

STEPHAN C. VOLKER (CSB #63093)
DANIEL P. GARRETT-STEINMAN (CSB #269146)
JAMEY M.B. VOLKER (CSB #273544)
M. BENJAMIN EICHENBERG (CSB #270893)
LAW OFFICES OF STEPHAN C. VOLKER
436 14th Street, Suite 1300
Oakland, California 94612
Tel: 510/496-0600
Fax: 510/496-1366

11.203.02

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

BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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|---------------------------------------|--|
| HEARING REGARDING PETITION FILED BY) | PACIFIC COAST FEDERATION OF |
| THE DEPARTMENT OF WATER) | FISHERMEN'S ASSOCIATIONS' AND |
| RESOURCES AND U.S. BUREAU OF) | INSTITUTE FOR FISHERIES |
| RECLAMATION REQUESTING CHANGES IN) | RESOURCES' RESPONSE TO |
| WATER RIGHTS FOR THE CALIFORNIA) | OBJECTIONS TO WRITTEN TESTIMONY |
| WATERFIX PROJECT) | AND EXHIBITS |

Protestants Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources (collectively, "PCFFA") hereby respond to the California Department of Water Resources' ("DWR's") Master Objections to Protestants' Cases-in-Chief Collectively, DWR's Objections to Testimony and Exhibits Submitted by PCFFA, et al. (Group 38) and Motion to Strike, and San Luis & Delta-Mendota Water Authority's ("SLDMWA's") Objections to Part 1B Parties' Cases in Chief. Per this Board's September 28, 2016 direction, we respond only to "objections to Part 1B cases in chief that concern whether testimony or exhibits are within the scope of Part 1B." PCFFA reserves the right to further respond to all other objections.

I. DWR'S MASTER OBJECTIONS TO PROTESTANTS' CASES-IN-CHIEF COLLECTIVELY

DWR's Master Objections to Protestants' Cases-in-Chief Collectively ("DWR Master Objections") allege that protestants generally have raised many issues that are outside the scope of the Board's hearing on petitioners' water rights Change Petition. DWR Master Objections at 11. Not so. PCFFA has presented evidence that directly implicates the profound harm to legal users and human uses

1 that the California WaterFix (“CWF”) will cause due to reduced water quantity and quality. DWR’s
2 claim that this Board lacks discretion to review evidence directly relevant to the Change Petition’s
3 potential injury to legal users of water or other human uses simply because each and every piece of
4 evidence submitted does not to DWR’s satisfaction “describe specifically what injury would result if the
5 proposed changes requested in the Petition were approved,” stands the applicable evidentiary standard on
6 its head. DWR Master Objections at 10. It is *petitioners’* burden to show no injury, and PCFFA properly
7 demonstrates that petitioners have not carried that burden. Further, DWR’s claim that evidence must be
8 excluded because protestants have not submitted to DWR’s satisfaction “specific information describing
9 the basis of the claim of right, the date the use began, the quantity of water used, the purpose of use and
10 the place of use” misapprehends the requirements of the California Water Code, the due process
11 protections provided by law to protestants, and this Board’s own rulings. *Id.* DWR has failed to present
12 any lawful basis for the Board to strip PCFFA of its right under Government Code section 11513(b) “to
13 call and examine witnesses [and] to introduce exhibits.” DWR’s objections must be overruled.
14 Alternatively, this Board must reserve its ruling until after it has heard PCFFA’s evidence, just as it
15 reserved ruling on protestants’ objections to petitioners’ evidence until after it heard that evidence.

16 **A. PROCEDURAL BACKGROUND**

17 In its October 30, 2015 Notice of Petition and Notice of Public Hearing and Pre-Hearing
18 Conference to consider the Petition, the Board divided the hearing into two parts in order to allow the
19 hearing to proceed in the absence of certain finalized environmental documents. *Id.* at 2. “The first part
20 of the hearing would focus on the potential effects of the Petition on agricultural, municipal and industrial
21 uses of water and associated legal users of water and conditions that should be placed on any approval of
22 the Petition to protect those uses.” *Id.* To this end, the Board defined the scope of issues in Part 1 as
23 follows:

- 24 1. Will the changes proposed in the Petition in effect initiate a new water right?
- 25 2. Will the proposed changes cause injury to any municipal, industrial or agricultural
26 uses of water, including associated legal users of water?
 - 27 a. Will the proposed changes in points of diversion alter water flows in a
28 manner that causes injury to municipal, industrial, or agricultural uses of
water?

1 b. Will the proposed changes in points of diversion alter water quality in a
2 manner that causes injury to municipal, industrial, or agricultural uses of
3 water?

4 c. If so, what specific conditions, if any, should the State Water Board
5 include in any approval of the Petition to avoid injury to these uses?

6 *Id.* at p. 11.

7 On February 11, 2016, the Board clarified the scope of Part 1, explaining that “some issues could
8 cross over Part 1 and 2, but generally Part 1 focuses on human uses of water (water right and water use
9 impacts).” Hearing Officers' Ruling on Pre-Hearing Conference Procedural Issues, p. 10. The Board
10 further clarified that “Part 1 can address human uses that extend beyond the strict definition of legal users
11 of water, including flood control issues and environmental justice concerns.” *Id.*

12 On May 24, 2016 the Board requested confirmation from PCFFA that its witness testimony
13 proposed for Part 1B was within the bounds permitted by the hearing officers' March 4, 2016 ruling.
14 Email from Jean McCue to Stephan Volker, May 24, 2016, 4:21pm. PCFFA responded that

15 PCFFA and IFR are, as your query confirms, participants in both Part 1B and Part 2 of the
16 WaterFix hearing. Per the hearing officers' March 4, 2016 ruling, this means that PCFFA
17 and IFR were allowed to, and did in fact, submit a revised Notice of Intent to Appear
18 (“NOI”) by March 16, 2016. PCFFA and IFR included two additional witnesses, Patricia
19 Schifferle and Deirdre Des Jardins, to address “potential impacts to human uses that
20 extend beyond the strict definition of legal users of water, including flood control and
21 environmental justice concerns,” as specified by both the hearing officers' March 4, 2016
22 and February 11, 2016 rulings.

23 Deirdre Des Jardins' testimony, as specified in PCFFA and IFR's revised NOI, will
24 address the subjects of “[w]ater availability & permits, climate change, modeling of SWP
25 & CVP operations and modeling limitations.” These subjects touch intimately on both
26 flood control and environmental justice concerns, as well as many other aspects of
27 potential impacts to human uses that extend beyond the strict definition of legal users of
28 water. PCFFA and IFR represent commercial fishermen and the coastal communities that
depend on them. Those communities are disproportionately impacted by the types of
freshwater diversions from the Sacramento River – and resulting loss of habitat for salmon
and other commercial fisheries dependent on the Delta – that the WaterFix proposes.

 Patricia Schifferle's testimony, as specified in PCFFA and IFR's revised NOI, will address
the “[a]uthentication of documentary evidence.” It is PCFFA's and IFR's intention that
this documentary evidence will address aspects of the WaterFix's potential impacts to
human uses that extend beyond the strict definition of legal users of water, including flood
control and environmental justice concerns.

 Thus, PCFFA and IFR do hereby confirm that the witness testimony they propose to
present in Part 1B of the hearing is testimony concerning human use impacts that they had
previously intended to present during Part 2 consistent with the hearing officers' March 4
ruling.

1 Email from Stephan Volker to CWF Hearing Service List, June 15, 2016, 2:45pm. No party objected to
2 the scope of PCFFA's proposed participation in Part 1B as set forth in PCFFA's response. Nor did this
3 Board raise any objection to PCFFA's revised NOI. To the contrary, by failing to reject PCFFA's revised
4 NOI, the Board implicitly allowed PCFFA to participate on the basis set forth in that revised NOI.
5 PCFFA relied on the Board's acceptance, and proceeded to prepare its case-in-chief on that basis.
6 Contrary to DWR's claim, the Board has never held that only holders of water rights may participate and
7 present evidence in its hearings. PCFFA has met the test laid out by the Board for its NOIs and it is too
8 late to now change the ground rules. To do so now would be analogous to moving the goalposts on a
9 football field after the winning field goal was kicked, and to then claim that it did not count.

10 Neither DWR's master objections, nor any of the other objections offered by DWR and San Luis
11 & Delta-Mendota Water Authority, address PCFFA's response to the Board's NOI query, served on them
12 over three months before their objections were filed. DWR is therefore estopped from arguing that
13 PCFFA's Notice of Intent to Participate – both as it was originally filed January 15, 2016, over eight
14 months before DWR's objections, and as it was revised February 26, 2016, seven months before DWR's
15 filed objections – is deficient.

16 Furthermore, it must be noted that DWR filed its objections late, after the noon deadline on
17 September 21, 2016, as noted by the Board's website.¹ The Board should disregard the objections raised
18 by DWR and the other parties who submitted late filings. Fundamental principles of fairness require that
19 the Board disregard such late filings where other such filings have been disregarded, even where filings
20 were only a few minutes late. Without waiving this objection, PCFFA responds below to DWR's
21 objections.

22 **B. PCFFA'S EVIDENCE IS NOT OUTSIDE THE SCOPE OF THE HEARING**

23 DWR argues that the funding for the CWF, damages to property, water rights determinations, and
24 other permits or projects underway outside of these proceedings are all “not relevant to the noticed
25

26 ¹ “Late - Written Objections to Part 1B Cases-In-Chief (were due by noon on September 21, 2016),”
available at

27 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/openin
28 [g_statements/part1b_objection.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/opening_statements/part1b_objection.shtml) (updated 9/28/16). PCFFA, et al.'s Objection to the Case-In-Chief
Testimony Submitted by Westlands Water District is also listed. *Id.*

1 hearing issues [and] should be excluded.” DWR Master Objections at 11-14. Yet all of these areas of
2 testimony, to the extent they impact or answer the questions the Board used to define the scope of Part 1
3 in its October 30 Notice and subsequent rulings, are entirely within the scope of Part 1. To the extent
4 funding for the CWF has an impact on or helps the Board understand (1) the creation of a new water
5 right, (2) injury to any municipal, industrial, or agricultural uses of water, including associated legal users
6 of water, and (3) what conditions may be applied to approval to limit such injury, evidence concerning
7 such funding must be admissible. As petitioners have repeatedly testified, there are a range of options for
8 what the final CWF may actually look like, and this range is inherently affected by cost and funding
9 issues. If petitioners have not accurately portrayed these impacts and constraints to the Board in their
10 applications and testimony, protestants must necessarily be allowed to do so. Notably, DWR presents
11 nothing more than the conclusory statement that funding is not relevant. But financial impacts are
12 demonstrably relevant not only to assessment of the CWF’s impacts on legal users and human uses, but
13 also the feasibility of conditions on any approved changes in the points of diversion to mitigate their
14 adverse impacts.

15 Likewise, DWR’s objection to evidence of damage to property must be overruled. DWR has
16 presented nothing more than the conclusory statement that valuation is handled by other decisional bodies
17 without directly addressing the potential injury to legal users of water posed by such processes. Again,
18 protestants must be allowed to present evidence that damage to property constitutes an injury to legal
19 users of water and human uses or is in some other way relevant to the issues enumerated by this Board.

20 DWR’s objection to evidence concerning water rights determinations is also baseless. DWR
21 Master Objections at 12. To the extent petitioners’ water rights form the foundation for the change
22 petition, such water rights are absolutely relevant to the question of injury to legal users of water and the
23 other questions the Board used to define the scope of Part 1. Such foundational issues cannot be
24 segmented out of existence by petitioners.

25 Next, DWR attempts to exclude all other permits and projects underway outside of the present
26 proceedings. DWR Master Objections at 12. Petitioners have based their application in part on some of
27 these documents. To now claim that such documents are outside the scope of Part 1, as DWR has done,
28 is disingenuous at best. For instance, many of DWR and Reclamation’s witnesses relied on the

1 environmental impact reports and environmental impact statements on these other permits and projects to
2 form their opinions, yet DWR now claims that these documents are not relevant. DWR may not rely on
3 these documents where it suits its petition but exclude evidence based on these same documents when
4 such evidence is presented by protestants.

5 Furthermore, the Board's October 30, 2015 Notice opened the door for evidence such as that to
6 which DWR now objects. The Board specifically stated that, "[i]f there are any issues that arise out of
7 the ESA and CESA processes that have a material bearing on the issues addressed in the first part of the
8 hearing, those issues also may be revisited in the second part of the hearing." October 30, 2015 Notice
9 of Petition and Notice of Public Hearing and Pre-Hearing Conference at 11. Likewise, the Board
10 explained that draft CEQA documents would be part of the record in the hearing, and that "[t]o the extent
11 that any significant changes to the final CEQA document have a material bearing on the issues addressed
12 in the first part of the hearing, those issues may be revisited during the second part of the hearing." *Id.* It
13 would make no sense for the Board to now strike, as DWR's objections request, testimony and evidence
14 concerning and including the very documents the Board previously stated it would rely upon. DWR's
15 objection, in essence, asks the Board to reassess its October 30, 2015 Notice and related rulings and
16 exclude environmental documents that were previously included. DWR's opportunity to do so was
17 during the pre-hearing briefing set by the Board, not now after protestants have relied on the Board's
18 earlier scoping rulings and submitted their cases in chief.

19 Finally, DWR enumerates a staggering list of "out of scope issues raised" by protestants in its
20 footnote 6. DWR Master Objections at 11. DWR's bare statement that all such issues fall outside the
21 scope must be overruled. Each of these issues could easily bear on the Board's enumerated questions
22 defining the scope of Part 1, and protestants must be allowed to present evidence based on these issues.
23 Exclusion of evidence from the hearing record on the basis of nothing more than a conclusory list
24 submitted by DWR would constitute a serious breach of due process.

25 **C. THIS BOARD HAS ALREADY RULED UPON AND DEFINED THE SCOPE OF**
26 **THE HEARING AND EVIDENCE THAT GOES TO QUESTIONS FOUND BY**
27 **THE BOARD TO BE WITHIN THAT SCOPE ARE ADMISSIBLE**

28 DWR impermissibly seeks to reargue the Board's October 30, 2015 Notice and February, 2016
Ruling defining the scope of Part 1B. It is too late for that. DWR's untimely claim that any evidence that

1 even touches on “issues such as flows for fish protection, cold water pool requirements, consideration of
2 ‘appropriate Delta flow criteria’ under the Delta Reform Act, and all aspects of recreation such as boating
3 and fishing” is now outside the scope of Part 1 is absurd. DWR Master Objections at 15. Such a sharp
4 narrowing of the scope of Part 1 would exclude evidence that may inform the Board’s determination of
5 whether the Petition poses the initiation of a new water right, injury to any municipal, agricultural, or
6 industrial uses of water, including changes in flow or quality, and what conditions might alleviate such
7 injuries. The time for DWR to make these arguments was seven months ago when the Board asked for
8 input regarding the scope of Parts 1 and 2 of the hearing, not now after protestants have relied on the
9 Board’s notices and rulings to prepare and submit their cases in chief.

10 **II. DWR’S OBJECTIONS TO TESTIMONY AND EXHIBITS SUBMITTED BY PCFFA,**
11 **ET AL. (GROUP 38) AND MOTION TO STRIKE**

12 DWR’s Objections to Testimony and Exhibits Submitted by PCFFA, et al. (Group 38) and
13 Motion to Strike (“DWR’s Group 38 Objections”) claim that PCFFA has produced “no testimony or
14 evidence connecting Ms. Des Jardins’ opinions to any alleged injury or water right,” and that as a result
15 Ms. Des Jardin’s testimony is “irrelevant to and beyond the scope of this Part 1 proceeding.” *Id.* at 3. As
16 with DWR’s Master Objections, DWR’s claims here are without basis in law or fact. PCFFA’s expert
17 witness, Deirdre Des Jardin, has to the contrary presented extensive expert evidence highly relevant to
18 this Board’s determination of the CWF’s injury to legal users of water or other human uses.

19 DWR contends that “Ms. Des Jardins’ testimony is not tied to any alleged injury or water right
20 and therefor is not relevant to Part 1.” *Id.* at 5. Yet DWR nowhere points to a ruling by this Board or any
21 rule of procedure that requires all evidence be tied to a specific injury to a specific water right. As
22 described above, the scope of Part 1 has been limited to the Board’s enumerated questions. But Ms. Des
23 Jardin’s testimony is clearly relevant to the Board’s pursuit of answers to these questions, and is therefore
24 squarely within the scope of Part 1.

25 Ms. Des Jardin’s climate change testimony – the example DWR discusses – is directly relevant to
26 the Board’s injury determination. Whether petitioners’ climate estimates are accurate directly implicates
27 petitioners’ claim that there will be no injuries to legal users of water even under diverse climate
28 scenarios that change current supply assumptions. Petitioners rely for their conclusions and testimony on

1 climate assumptions and modeling results that DWR now claims protestants should not be allowed to
2 refute. Yet DWR advanced repeated objections during protestants' cross-examination that their
3 questioning was precluded because this very subject was *more appropriate to protestants' cases in chief*.
4 DWR's is estopped to now complain that protestants are doing exactly what DWR contended they should
5 – make their points through their cases in chief. If DWR is confused as to how petitioners' poorly
6 modeled climate scenarios may result in injuries, it is free to ask Ms. Des Jardins to elaborate on this
7 issue during cross examination.

8 **SAN LUIS & DELTA-MENDOTA WATER AUTHORITY'S ("SLDMWA'S")**
9 **OBJECTIONS TO PART 1B PARTIES' CASES IN CHIEF**

10 SLDMWA's Objections to Part 1B Parties' Cases in Chief ("SLDMWA Objections") claim that
11 the exhibits authenticated through the testimony of Patricia Schifferle raised "issues beyond those that are
12 the subject of this proceeding or part." SLDMWA Objections at 58. As with DWR's misplaced
13 objections discussed above, SLDMWA has misapprehended what is and is not relevant to Part 1 of the
14 hearing. Consequently its objections are invalid and must be overruled.

15 SLDMWA states that PCFFA exhibits 23-61 "regard issues beyond those that are the subject of
16 this proceeding or part, including issues related to effects on fish and wildlife and other environmental
17 effects, issues regarding CEQA and NEPA compliance or document preparation, and financing and
18 political issues." SLDMWA Objections at 58. Like DWR, SLDMWA's objections rest on the bare
19 statement that SLDMWA believes certain broad issues are beyond the scope of Part 1. But the only
20 relevant question is whether the proffered evidence bears on the questions enumerated by the Board to
21 define Part 1. As with DWR's objections, the questions the Board is answering can be informed by
22 evidence of environmental effects and the viability and burdens of financing. Just because many of the
23 injuries that fall squarely within the scope of Part 1 may also pose "political issues" does not render them
24 irrelevant. SLDMWA provides no explanation for why such evidence falls outside the Board's purview
25 when determining whether a new water right has been created, whether there has been any injury to any
26 municipal, industrial, or agricultural uses of water, including associated legal users of water, and what
27 conditions may be applied to approval to limit such injury. Evidence concerning "effects on fish and
28 wildlife and other environmental effects, issues regarding CEQA and NEPA compliance or document

1 preparation, and financing and political issues” must be admissible to aid in this determination.

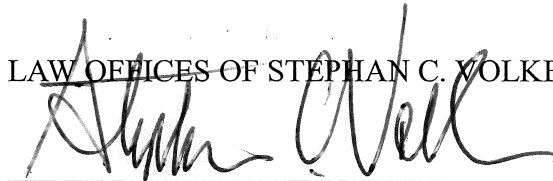
2 Furthermore, SLDMWA, like DWR, ignores petitioners’ own reliance on evidence and testimony
3 relating to the very issues that SLDMWA now claims are irrelevant. Each witness petitioners brought
4 forward relied on evidence in these areas to support their opinions that the Board should approve the
5 CWF. The Board cannot not exclude protestants’ presentation of the same categories of evidence.

6 **CONCLUSION**

7 For the foregoing reasons, DWR’s and SLDMWA’s objections are without merit and must be
8 overruled.

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10 Dated: September 30, 2016

LAW OFFICES OF STEPHAN C. VOLKER



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12 STEPHAN C. VOLKER

Attorney for Protestants

13 PACIFIC COAST FEDERATION OF FISHERMEN’S
14 ASSOCIATIONS and INSTITUTE FOR FISHERIES
15 RESOURCES
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STATEMENT OF SERVICE

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

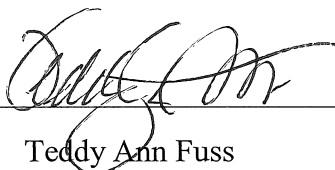
I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS AND INSTITUTE FOR FISHERIES RESOURCES' RESPONSE TO OBJECTIONS TO WRITTEN TESTIMONY AND EXHIBITS

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 20, 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

I certify that the foregoing is true and correct and that this document was executed on September 30, 2016.



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|--------------------|--|
| Name: | Teddy Ann Fuss |
| Title: | Legal Secretary |
| Party/Affiliation: | Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources |
| Address: | 436 14 th Street, Suite 1300 Oakland, CA 94612 |