

1 Spencer Kenner (SBN 148930)  
James E. Mizell (SBN 232698)  
2 Robin McGinnis (SBN 276400)  
3 **CALIFORNIA DEPARTMENT OF WATER  
RESOURCES**

4 Office of the Chief Counsel  
1416 Ninth Street, Room 1104  
Sacramento, CA 95814  
5 Telephone: (916) 653-5966  
E-mail: james.mizell@water.ca.gov

6  
7 Attorneys for California Department of Water  
Resources

8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

9  
10 HEARING IN THE MATTER OF  
11 CALIFORNIA DEPARTMENT OF WATER  
RESOURCES AND UNITED STATES  
12 BUREAU OF RECLAMATION REQUEST  
FOR A CHANGE IN POINT OF  
13 DIVERSION FOR CALIFORNIA WATER  
FIX

**CALIFORNIA DEPARTMENT OF  
WATER RESOURCES' OBJECTIONS  
TO TESTIMONY AND EXHIBITS  
SUBMITTED BY SAVE THE  
CALIFORNIA DELTA ALLIANCE, ET  
AL. (GROUP 30) AND MOTION TO  
STRIKE**

14  
15 **INTRODUCTION**

16 California Department of Water Resources ("DWR") submits the following  
17 objections to the written testimony and exhibits submitted by Save The California Delta  
18 Alliance, et. al. ("SCDA"), and concurrently moves to strike the same written testimony  
19 and exhibits.<sup>1</sup>

20 SCDA's testimony and exhibits consist of written testimony from six witnesses,  
21 and twenty-five (25) exhibits. The written testimony consists of (a) the legal arguments  
22 and contentions of SCDA's counsel, Michael Brodsky, (b) three lay witnesses whose  
23 testimony is merely the conjecture, speculation and fear of concerned citizens, (c) the  
24 unsupported conclusions of an environmental scientist, after no research or study, and  
25 \_\_\_\_\_

26  
27 <sup>1</sup> DWR reserves the right to make additional evidentiary/procedural objections to  
evidence and exhibits submitted by Protestants in support of their cases-in-chief.  
28

1 (d) the testimony of a water engineer.

2 Where applicable, DWR cites to its concurrently-filed Objections to Protestants'  
3 Cases-In-Chief Collectively ("Collective Objections"), which also provide a common  
4 Statement of Facts and Legal Standards for DWR's separate response to Protestants'  
5 cases-in-chief. The Collective Objections are, therefore, incorporated by reference  
6 herein.

## 7 OBJECTIONS

### 8 **A. Testimony of Michael Brodsky, Esq. (SCDA-48).**

#### 9 **1. Mr. Brodsky's Testimony Is Legal Argument and Numerous** 10 **Legal Conclusions That Are Not Admissible as Testimony** 11 **Before the Board.**

12 Mr. Brodsky mistakes witness testimony before the Board in an evidentiary  
13 hearing with opening statements and oral arguments by a party's attorney (like himself),  
14 and has submitted as "written testimony" a 15-page legal brief for which he erroneously  
15 reserves 60-80 minutes for his own testimony as counsel for SCDA.<sup>2</sup> (First Amended  
16 Notice of Intent to Appear, With Revised Witness List; SCDA-48.) Accordingly, SCDA-  
17 48 should be excluded as evidence and stricken from the record. Possibly, the Board  
18 may consider it as part of SCDA's written opening statement. (See October 30, 2015  
19 Notice of Hearing, p. 35.) Further, Mr. Brodsky must be limited to the 20 minutes  
20 allowed for opening statements, per party, (id.), and denied the requested 60-80 minutes  
21 of testimony.<sup>3</sup>

22 \_\_\_\_\_  
23 <sup>2</sup> Mr. Brodsky's own significant experience following and participating in these  
24 proceedings, (SCDA-48, p. 1:5-12), and the fact that Mr. Brodsky has separately filed a  
25 written opening statement, (SCDA-38), suggests this mistake was intended. Mr.  
26 Brodsky's testimony is an intentional effort to circumvent the Board's rule that a party's  
27 attorney receives only 20 minutes for opening statements.

28 <sup>3</sup> To allow a party additional time for oral argument by simply presenting its own attorney  
as a witness, but setting forth the attorney's testimony as only legal argument and no  
*factual* testimony, would be unfair to all other parties and unduly waste the Board's  
limited time.

1 While the Board may hear testimony containing legal conclusions or statements of  
2 law when such testimony “is helpful to a clear understanding of [the witness’s]  
3 testimony,” (Evid. Code § 800), testimony that does no more than make conclusory  
4 statements as to what the law is or legal arguments interpreting the law is inappropriate.  
5 (See also DWR’s Collective Objections.) The central issue is whether the testimony  
6 assists in making determinations of fact – as opposed to decisions of law or even  
7 application of law to fact.

8 That Mr. Brodsky’s testimony consists almost exclusively of legal argument,  
9 incapable of assisting with the resolution of a *factual* determination, is facially obvious.  
10 The following passages are exemplary:

11 “Trust us” is not evidence. DWR has failed to carry its burden of demonstrating no  
12 injury to legal users of water.

13 CWF is a legislatively disfavored project. The legislature declared that the Delta and  
14 “California’s water infrastructure are in crisis.” (Water Code § 85001(a). The  
15 legislature set out in the Delta Reform Act standards that the BDCP (including CWF)  
16 should meet if it were to be legislatively favored as a part of resolving the crisis.  
17 (Water Code § 85320(b).) The legislature ordained that no state funds may be  
18 expended on any aspect of CWF if it fails to meet the statutory criteria set out in the  
19 Delta Reform Act for resolving the Delta’s crisis. (Water Code § 85320(b). CWF did  
20 fail to meet the criteria set out in Water Code section 85320. No state funds may be  
21 expended on CWF and it comes to this Board as a legislatively disfavored project.

22 The Board has ample legal grounds to deny the Petition. If the Board considers  
23 granting the Petition with conditions, those conditions should not be constrained by  
24 the limits of existing infrastructure. There is ample authority for the Board to impose  
25 conditions that would force either a reduction in exports south of Delta or would force  
26 DWR and Contractors to undertake a portfolio approach as a part of the CWF  
27 project description, including additional surface storage, additional groundwater  
28 recharge, integrated water management, and conservation, including increasing  
regional self-reliance. These measures are all cost effective, feasible, and  
necessary. (SWRCB-23; SCDA-40–SCDA-47; SCDA-50–SCDA-56.)

(SCDA-48, p. 3:8-25.)

Water Code section 85001(c) provides that:

By enacting this division, it is the intent of the Legislature to provide for the  
sustainable management of the Sacramento-San Joaquin Delta ecosystem, to  
provide for a more reliable water supply for the state, to protect and enhance the  
quality of water supply from the Delta, and to establish a governance structure that  
will direct efforts across state agencies to develop a legally enforceable Delta Plan.

1 The legislature's intent was to "enhance the quality of water supply from the Delta"  
2 for in-Delta users and export Contractors alike. Although DWR reads this paragraph  
3 to apply only to the quality of water exported from the Delta, there is no such limiting  
4 language and no evidence that the legislature meant anything other than what it  
5 said. Likewise, a "more reliable water supply for the state" includes those portions of  
6 the state that are within the Delta and rely on water diverted from the Delta.

7 (SCDA-48, p. 7:15-25)

8 The Board was not a party to the Delta Stewardship Council cases and the decision  
9 is not directly binding on the Board. However, the trial court's interpretation of the  
10 Delta Reform Act would mean that the Act would require the Board to impose permit  
11 conditions achieving reduced reliance and enhanced water quality supply for in-  
12 Delta users, pursuant to Water Code sections 85001 and 85021. These issues are  
13 directly relevant to Part 1 of the hearings as they implicate the water rights of DWR  
14 and of in-Delta diverters.

15 DWR essentially does not dispute that the quantity and quality of water available for  
16 in-Delta diverters and human uses will be degraded. However, their two-pronged  
17 argument that degrading water quality and diminishing water quantity does not  
18 constitute injury is that 1) they will continue to meet the terms of D-1641 and  
19 meeting D-1641 equates to non-injury to in-Delta legal users and human uses; and  
20 2) any reduction in quantity or quality of water for in-Delta diverters and human uses  
21 is the result of stored water not flowing through the Delta, and in-Delta users have  
22 no right to stored water.

23 (SCDA-48, p. 9:1-13.)

24 Through cross-examination, CWF's modeling has been shown to be un-useful for  
25 both absolute predictions and for comparison of scenarios. Our expert testimony  
26 further establishes that CWF modeling is not useful for comparison of scenarios.  
27 (SCDA-35.)

28 The modeling should be excluded from evidence and absent the modeling CWF has  
no evidence to establish that it does not injure human uses and legal users of water  
in the Delta.

(SCDA-48, p. 14:17-21.)

Similarly, Attorney Brodksy argues that a May 18, 2016 ruling in the case *Delta Stewardship Council Cases*, Coordinated Case no. 4758, Sacramento County Superior Court, should be considered instructive by the Board in determining how to apply the Sacramento-San Joaquin Delta Reform Act of 2009 ("Delta Reform Act"). (SCDA-48, p. 8-9.) This is pure legal argument.

These written statements are not factual testimony or expert testimony, they are legal argument by counsel. These statements do not help the Board determine any

1 *issues of fact.* The examples above – urging the Board to apply a Superior Court’s  
2 decision from a different case, or statements suggesting what results SCDA expects to  
3 produce in cross-examination, or counsel’s characterizations of the DWR’s case in chief  
4 – do not help resolve any issues of fact.

5 The only *factual* statement properly offered in Mr. Brodsky’s written testimony is  
6 the following:

7 I use my boat, which is kept at my metal frame dock, to visit clients in the Delta and  
8 to view Delta locations relevant to my law practice.

9 (SCDA-48, p. 14:12-13.) The remainder is either improper legal argument, irrelevant  
10 facts regarding counsel’s involvement in these proceedings, or unsupported and  
11 unfounded opinions far beyond the scope of any expertise or personal knowledge of Mr.  
12 Brodsky. (See e.g. SCDA-48 [though entirely irrelevant to the Board’s decision in this  
13 proceeding, stating that “[i]n 2013, [Brodsky] filed a Petition for Writ of Mandate seeking  
14 to set aside the Delta Plan for failure to comply with the Delta Reform Act.”] p. 1:18-19;  
15 [concluding without foundational support or expertise that “[s]alt water intrusions in  
16 Discovery Bay will cause millions of dollars of property damage to metal frame docks.”]  
17 p. 14:11-12.)

18 Accordingly, Mr. Brodsky’s testimony should be excluded as evidence, or stricken.  
19 At most, it may be considered SCDA’s written opening statement, submitted under the  
20 rules set forth by the Notice of Petition. (See Notice of Petition, p. 35.)

21 **2. Mr. Brodsky Is Not Qualified To Provide Expert Testimony,  
22 Including Testimony Regarding the Effects Of Water Flow or  
23 Water Quality.**

24 The Board is not constrained by Evidence Code § 720 to admit expert testimony;  
25 however, it is limited by the requirement in Government Code § 11513 that evidence be  
26 admitted only if “it is the sort of evidence on which responsible persons are accustomed  
27 to rely in the conduct of serious affairs.” Additionally, under Evidence Code § 801, the  
28 Board may exclude the opinion of a witness who lacks *relevant* special knowledge, skill,

1 experience, training and education on which to form his or her opinion regarding matters  
2 known to or made known to him or her. (Evidence Code § 801(b).)

3 The Board requires that “[a] party who proposes to offer expert testimony must  
4 submit an exhibit containing a statement of the expert witness’s qualifications.” (Notice  
5 of Petition, p. 33.) Mr. Brodsky apparently intends to offer testimony as an expert  
6 witness, as he has filed a statement of qualifications. (SCDA-49). However, Mr.  
7 Brodsky’s stated qualifications – which are verbatim repeated in his “written testimony” –  
8 do not establish that he holds any relevant expertise.

9 Mr. Brodsky is an attorney, who has participated in proceedings involving the Bay  
10 Delta Conservation Plan (“BDCP”), commented on BDCP EIR/S in recent years,  
11 attended meetings related to the BDCP, and familiarized himself with the Delta Reform  
12 Act, in part through a Writ of Mandate Proceeding. (SCDA-49.)

13 What Mr. Brodsky does not hold himself out to be is an expert on hydro-  
14 engineering, water quality, invertebrate or marine biology, civil engineering, or climate  
15 change. (See SCDA-49.) Yet, conclusory statements made with absolutely no  
16 reference to scientific studies or other authoritative sources regarding these broad and  
17 complex subject matters pervade Mr. Brodsky’s written testimony. The following are  
18 examples of such unfounded and unsupported conclusions about which Mr. Brodsky  
19 lacks the necessary qualifications to testify:

- 20 • It is precisely during these dry years that water quality is degraded the  
21 most to the detriment of in-Delta users. (SCDA-48, p. 6:16-17);
- 22 • The concentration of nutrients in Sacramento River water in the vicinity of  
23 the proposed NDD is lower than the concentration of nutrients in the  
24 central and south Delta. When Sacramento River water flows through the  
25 Delta on the way to the export pumps it dilutes the nutrient load in the  
26 central and south Delta. . . . Agricultural return flow traveling in the San  
27 Joaquin River from Central Valley farms back into the Delta carries a very  
28 high nutrient load and combines with the higher nutrient load already  
present in the central and south Delta. The agricultural return flow from the  
Central Valley is also responsible for the salinity problem in the south  
Delta. (SCDA-48, pp. 10-27-11:6);

- 1 • If diversions are shifted to the proposed NDD, this dilution effect will be  
2 reduced or eliminated. This will result in a higher nutrient loads for waters  
3 in and around Discovery Bay. (SCDA-48, p. 11:10-11);
- 4 • Livestock wade into and drink the water of Kellogg Creek so the algae is  
5 also a threat to the watering of livestock, which is injury to legal users of  
6 water. (SCDA-48, p. 11:16-17);
- 7 • CWF will tend to reduce very cold water events in Discovery Bay,  
8 exacerbating the Asiatic clam problem. . . . Higher nutrient levels caused  
9 by CWF will also encourage growth of Asiatic clam populations. (SCDA-48,  
10 p. 12:3-7);
- 11 • During the most recent drought DWR installed a drought barrier on False  
12 River so it could continue pumping without drawing saltwater into the  
13 pumps from the bay during periods of very low flow when water quality  
14 standards were not being met. Conditions that brought about this situation  
15 are likely to repeat themselves more often, more severely, and for more  
16 prolonged periods in the future. However, with the addition of the NDD,  
17 DWR will simply switch pumping to the NDD and allow salt water to intrude  
18 into the Delta with no concern. There is nothing in the CWF operating rules  
19 that will prevent pumping from NDD, with no pumping from south Delta  
20 points of diversion, during periods of severe drought and salinity intrusion  
21 deep into the Delta. Indeed, CWF operating rules are crafted with precisely  
22 this eventuality in mind. (SCDA-48, p. 13:2-10); and,
- 23 • [M]any of the docks in Discovery Bay are constructed with metal frames.  
24 Metal frame docks are suitable for use in fresh water. However, salt water  
25 quickly corrodes metal docks. Many of the docks in Discovery Bay are  
26 used for commercial purposes. Salt water intrusions in Discovery Bay will  
27 cause millions of dollars of property damage to metal frame docks. (SCDA-  
28 48, p. 14:7-12.)

Because Mr. Brodsky's testimony rests on broad sweeping generalizations and  
conclusory statements made without supporting evidence, and Mr. Brodsky's own  
statement of qualifications provides no evidence that he is an expert in any of the fields  
relevant to his own conclusory testimony, his testimony should be excluded. His  
testimony merely offers opinions on which no responsible person would rely, in  
conducting serious affairs. (Government Code§ 11513(c).)

### 3. Mr. Brodsky's Testimony Exceeds the Scope of Part 1.

Mr. Brodsky's testimony concerns issues outside the scope of Part 1, as it relates  
to his allegations of impact on recreational uses or public trust resources. (See SCDA-  
48, p.14:12-14.) His testimony concerns his conjectures regarding the impact to his  
metal dock, where he stores his boat that he allegedly uses for transportation. (Id.)

1 Recreational impacts and impacts on public trust resources due to the proposed  
2 changes in the Petition are not within the scope of this Part 1 proceeding. (See October  
3 30, 2015 Notice of Hearing, p. 12; February 11, 2016 Ruling, p. 10; DWR's Collective  
4 Objections.)

5 Mr. Brodsky does not identify any water right belonging to him or any other  
6 person. He only alleges that he uses his boat, stored in a metal dock at his home, for  
7 transportation. (SCDA-48, p. 14:12-13 ["I use my boat, which is kept at my metal frame  
8 dock, to visit clients in the Delta and to view Delta locations relevant to my law  
9 practice."].) He claims that "[his] non-recreational human use will be injured by damage  
10 to my dock caused by CWF." (Id. at 14:13-14.) At most, impact on Mr. Brodsky's metal  
11 doc, from which he uses a boat for transportation, is an impact to a public trust resource  
12 – transportation.

13 This testimony, regarding alleged injury to Mr. Brodsky's recreational or non-  
14 recreational use of his dock is not properly before the Board in this Part 1, and should be  
15 excluded and stricken.

16 **4. Mr. Brodsky's Testimony Fails to Follow the August 24, 2016**  
17 **Hearing Officer's Ruling Prohibiting Testimony from this Party Regarding Injury to**  
18 **Legal Users of Water**

19 Mr. Brodsky's testimony concerns issues on injury to legal users of water. It was  
20 clearly and unambiguously stated by the Hearing Officers in their August 24, 2016 ruling  
21 that Mr. Brodsky and Save the California Delta Alliance were not to submit testimony  
22 regarding injury to legal users of water, as such evidence would constitute an  
23 impermissible modification of the filed Notice of Intent to Appear. As stated in that ruling,  
24 "We have allowed parties participating in Part 2 to make limited revisions to their NOIs to  
25 present testimony on impacts to human uses, such as flood control issues, during Part 1  
26 instead of Part 2. Since Delta Alliance et al. timely submitted a revised NOI, they may  
27 present testimony and exhibits on human use impacts in Part 1. In our ruling dated June  
28 10, 2016, however, we denied Delta Alliance et al.'s request to amend their protest to

1 allege injury to legal users of water and to expand the scope of their proposed testimony  
2 to address that issue.” (August 24, 2016 Ruling, p. 1.) For this reason, all testimony of  
3 Mr. Brodsky related to injury to legal users of water should be excluded and stricken.

4 **B. Testimony of Tom Burke (SCDA-35).**

5 **1. Mr. Burke’s Conclusory Statements In His Expert Testimony**  
6 **Lacks Adequate Support or Bases .**

7 Mr. Burke claims his written testimony is merely a summary “of the analyses that  
8 [he] conducted on the different scenarios and results that [he] ha[s] developed from  
9 those analyses.” (SCDA-35, p. 1:18-20.) The summary nature of Mr. Burke’s testimony  
10 is obvious, in his six pages of written testimony he includes almost no references to  
11 technical data or other reports. (SCDA-35.) Instead, Mr. Burke relies on another party’s  
12 case-in-chief, stating that “[a] detailed report of [his] analyses has been submitted as  
13 Exhibit SDWA 47.” (SCDA-35, p. 1:19-20.)<sup>4</sup>

14 Without citing any actual analysis or data supporting his conclusions, Mr. Burke’s  
15 written testimony lacks foundation and is unreliable speculation. With regards to nutrient  
16 loads, Mr. Burke concludes that “[t]he concentration of nutrients in [sic] Sacramento  
17 River water in the vicinity of the proposed NDD is typically lower than the concentration  
18 of nutrients in the central Delta”, but does not reference any data supporting that  
19 conclusion. (SCDA-35, p. 2:16-18.) Similarly, Mr. Burke concludes that “higher nutrient  
20 loads can lead to algal blooms which reduce dissolved oxygen and lead to degradation  
21 of water quality.” Again, he reference no supporting data or analysis for such  
22 conclusions. (SCDA-35, p. 2:23-25.) In concluding that “[t]hese salinity increases will  
23 also impact agricultural diverters in the vicinity of Discovery Bay”, (SCDA-35, p. 5:24),  
24 Mr. Burke, does not reference supporting data or even his own underlying analysis of the

25 \_\_\_\_\_  
26  
27 <sup>4</sup> In fact, Mr. Burke’s analysis for the South Delta Water Agencies was filed as “SDWA  
28 78”, not “SDWA 47”. The analysis is not focused on Discovery Bay. (SDWA 78.)

1 agricultural interests in Discovery Bay.

2 Without supporting data, these conclusions are mere conjecture and speculation.  
3 Responsible persons do not rely on such speculative conclusions. Moreover, without  
4 providing his supporting data and analysis, Mr. Burke's conclusions deprive DWR of  
5 proper opportunity to cross examine. Accordingly, Mr. Burke's testimony at page 2, lines  
6 16-20 and 23-24, and at page 5 line 24 should not be considered, and should be  
7 stricken.

8 **C. Mr. Ringelberg's Testimony (SCDA-33).**

9 **1. Mr. Ringelberg Lacks the Necessary Qualifications and**  
10 **Evidentiary Support to Provide Testimony on Water Quality**  
11 **Analysis For Discovery Bay; And Available Mitigation**  
12 **Measures.**

12 Mr. Ringelberg is an environmental scientist, but not a water engineer. He does  
13 not purport to have any significant modeling experience, in particular with the hydrologic  
14 models extensively used to analyze the Delta (CALSIM II and DSM2). (SCDA-32.)  
15 Moreover, he does not claim to have any experience with the operations of large-scale  
16 water systems such as the Central Valley Project ("CVP") or State Water Project  
17 ("SWP"). (Id.) Nonetheless, he offers expert opinion testimony on the hydrologic effect  
18 of the proposed diversion intakes – including how such new diversion intakes will impact  
19 freshwater circulation, flow dynamics, salinity levels and temperatures in the Delta and  
20 particularly, Discovery Bay. (SCDA-33, p. 1:10-22, 2:22-24.)

21 Lacking professional and academic background in hydrology, Mr. Ringelberg  
22 offers these opinions without any supporting evidence or authorities. (Id.) In fact, Mr.  
23 Ringelberg's testimony admits he performed no scientific studies or research to support  
24 his opinions, but instead merely "assed [the California WaterFix Petition and unspecified  
25 public documents] for their description of potential project impacts on Discovery Bay and  
26 its water quality." (SCDA-33, p. 1:2-4.) Without having done any actual research, and  
27 having merely reviewed unnamed public documents, Mr. Ringelberg's opinions lack a  
28 sufficient foundation. In fact, Mr. Ringelberg himself claims that the WaterFix Petition

1 lacks sufficient information regarding water quality impacts in Discovery Bay, yet he has  
2 relied only on the WaterFix Petition itself to form his opinion. (Id., pp. 1:1-2:3, 2:22-24.)  
3 Having done no research himself, nor identified any data on which his testimony is  
4 based, Mr. Ringelberg’s own conclusory speculations about Discovery Bay water quality  
5 are without evidentiary basis. They are pulled from thin-air.

6 Mr. Ringelberg’s two-pages of testimony, in which he cites no evidence to support  
7 his opinions nor provides any description of a scientific methodology by which he arrived  
8 at his opinion, should be excluded as lacking an adequate foundation and improper lay  
9 opinion testimony.

10 **D. Testimony of Michael Guzzardo (SCDA-24).**

11 **1. Mr. Guzzardo Is Not Qualified To and Lacks Sufficient Basis To**  
12 **Provide Expert Testimony, Including Testimony Regarding the**  
13 **Effects Of Water Flow or Water Quality.**

14 The applicable standard for admission of expert testimony under Government  
15 Code § 11513 and Evidence Code § 801, has been set forth above.

16 Mr. Guzzardo’s testimony sets forth that he is an accomplished realtor in  
17 Discovery Bay, California, and an upstanding citizen, in addition to a member of the  
18 Discovery Bay Yacht Club. (SCDA-22.) However, he opines that the proposed  
19 diversions at issue in the Petition “will degrade water quality in Discovery Bay, cause  
20 increases in invasive weeds, increases in toxic algae, and turn the bays . . . into brackish  
21 and salt water.” (Id.) He also opines on economic consequences of the water quality  
22 that he forecasts. (Id.)

23 Mr. Guzzardo does not claim to have any expertise in hydrology, or otherwise in  
24 water quality or water flow, or on economic consequences of alterations to water quality.  
25 In fact, because Mr. Guzzardo has not filed a “statement of qualifications”, it is clear he  
26 does not claim to be an expert in anything. He also offers no evidentiary basis for his  
27 opinions. (Id.) Yet Mr. Guzzardo intends to offer testimony regarding water quality  
28 based on projected diversions, something that no party to this proceeding legitimately

1 claims to be within the scope of lay knowledge. Such lay opinion testimony regarding  
2 matters outside the scope of common knowledge is inadmissible. (See Evidence Code  
3 §§ 800(a), 801(a).)

4 Mr. Guzzardo's statement is, instead the opinion of a concerned citizen, a policy  
5 statement. Such statements are not proper testimony to be heard by the Board, as they  
6 do not help the Board determine any issue of fact. Mr. Guzzardo's testimony should,  
7 therefore, be excluded and stricken.

## 8 **2. Mr. Guzzardo's Testimony Exceeds the Scope of Part 1.**

9 Mr. Guzzardo's testimony concerns issues outside the scope of Part 1, as it  
10 relates to his allegations of impact on public trust resources or recreational uses of  
11 water. (See SCDA-24.) His testimony concerns his conjectures regarding the economic  
12 impact to the greater community from the proposed changes. (Id.) Recreational impacts  
13 and impacts on other public trust resources due to the proposed changes in the Petition  
14 are not within the scope of this Part 1 proceeding. (See October 30, 2015 Notice of  
15 Hearing, p. 12; February 11, 2016 Ruling, p. 10; DWR's Collective Objections.)

16 Mr. Guzzardo does not identify any water right belonging to him. (SCDA-24.) He  
17 does not even claim his use of water will be impacted by the proposed changes in the  
18 Petition. (Id.) He simply states that, as lay opinion, that "cultural values of Discovery  
19 Bay would be devastated" by the proposed changes, that home prices will drop, and that  
20 the changes will hurt his community's "tax base." (Id.)

21 This testimony, regarding alleged injury to Mr. Guzzardo's community's economic  
22 well-being concerns, at best, an impact on public trust resources. It is not properly  
23 before the Board in this Part 1, and should be excluded and stricken.

### 24 **E. Testimony of Janet McCleery (SCDA-22).**

#### 25 **1. Mrs. McCleery's Opinions Should Be Excluded As They Are** 26 **Improper Lay Opinion Testimony And Mrs. McCleery Is Not** 27 **Qualified To Provide Expert Testimony.**

28 Under Evidence Code § 800(a), lay witness testimony must be rationally based on

1 the perception of the witness, i.e., personal observation of the witness. Generally, lay  
2 witnesses may only express opinions on matters within common knowledge or  
3 experience. (See Evidence Code §§ 800(a), 801(a); see also *Miller v. Los Angeles*  
4 *County Flood Control Dist.* (1973) 8 Cal.3d 689, 702.) Expert testimony is required when  
5 related to a “subject that is sufficiently beyond the common experience that the opinion  
6 of an expert would assist the trier of fact.” (Evidence Code § 801; see also *Miller*, 8  
7 Cal.3d at 702.)

8 In the First Amended Notice of Intent with Revised Witness List filed by SCDA,  
9 Mrs. McCleery is expressly identified as “not” an expert witness. She admits in her  
10 testimony that she was a software engineer. (SCDA-22, p. 1.)

11 However, Ms. McCleery’s testimony nonetheless seeks to provide opinion  
12 testimony on matters outside common knowledge or experience. Mrs. McCleery opines  
13 that “If the Tunnels go into operation” a parade of horrors will befall Discovery Bay and  
14 unnamed persons: Discovery Bay will be deprived of fresh water, “many . . . businesses  
15 will have to close”, it will “negatively impact [Discovery Bay’s] tax base”, “[m]any people  
16 will lose their livelihood”, a “entire culture and sense of community will be destroyed”,  
17 “[h]ome values will plummet”, “barges will block waterways and large muck ponds will be  
18 dumped nearby with their resulting smell and bugs,” “Highway 4 . . . will suffer significant  
19 closures”, “water temperatures will increase”, “pets will die”, and “bays will become  
20 brackish or polluted.” (SCDA-22, pp. 1:19-24, 2:5-8, 2:24-28, 3:1-20.) Testimony on the  
21 impacts of the WaterFix on water quality and related impacts on unspecified Delta water  
22 users or communities is sufficiently outside the common experience of a lay witness that  
23 only a qualified expert can offer such testimony. (Evidence Code § 801).

24 Ms. McCleery’s statements are, instead, the opinion of a concerned citizen; a  
25 policy statement. Such statements are not proper testimony to be heard by the Board,  
26 as they do not help the Board determine any issue of fact. Ms. McCleery’s testimony  
27 should, therefore, be excluded and stricken.

28 ///

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2                           **2.     Mrs. McCleery’s Testimony Lacks Foundation and Is Not the**  
3                           **Type of Information on Which a Responsible Person Would**  
4                           **Rely.**

5                   Similarly, Ms. McCleery’s testimony sets forth opinions regarding complex issues  
6 of water quality and economic behavior without referencing any supporting evidence or  
7 foundational facts. (See SCDA-22, pp. 1:19-24, 2:5-8, 2:17-3:13, 3:21-24.) Ms.  
8 McCleery’s speculation and conjecture regarding the horrible impact she fears from the  
9 proposed diversions at issue are not opinions or evidence on which responsible persons  
10 customarily base their opinions. Moreover, even if Ms. McCleery were an expert, her  
11 unsupported speculation and conjecture would not be reliable or admissible. (See *In re*  
12 *Lockheed Litig. Cases* (2004) 115 Cal.App.4th 558, 564 [“Expert opinion based on  
13 speculation or conjecture is inadmissible”].)

14                           **3.     Mrs. McCleery’s Testimony Exceeds the Scope of Part 1 Issues.**

15                   Ms. McCleery’s testimony acknowledges that it concerns issues outside the scope  
16 of Part 1, as her testimony relates to her assumptions as to the recreational impacts of  
17 the proposed diversion. (See SCDA-22, p.1:14-15 [“We understand that the effects of  
18 the tunnels on ‘recreation’ are scheduled for part II of the hearings.”]; see also February  
19 11, 2016 Ruling, p. 10; DWR’s Collective Objections.) Yet, Ms. McCleery nonetheless  
20 seeks to testify regarding recreational impacts, stating:

- 21                   • That the proposed changes will injury the Discovery Bay Yacht Club;  
22                   • That her community will no longer be able to swim, paddle, peddle or float  
23                   in its “common” bays;  
24                   • That weekend recreational visitors from Silicon Valley with “water ski and  
25                   wakeboard boats” will no longer visit; and,  
26                   • That invasive weeds have prevented recreational water navigation.

27 (See SCDA-22, pp. 1:19-24, 2:1-23.)

28                   Ms. McCleery’s further testimony regarding loss of Discovery Bay’s “tax base” and

1 home values is predicated on the same testimony regarding decreased recreational  
2 value of the water. (SCDA-22, p. 3:25-26 [“Our community is a freshwater boating  
3 community. It is our way of life. It is our economy. It is the basis of our home value.  
4 And for [Ms. McCleery], personally, it is [her] retirement and peace of mind.”].)

5 Similarly, Ms. McCleery’s testimony states that the operational aspects of the  
6 changes proposed in the Petition will cause traffic problems on Highway 4, (SCDA-22, p.  
7 2), which is beyond the scope of this Part 1 proceeding. (See February 11, 2016 Ruling,  
8 p. 10; DWR’s Collective Objections.)

9 Ms. McCleery’s testimony – predicated on the recreational and traffic impacts  
10 from the changes proposed in the Petition – is not relevant to this Part 1 proceeding.  
11 (See DWR’s Collective Objections.) Her testimony should be excluded.

## 12 F. Testimony of Frank Morgan

### 13 1. Mr. Morgan Is Not Qualified To and Lacks Sufficient Basis To 14 Provide Expert Testimony, Including Testimony Regarding the Effects Of Water Flow or Water Quality.

15 The applicable standard for admission of expert testimony under Government  
16 Code § 11513 and Evidence Code § 801, has been set forth above. (See Section \_\_,  
17 *supra*.) In particular, under Evidence Code § 801, the Board may exclude the opinion of  
18 a witness who lacks **relevant** special knowledge, skill, experience, training and  
19 education on which to form his or her opinion regarding matters known to or made  
20 known to him or her. (Evidence Code § 801(b).)

21 Neither Mr. Morgan nor SCDA, claims that Mr. Morgan has expertise in hydrology  
22 or engineering. No statement of qualifications was submitted for Mr. Morgan, as  
23 required for any expert. (Notice of Petition, p. 33.)

24 Nonetheless, Mr. Morgan offers the following opinions in his testimony:

- 25 • “Clean fresh water moving through the Delta is essential for the health of  
26 the Delta and my livelihood as a boat operator.” (SCDA-25, p. 5:12-13);
- 27 • “The public’s education about flood control and water supply will suffer  
28

1 because I will not be able to get my boat out of the harbor.” (SCDA-25, p.  
2 5:26-27);

- 3 • “I believe that the tunnels will make the water hyacinth problem much  
4 worse and outbreaks will be more frequent.” (SCDA-25, p. 5:20-21); and,
- 5 • “I believe that the tunnels will make the algae much worse. Summers are  
6 getting hotter and it seems like that is going to continue. Less fresh water  
7 and warmer Delta waters because of the tunnels will certainly exacerbate  
8 the blue green algae issue . . .” (SCDA-25, p. 6:7-10)

9 These statements by Mr. Morgan are not factual evidence or proper lay testimony  
10 that will assist the trier of fact. They are, instead, merely the opinions of a concerned  
11 citizen; policy statements. Moreover, the statements are made without reference to any  
12 supporting evidence or scientific authority. Such statements are not proper testimony to  
13 be heard by the Board, as they do not help the Board determine any issue of fact. Mr.  
14 Morgan’s testimony should, therefore, be excluded and stricken.

15 **2. Mr. Morgan’s Testimony Exceeds the Scope of Part 1 Issues.**

16 Mr. Morgan’s testimony concerns issues outside the scope of Part 1, as it relates  
17 to his assumptions regarding the proposed diversion’s impact on recreational activity.  
18 (See SCDA-25, p.1:17-27, 2:17-4:9.) His testimony concerns his conjectures regarding  
19 the impact to water skiing, house boat rentals, and visitor tours on the Delta waterways,  
20 including on his tour boat. (Id.) Recreational impacts of the proposed changes in the  
21 Petition are not within the scope of this Part 1 proceeding. (See February 11, 2016  
22 Ruling, p. 10; DWR’s Collective Objections.)

23 Mr. Morgan’s contention that his testimony concerns more than “just a  
24 recreational opportunity” are belied by the very facts to which he testifies. First, he  
25 admits that the vast majority, almost two thirds, of the tours he provided in 2015 were  
26 free of charge. (SCDA-25, pp. 2:23-25, 4:5. [he claims to have donated 87 free tours,  
27 out of the 135 tours he provided in total in 2015].) Mr. Morgan also testified that he has  
28

1 spent almost 2,300 hours motoring his boat “Rosemarie” on Delta waters. Unless his  
2 tours are more than ten-hours long, it is clear that vast majority of hours during which Mr.  
3 Morgan’s boat was operating in the past two years were (a) for his personal leisure, or  
4 (b) free trips for his guests.

5 Second, Mr. Morgan makes a clear distinction between himself and “substance  
6 fishing people”. (SCDA-25, 3:27-4:3.) He “see[s] them” and hopes “their” needs will be  
7 considered. (Id.) According to his own testimony, he is not among those whose  
8 subsistence depends on the Delta.

9 As Mr. Morgan’s testimony focuses on only the recreational aspects of the Delta  
10 and potential impacts he speculates the proposed changes in the Petition will have on  
11 recreational activities is not relevant to this Part 1 proceeding. (See DWR’s Collective  
12 Objections.) His testimony should be excluded.

13 **3. Mr. Morgan’s Testimony Is Inadmissible Under Government**  
14 **Code Section 11513(f) As It Will Unduly Consume the Board’s**  
15 **Time.**

16 Section 11513 of the Government Code governs the admission of Mr. Morgan’s  
17 testimony, (see Notice of Petition, p. 36), and precludes testimony whose “probative  
18 value is substantially outweighed by the probability that its admission will necessitate  
19 undue consumption of time.” (Gov. Code § 11513(f).) Large aspects of Mr. Morgan’s  
20 testimony have no relevance to the Board’s determinations in this Part 1 proceeding.

21 Much of Mr. Morgan’s testimony consists merely of personal anecdotes and  
22 memories that have no factual relevance to the existence of cognizable injury or water  
23 rights. (See SCDA-25, pp. 1 (describing Mr. Morgan’s experiences as a teenager from  
24 southern California), 2:4-12 (describing Mr. Morgan’s emotional attachment to the Delta),  
25 3:1-4:3 (describing Mr. Morgan’s advocacy efforts on his primarily free “tours”), 4:13-23  
26 (stating Mr. Morgan’s experience frequently being asked his opinion about “the Tunnels”,  
27 his response and whether he’s heard a “compelling” answer that the tunnels “do good”  
28 for Northern California), and 5:7-11 (stating Mr. Morgan’s opinions regarding the

1 trustworthiness of an unspecified, and generically described “government that said out  
2 insurance premiums would go down with the new health care law”).) This testimony,  
3 while not particularly pernicious, is not appropriate for consideration by the Board, and  
4 will merely unduly consume the Board’s limited time.

5 Again, Mr. Morgan’s testimony primarily concerns recreational use of Delta  
6 waterways – including his own recreation. This testimony regarding his speculations as  
7 to the impact the proposed diversion will have on water skiing, house boat rentals, and  
8 visitor tours on the Delta waterways, including on his tour boat, is irrelevant and not  
9 probative regarding the issues in Part 1. It therefore, unduly consumes the Board’s time.

10 **CONCLUSION**

11 For the foregoing reasons, Petitioner DWR respectfully requests that the Water  
12 Board exclude and strike the aforementioned testimony of Mr. Brodsky, Mr. Burke, Mr.  
13 Ringelberg, Mr. Guzzardo, Ms. McCleery, and Mr. Morgan, as well as the corresponding  
14 exhibits discussed above.

15  
16 Dated: September 21, 2016

CALIFORNIA DEPARTMENT OF WATER  
RESOURCES  
James (Tripp) Mizell

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19  
20 Office of the Chief Counsel