent with those documents on its face, do not provide the requisite foundation. (*See also*
6 *Hearing Notice, Enclosure D, at 33* (testimony must presented in writing, including sufficient
7 information in support of technical evidence to “clearly identify and explain the logic,
8 assumptions, development, and operation of the studies or models.”).) The admission of
9 unsupported and unverified evidence creates unfair surprise, to the undue prejudice of the other
10 parties and the Hearing Team. For those reasons, too, it should be excluded. (*See Feb. 21, 2017*
11 *Ruling Letter, p. 34* (declining to admit exhibits because they “do not identify the source of
12 information depicted, and neither the exhibits themselves nor [the witnesses] explained how the
13 exhibits were prepared or by whom”); *id.*, at p. 51 (parties are responsible for “providing
14 adequate foundation to demonstrate that their exhibits are relevant and reliable.”).)

15 If, as DWR asserts, DWR-1143 simply summarizes criteria already presented in this
16 Hearing, it has almost no probative value, and does not meaningfully assist the Hearing Officers
17 in making their determinations regarding the proposed changes. (*See id.* at p. 13 (“We are
18 capable of distinguishing and disregarding testimony that is essentially legal argument, and to
19 reach our own determinations on pure questions of law. Rather than attempting to parse the
20 testimony, however, to separate and exclude testimony concerning pure legal issues from
21 testimony concerning mixed issues of law and fact, we will disregard testimony that has no
22 probative value.”).) In contrast, the risk of confusion and undue consumption of time associated
23 with the admission of this exhibit is potentially enormous, as inconsistencies between the
24 Consolidated Chart’s assertions and the documents to which it cites as sources will raise serious
25 questions regarding the actual operating criteria under which the Project is proposed to function.

26 CONCLUSION

27 Exhibit DWR-1143 is inadmissible hearsay, lacking in foundation, and surprise testimony,
28 offered long after the due date for submission of exhibits. On its face, the document is

1 inconsistent with the source materials that it purports to summarize. In light of these issues, and
2 particularly given the lack of any meaningful opportunity to test the veracity or foundation for the
3 assertions made in DWR-1143 during the course of cross examination, admission of DWR-1143
4 raises a serious risk of confusion; whatever probative value it provides is overshadowed by the
5 probability that it will result in further undue consumption of time rather than expedite this
6 proceeding. Simply put, this evidence is not the sort upon which a reasonable person would
7 responsibly rely. On these grounds, Protestants respectfully request that the Hearing Officers
8 refuse to admit this exhibit into evidence.


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DOWNEY BRAND LLP

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DATED: March 12, 2018

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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:

PROTESTANTS' OBJECTIONS TO DWR-1143 AND MOTION TO STRIKE

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 March 6, 2018, posted by the State of Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

	I caused a true and correct hard copy of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818: Method of Service: _____
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I certify that the foregoing is true and correct and that this document was executed on March 12, 2018.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814