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16  
17 BEFORE THE  
18 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

EAST BAY MUNICIPAL UTILITY  
DISTRICT'S RESPONSE TO SAN LUIS  
& DELTA-MENDOTA WATER  
AUTHORITY AND WESTLANDS  
WATER DISTRICT'S OBJECTIONS TO  
PART 1-B PARTIES' CASES IN CHIEF

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1 East Bay Municipal Utility District (“EBMUD”) respectfully responds to the objections  
2 of San Luis & Delta-Mendota Water Authority (“SLDMWA”) and Westlands Water District  
3 (“Westlands”) as follows:

4 **I. INTRODUCTION**

5 SLDMWA and Westlands’ objections to the testimony of EBMUD’s three expert  
6 witnesses should be overruled. EBMUD’s expert testimony is relevant to Petitioners’ Joint  
7 Change Petition (“Change Petition”) and is within the scope of Part 1 of the Change Petition  
8 hearing. The testimony to which SLDMWA and Westlands object relates to potential injury to  
9 EBMUD’s legal rights to Mokelumne River water, which is the primary water supply for almost  
10 1.4 million East Bay residents, and a proposed measure to mitigate injury to EBMUD’s rights to  
11 divert water at the Freeport Regional Water Project (“Freeport Project”). EBMUD’s witnesses  
12 are qualified to provide the testimony at issue and each provided a proper foundation for their  
13 testimony. If SLDMWA and Westlands believe the testimony lacks foundation or is beyond the  
14 witnesses’ expertise, these issues are most appropriately addressed through cross-examination in  
15 Part 1-B of the hearing. The State Water Board should overrule the objection or, alternatively,  
16 defer any ruling until the close of EBMUD’s Part 1-B case in chief.

17 **II. DISCUSSION**

18 **A. Standard of Review**

19 All relevant evidence is admissible unless otherwise provided by law. (Evid. Code,  
20 § 350.) State Water Board adjudicative proceedings “need not be conducted according to  
21 technical rules relating to evidence and witnesses.” (Gov. Code, § 11513, subd. (c).) Rather,  
22 “[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible  
23 persons are accustomed to rely in the conduct of serious affairs ... .” (Gov. Code, § 11513, subd.  
24 (c); *see also* Cal. Code Regs., tit. 23, §§ 648, 648.5.1 [establishing laws and evidentiary rules for  
25 State Water Board proceedings].) Expert witnesses may rely on hearsay evidence to establish  
26 their expert opinions. Hearsay is admissible in State Water Board proceedings subject to  
27 Government Code section 11513. (Cal. Code Regs., tit. 23, § 648.5.1.) That Government Code  
28 section provides that hearsay evidence may be sufficient to support a finding if the hearsay is

1 admissible over objection in civil actions. (*Id.* at subd. (d).) In fact, expert opinion based on  
2 hearsay is admissible in civil actions, as long as the hearsay is “of a type that reasonably may be  
3 relied upon by an expert in form an opinion” on the relevant subject matter. (Evid. Code, § 801,  
4 subd. (b).)

5 **B. The Expert Testimony Should Be Admitted**

6 **a. Testimony of Xavier J. Irias**

7 SLDMWA and Westlands’ challenges to Mr. Irias’ testimony are unfounded and  
8 contradicted by the testimony provided. Mr. Irias is a professional civil engineer and EBMUD’s  
9 Director of Engineering and Construction. He describes EBMUD’s Mokelumne Aqueducts and  
10 associated water rights, EBMUD’s proposed Delta tunnel, and Petitioners’ project’s potential  
11 impacts to EBMUD’s Mokelumne River water supply. Mr. Irias also identifies reasonable  
12 measures to avoid, reduce, and compensate EBMUD for those impacts.

13 The State Water Board has broad jurisdiction in determining whether and under which  
14 conditions to allow a change in the point of diversion of water. (*See* Wat. Code, §§ 1704, 1705  
15 [authorizing the State Water Board to impose conditions when granting a change petition].) The  
16 State Water Board noted in its initial ruling in this proceeding that it has an obligation to address  
17 potential impacts and mitigation measures in reviewing Petitioners’ Change Petition, and  
18 therefore encouraged protestants “to propose specific permit conditions in their cases.” (*See*  
19 February 11, 2016 Pre-Hearing Conference Ruling at p. 6.) EBMUD responded to the State  
20 Water Board’s request through the testimony of Mr. Irias (and, as discussed below, Dr. Bray).

21 Contrary to SLDMWA’s and Westlands’ assertion, when assessing legal injury to water  
22 users, the State Water Board may examine concerns relating to the construction and operation of  
23 the proposed project, including potential damage to neighboring property. In fact, the State  
24 Water Board has imposed conditions for that purpose in its previous decisions. (*See* SWRCB  
25 Order No. WR 2009-0058-DWR at pp. 14-17 [conditioning a temporary transfer and change  
26 order to address potential damage to land around a river and a dam resulting from the risk of  
27 increased flows, seepage and dam failure]; SWRCB D-1643 at pp. 57-61, 96-98 [imposing  
28 conditions to address potential impacts to PG&E’s gas pipelines and other neighboring property]

1 [reversed on other grounds by *Central Delta Water Agency v. State Water Resources Control Bd.*  
2 (2004) 124 Cal.App.4th 245].) The State Water Board’s Delta Wetlands decision (D-1643) is  
3 instructive. In that decision, detailed conditions were imposed to address potential project  
4 impacts on physical facilities – namely, nearby PG&E pipelines. D-1643 required the project  
5 proponent to monitor levee settlement and subsidence near PG&E’s pipelines and ensure the  
6 pipelines would be protected from damage due to settlement, subsidence and construction  
7 equipment. (SWRCB D-1643 at pp. 95-97.)

8         These are precisely the types of harm expressed in Mr. Irias’ testimony as to EBMUD’s  
9 Aqueduct pipelines, and for which – consistent with State Water Board direction – Mr. Irias  
10 proposed conditions to address. Any such damage to EBMUD’s Aqueducts could impact its  
11 Mokelumne River water rights. In light of the potential harm Petitioners’ proposed WaterFix  
12 Project could cause to the primary source of water for approximately 1.4 million California  
13 residents, the State Water Board should consider any testimony regarding the potential impact to  
14 EBMUD’s exercise of its Mokelumne River water rights and any proposed permit conditions to  
15 avoid such harm. (*See* Water Code § 106.3 [declaring human right to safe, clean, and accessible  
16 water].) As Mr. Irias explained in his testimony, on a long-term basis, virtually all – 90% – of  
17 the EBMUD water supply is conveyed by the Mokelumne Aqueducts. (EBMUD-153 at pp.  
18 4:26-27.) Damage to those Aqueducts caused by Petitioners’ proposed WaterFix Project could  
19 sever EBMUD’s Mokelumne River water supply from its service area, causing impacts to  
20 EBMUD as a legal municipal user of water in a manner no different than if the WaterFix Project  
21 were to cut off EBMUD’s access to its supply at its source. Given the gravitas of the potential  
22 impacts Mr. Irias outlines and the conditions he provides to address such harm, the probative  
23 value of Mr. Irias’ testimony would not consume undue time.

24         Mr. Irias also sufficiently establishes his qualifications to provide his testimony. In his  
25 submissions to the State Water Board, Mr. Irias outlines his experience and education, including  
26 more than thirty years as a registered civil engineer and public utilities manager, including  
27 specifically, water and wastewater engineering, and approximately ten years as EBMUD’s  
28 Director of Engineering and Construction.

1 To the extent that SLDMWA and Westlands seek to challenge Mr. Irias’ expert  
2 qualifications or the foundation for his testimony, such challenges are most appropriately  
3 addressed through cross-examination. (*See e.g.*, Gov. Code, § 11513; July 22, 2016 State Water  
4 Board Correspondence re: Evidentiary Objections and Other Procedural Matters [noting State  
5 Water Board practice to consider objections “in the course of the hearing, when petitioners move  
6 to enter their testimony and exhibits into the record after their case in chief, or in the final order  
7 taking action on the petition”].) Ultimately, however, SLDMWA and Westlands’ objections fail  
8 for the reasons outlined above and, moreover, because Mr. Irias’ testimony is also relevant to the  
9 legal injury and public interest findings the State Water Board must make with respect to the  
10 Change Petition and in passing on the adequacy of Petitioners’ Final Environmental Impact  
11 Report – issues that the State Water Board has explicitly noticed for this proceeding. (*See*  
12 October 30, 2015 Notice of Petition at p. 12.) Accordingly, SLDMWA and Westlands’  
13 objections to Mr. Irias’ testimony should be overruled.

14 **b. Testimony of Eileen M. White, P.E.**

15 SLDMWA and Westlands object to the limited portion of Ms. White’s testimony that  
16 addresses the impact to EBMUD’s Mokelumne River water rights that would result from  
17 physical damage to the Mokelumne Aqueducts caused by the Petitioners’ construction and/or  
18 operation of the proposed WaterFix Project. (EBMUD-151 at pp. 13:7-21.) The objections to  
19 the relevance of and foundation for the testimony, and to Ms. White’s qualifications, are without  
20 merit and should be overruled.

21 As explained above, potential impact to the water rights of other parties is relevant and  
22 properly considered by the State Water Board in its review of Petitioners’ Change Petition. (*See*  
23 SWRCB D-1643 at pp. 57-61, 96-98; SWRCB Order No. WR 2009-0058-DWR at pp. 14-17.)  
24 All of Ms. White’s testimony – including the challenged portion – is properly before the State  
25 Water Board because it concerns EBMUD’s legal use of water. Furthermore, as with Mr. Irias’s  
26 testimony, Ms. White’s testimony also relates to the public interest and to the adequacy of  
27 Petitioners’ Final Environmental Impact Report, both issues that the State Water Board expressly  
28 noticed for this proceeding. (*See* October 30, 2015 Notice of Petition at p. 12.) Therefore,

1 because the subject testimony is relevant, there is no basis to exclude it. (*See* Gov. Code,  
2 § 11513, subd. (c).)

3 The objection to Ms. White’s qualifications is also without merit. Ms. White is  
4 particularly qualified to testify as to the impacts on EBMUD’s Mokelumne River water rights  
5 and supply. As she detailed in her submissions to the State Water Board, Ms. White is the  
6 Operations and Maintenance Department Manager and Chief Operator for EBMUD, a registered  
7 civil engineer, and a Grade 5 Water Distribution Operator, with approximately thirty years’  
8 experience in water engineering and management. (EBMUD-151 at p. 2:3-4). Ms. White’s  
9 testimony on issues relating to EBMUD’s water supply should be admitted as within her area of  
10 expertise. SLDMWA and Westlands’ challenges to Ms. White’s expert qualifications and the  
11 foundation for her testimony are, at most, challenges to the probative value of her testimony and  
12 therefore are most appropriately addressed through cross-examination.

13 **c. Testimony of Dr. Benjamin S. Bray, Ph.D., P.E.**

14 SLDMWA and Westlands object to the limited portion of Dr. Bray’s testimony in which  
15 he proposes tidal marsh restoration to mitigate the impact on EBMUD’s Freeport Project  
16 diversions resulting from the increase in significant reverse flow events near the intake for the  
17 Freeport Regional Water Project caused by Petitioners’ WaterFix Project. (EBMUD-152 at  
18 pp. 23:12-24). SLDMWA and Westlands generally contend that this testimony is irrelevant,  
19 contains hearsay and speculation, lacks foundation, and is outside of Dr. Bray’s range of  
20 expertise. SLDMWA and Westlands are incorrect.

21 Dr. Bray’s testimony on tidal marsh restoration is relevant to Part 1 of this hearing. The  
22 State Water Board’s Notice of Petition, issued on October 30, 2015, requested Part 1 exhibits and  
23 testimony on the following issues: “Will the proposed changes in points of diversion alter water  
24 flows in a manner that causes injury to municipal, industrial, or agricultural uses of water? ... If  
25 so, what specific conditions, if any, should the State Water Board include in any approval of the  
26 Petition to avoid injury to these uses?” (*Id.* at p. 11.) Dr. Bray’s testimony meets this relevance  
27 standard. Dr. Bray’s testimony generally explains why the WaterFix Project could cause injury  
28 to EBMUD by altering water available for EBMUD’s lawful diversion its Freeport Project

1 intake. EBMUD uses the Freeport Project intake to divert water under its Central Valley Project  
2 (“CVP”) contract. As an affected CVP contractor, EBMUD is a legal user of water involved in  
3 this Change Petition proceeding. (*State Water Resources Control Bd. Cases* (2006) 136  
4 Cal.App.4th 674, 798-804.) The challenged portion of Dr. Bray’s testimony – his explanation of  
5 why tidal marsh restoration would mitigate the injury to EBMUD – provides evidence relating to  
6 a “specific condition[.]” that should be inserted in any approval, as the State Water Board  
7 requested. (*Ibid.*) To the extent SLDMWA and Westlands object to Dr. Bray’s reference to  
8 modeling associated with a previous similar project – the Bay-Delta Conservation Plan  
9 (“BDCP”) – that objection goes to the weight of the testimony, which is properly an issue for  
10 cross-examination.

11 Second, Dr. Bray’s testimony is not barred by the rule against hearsay. As an expert  
12 witness, Dr. Bray may properly rely on hearsay in forming his expert opinions. (Cal. Code  
13 Regs., tit. 23, §§ 648; 648.5.1; Evid. Code, § 801, subd. (b); Gov. Code, § 11513, subd. (d).)  
14 Accordingly, Dr. Bray’s reliance on modeling prepared by Petitioners in support of the BDCP as  
15 the basis for his opinion regarding a potential mitigation measure is not barred as hearsay.

16 Third, Dr. Bray provided the necessary foundation for this testimony. He identified the  
17 specific modeling upon which he relied and explained how he analyzed that modeling. (*See*  
18 EBMUD-152 at pp. 19:1-20:7, fn. 10, and pp. 48-49; EBMUD-176 at pp. 14, 167-179 [EBMUD  
19 comment letter cited in Dr. Bray’s testimony].) SLDMWA and Westlands may explore  
20 Dr. Bray’s reliance on this modeling in their cross-examination of his testimony. However, the  
21 mere fact that Dr. Bray relied on that modeling in forming an opinion regarding a potential  
22 mitigation measure alone is insufficient to preclude his testimony on this issue. (*See* Cal. Code  
23 Regs., tit. 23, §§ 648; 648.5.1; Evid. Code, § 801, subd. (b); Gov. Code, § 11513, subd. (d).)

24 Finally, Dr. Bray’s testimony on reverse flows is within his expertise. Dr. Bray is an  
25 expert in hydrodynamic modeling. (*See* EBMUD-127 [summary of qualifications].) His opinion  
26 that tidal marsh restoration would mitigate the legal injury to EBMUD is based on his expert  
27 interpretation of the modeling results identified and cited to in his testimony. Dr. Bray is well-  
28 qualified to provide an opinion interpreting the meaning and significance of those model results,

1 and to opine that the modeling shows that tidal marsh restoration would mitigate the injury to  
2 EBMUD and its Freeport Project.

3 **III. CONCLUSION**

4 As outlined above, EBMUD respectfully requests that the State Water Board overrule  
5 SLDMWA and Westlands' objections to the expert testimony offered by Mr. Irias, Ms. White  
6 and Dr. Bray.

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8 Dated: September 30, 2016

EAST BAY MUNICIPAL UTILITY DISTRICT

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By:



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FRED S. ETHERIDGE

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Attorney

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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(s):

**EAST BAY MUNICIPAL UTILITY DISTRICT'S RESPONSE TO SAN LUIS & DELTA-  
MENDOTA WATER AUTHORITY AND WESTLANDS WATER DISTRICT'S OBJECTIONS TO  
PART 1B PARTIES' CASES IN CHIEF**

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 September 29, 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):


*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 <b>hard copy</b> 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:  <b>Method of Service:</b> _____
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I certify that the foregoing is true and correct and that this document was executed on September 30, 2016.

Date

Signature: 

Name: Anna Haynes

Title: Litigation Secretary

Party/Affiliation: **East Bay Municipal Utility District**

Address: 375 11th Street, Oakland, CA 94607