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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

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

CITY OF STOCKTON'S RESPONSES
TO DEPARTMENT OF WATER
RESOURCES' OBJECTIONS TO CITY
OF STOCKTON'S PART 1B CASE IN
CHIEF

I. INTRODUCTION

The City of Stockton (Stockton) filed its case in chief on August 31, 2016.
Stockton's case in chief included the Opening Statement of City of Stockton (Opening
Statement), three comment letters relating to the Environmental Impact
Report/Environmental Impact Statement (EIR/EIS) for the Bay Delta Conservation Plan

1 and California Water Fix Project (Project), marked as exhibits STKN_002, STKN_003,
2 and STKN_004 (Comment Letters), the Testimony of Robert Granberg, and a copy of
3 Delta Diversion-DWSP Output Table, marked as exhibit STKN_022. The Department of
4 Water Resources (DWR) submitted extensive objections and moved to strike the above-
5 mentioned portions of Stockton's case in chief. (See California Department of Water
6 Resources' Objections to City of Stockton's Part 1B Case in Chief (Sept. 21, 2016)
7 (DWR's Objections).) Stockton responded to DWR's objections regarding scope and
8 relevance on September 30, 2016, and therefore, responds here to the substantial
9 number of remaining objections made by DWR. (See City of Stockton's Responses to
10 Department of Water Resources' Scope Objections to City of Stockton's Part 1B Case in
11 Chief (Sept. 30, 2016) (Stockton's Responses to DWR's Scope Objections).) None of
12 DWR's remaining objections have merit, and therefore, its objections should be
13 overruled and its motion to strike should be denied.

14 II. LEGAL STANDARD

15 This hearing is governed by Chapter 4.5 of the Administrative Procedure Act,
16 (Gov. Code, § 11400 et. seq.); regulations adopted by the State Water Resources
17 Control Board (State Water Board), (Cal. Code of Regs., tit. 23, § 648-648.8);
18 sections 801 to 805 of the Evidence Code; and section 11513 of the Government Code.
19 (Cal. Code of Regs., tit. 23, § 648(b).) The State Water Board is not required to conduct
20 adjudicative hearings according to the technical rules of evidence applicable to a court.
21 (Gov. Code, § 11513(c).) Instead, "[a]ny relevant evidence shall be admitted if it is the
22 sort of evidence on which responsible persons are accustomed to rely in the conduct of
23 serious affairs, regardless of the existence of any common law or statutory rule which
24 might make improper the admission of evidence over objection in civil actions." (*Ibid.*)
25 The State Water Board follows these relaxed standards because the Hearing Officers'
26 expertise in the subject matter justifies the State Water Board's ability to make both legal
27 and factual determinations.

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III. ARGUMENT

A. DWR's Objections to Stockton's Opening Statement Are Meritless

The purpose of an opening statement is to inform the State Water Board "in a general way of the nature of the action and defense, to advise them of the facts relied on by the party to make up his right of action or defense, to define the nature of the questions involved, and advise them of the issues to be tried and the facts intended to be proved, so as to enable them to understand the case to be tried; and the opening statement is not for the purpose of discussing questions of law." (*Williams v. Goodman* (1963) 214 Cal.App.2d 856, 869.) "The function of an opening statement is not only to inform the [trier of fact] of the expected evidence, but also to prepare [it] to follow the evidence and more readily discern its materiality, force, and meaning." (*People v. Dennis* (1998) 17 Cal.4th 468, 518.) Finally, an opening statement is not evidence (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1028), so it cannot be objected to in the same manner as evidence. Stockton's opening statement sets the stage for its case in chief by highlighting the issues that must be decided and the facts that it will use to show the Petitioners have not met their burden. Stockton offers the following responses to the specific portions of its opening statement that DWR objected to:

<u>Statement Objected to:</u>	<u>Response to Objections:</u>
<p>Stockton's Opening Statement, p. 2:15-16.</p> <p><u>Objections:</u> Vague, speculative, conclusory, and unsupported by competent evidence.</p>	<p>This statement is admissible because it frames the nature of the action and the issues to be tried. (<i>Williams v. Goodman</i> (1963) 214 Cal.App.2d 856, 869.)</p> <p>Furthermore, it provides facts that Stockton intends to prove in its case in chief. (<i>Ibid.</i>)</p>

<p><u>Statement Objected to:</u></p> <p>Stockton's Opening Statement, p. 2:18-19.</p> <p><u>Objections:</u> False, misleading, and mischaracterizes the evidence.</p>	<p><u>Response to Objections:</u></p> <p>This statement is admissible because it provides facts that Stockton intends to prove in its case in chief. (<i>Williams, supra</i>, at p. 869.)</p>
<p><u>Statement Objected to:</u></p> <p>Stockton's Opening Statement, p. 2:20-23</p> <p><u>Objections:</u> Speculative, conclusory, mischaracterizes Petitioner's evidence, and cumulative.</p>	<p><u>Response to Objections:</u></p> <p>This statement is admissible because it frames the nature of the action and the issues to be tried. (<i>Williams, supra</i>, 214 Cal.App.2d at p. 869.) Furthermore, it provides facts that Stockton intends to prove in its case in chief. (<i>Ibid.</i>)</p>
<p><u>Statement Objected to:</u></p> <p>Stockton's Opening Statement, p. 3:24-25.</p> <p><u>Objections:</u> Unsigned and unverified.</p>	<p><u>Response to Objections:</u></p> <p>This objection is improper and irrelevant. Furthermore, this statement is admissible because it frames the nature of the action and the issues to be tried. (<i>Williams, supra</i>, at p. 869.) Furthermore, it provides facts that Stockton intends to prove in its case in chief. (<i>Ibid.</i>)</p>

B. Stockton's Comment Letters Are Admissible and DWR Has Waived Any Objection to Them

DWR has employed the "kitchen sink" approach in objecting to Stockton's three Comment Letters. DWR submitted nine different objections to these exhibits, including irrelevant, untimely, impermissible surprise testimony, waste of time, misleading, incomplete, conclusory, improper proffer of legal opinion, and improper proffer of expert opinion. (DWR's Objections at p. 2, Attachment A.) However, as noted in Stockton's Responses to DWR's Scope Objections, DWR has waived any objection to these

comment letters by (1) not objecting when the Comment Letters were introduced as exhibits during Stockton's cross-examination of DWR's modeling panel on August 25, 2016, and (2) by including two of the comment letters, STKN_002 and STKN_004 in DWR's own exhibit list and moving them into evidence. (Stockton's Responses to DWR's Scope Objections at pp. 3-5.) Furthermore, the State Water Board directed DWR to include STKN_003 with the 2013 Draft EIR/Draft EIS, and has explained that a party may rely on a California Environmental Quality Act document "as evidence of the potential effects of the project on legal users of water, or they may wish to refute that analysis." (See State Water Resources Control Board Notice of Pre-Hearing Agenda and Service List in the Matter of Hearing on Petition (Jan. 15, 2016) at pp. 5-6.) Thus, these objections are meritless and must be overruled.

DWR objects to Stockton's Comment Letters as untimely because "the final EIR/EIS will include written responses as to the resolution of the public comments." (DWR's Objections at p. 2.) However, these Comment Letters are not untimely because they raise Stockton's concerns about how the Project would injure its water supply and water quality, and they demonstrate how Stockton has repeatedly raised these concerns without response from DWR in subsequent drafts of the EIR/EIS. Therefore, DWR's untimely objection should be overruled.

DWR also objected that the Comment Letters may result in surprise testimony. (DWR's Objections at p. 2.) This is incorrect. First, this objection is inappropriate because the Comment Letters are not testimony, but rather exhibits that support Stockton's position regarding the detrimental effects of the Project. Second, Stockton submitted these Comment Letters on May 30, 2008, July 29, 2014, and October 29, 2015, so they are far from a surprise exhibit. Finally, Stockton submitted these exhibits as part of its case in chief in compliance with California Code of Regulations, title 23, section 648.4, and the State Water Board's October 30, 2015 Hearing Notice, which requires the submission of testimony and exhibits prior to the hearing in order to prevent surprise testimony. Therefore, DWR's objection should be overruled because Stockton's

Comment Letters are not and will not result in surprise testimony.

Stockton offers the following responses to DWR's additional objections to the submission of its Comment Letters:

<p><u>Objection:</u> Waste of time.</p>	<p><u>Response:</u></p> <p>DWR has failed to demonstrate that the significant probative value of Stockton's Comment Letters is "substantially outweighed" by the probability that their admission will result in the undue consumption of time.</p>
<p><u>Objection:</u> Misleading.</p>	<p><u>Response:</u></p> <p>Stockton's Comment Letters are not misleading because the State Water Board also has the corresponding EIR/EIS documents to which the Comment Letters are directed. Therefore, the Comment Letters reflect Stockton's responses to those documents, and provide a complete picture of the environmental review process.</p>
<p><u>Objection:</u> Conclusory.</p>	<p><u>Response:</u></p> <p>Stockton's Comment Letters are not conclusory because they illustrate Stockton's concerns regarding the detrimental effects of the Project on Stockton's water supply and water quality.</p>

<u>Objection:</u>	<u>Response:</u>
Improper proffer of legal opinion, improper proffer of expert opinion.	These objections are irrelevant. Stockton's Comment Letters do not include legal opinions, and they are not offered as expert opinions. The Comment Letters highlight Stockton's concerns regarding the Project and demonstrate that its concerns have not been addressed.

DWR's objections to Stockton's Comment Letters have been waived, are meritless, and should be overruled.

C. DWR's Objections to Robert Granberg's Testimony Are Groundless

1. Robert Granberg Is an Expert Witness That Can Offer Facts and Opinions

Robert Granberg is an expert competent to testify on the subjects included in his testimony. DWR objected to Mr. Granberg's testimony on the grounds that it is an improper proffer of expert opinion, improper proffer of legal opinion, and cumulative. (DWR's Objections, Attachment A.) An expert witness can offer testimony as to facts and opinions. An expert can testify to facts that "are peculiarly within the expert's knowledge and are not a matter of common knowledge as to which an ordinary witness may competently testify." (5 Witkin Cal. Evid., § 27, citing 31A Am.Jur.2d (2002 ed.), Expert and Opinion Evidence § 58 et seq.) Mr. Granberg established his unique knowledge of Stockton's water supply and wastewater operations in his testimony. He is a registered engineer in California, and has been the Assistant Director of Stockton's Department of Municipal Utilities since 2013. (Testimony of Robert Granberg at p. 1.) He has also served as the Deputy Director of Water Resources Planning. (*Id.* at pp. 1-2.) Finally, for eight (8) years he "served as Project Manager delivering the City of Stockton Delta Water Supply Project, the largest capital improvement project in Stockton's history and the first drinking water intake in the Sacramento-San Joaquin

1 Delta in decades.” (*Id.* at p. 2.) Thus, Mr. Granberg’s special knowledge of Stockton’s
2 water supply, wastewater, operations, and management is not a matter of common
3 knowledge, and his testimony is necessary to establish the facts regarding surface and
4 groundwater supply, contract supplies, water quality, the Regional Wastewater Control
5 Facility, and the conditions that affect Stockton’s water supply and water quality.

6 Mr. Granberg’s experience entails significant involvement in all aspects of water
7 management decisions, and he is qualified to provide opinions on the effects of the
8 Project on Stockton’s water supply and water quality. DWR objects that Mr. Granberg is
9 not qualified to offer an expert opinion regarding “impacts of the proposed change in
10 point of diversion on water supply, water quality, [and] the sufficiency of the modeling
11 performed.” (DWR’s Objections at p. 4.) An expert may offer testimony in the form of an
12 opinion that is “[r]elated to a subject that is sufficiently beyond common experience that
13 the opinion of an expert would assist the trier of fact” and “[b]ased on matter (including
14 his special knowledge, skill, experience, training, and education) perceived by or
15 personally known to the witness.” (Evid. Code, § 801.) First, Mr. Granberg does not
16 offer an opinion regarding the sufficiency of DWR’s modeling, so this objection is
17 irrelevant. Second, Mr. Granberg’s opinions regarding the effects of the Project on
18 Stockton’s water supply and water quality are based on his specialized knowledge and
19 experience, which are personally known to him. Furthermore, his opinions are on
20 subjects that are “beyond the common experience” because he has specialized
21 knowledge of Stockton’s water supply and wastewater operations, and the conditions
22 that affect those operations. (*Ibid.*) Therefore, his opinions will aid the State Water
23 Board in determining whether the change petition will injure Stockton. Mr. Granberg’s
24 opinions are valid expert opinions, and DWR’s objection should be overruled.

25 2. Mr. Granberg Does Not Offer Any Legal Opinions

26 None of Mr. Granberg’s opinions are legal opinions. His opinions reflect his
27 understanding of the conditions that affect Stockton’s water supply, water quality, and
28 the operations of its water system. An expert may not give an opinion on questions of

1 law that are decided by a court. (*Sheldon Appel Co. v. Albert & Oliker* (1989)
2 47 Cal.3d 863, 884.) However, an opinion that embraces the ultimate issue is
3 admissible. (Evid. Code, § 805.) Mr. Granberg's opinions are about the potential effects
4 of the Project, including degradation of water quality at its drinking water intake and at its
5 wastewater discharge location. These opinions embrace the ultimate issue of whether
6 the addition of new points of diversion to Petitioners' permits will harm Stockton, but they
7 are not legal opinions regarding whether the Petitioners have met their burden that the
8 change will cause no harm. In Mr. Granberg's opinion, the change may adversely affect
9 water quality such that Stockton will be injured by not being able to use its surface water
10 permit, being forced to rely on groundwater, and potentially violating its wastewater
11 discharge permit. Thus, Mr. Granberg's expert opinions are admissible evidence, and
12 DWR's objection that it is an improper legal opinion should be overruled.

13 3. Mr. Granberg's Testimony Is Not Cumulative

14 DWR objects that Mr. Granberg's testimony is cumulative. However, his
15 testimony is relevant and admissible. Cumulative evidence is "[a]dditional evidence that
16 supports a fact established by the existing evidence (esp. that which does not need
17 further support)." (Black's Law Dict. (9th ed. 2009) at p. 636. col. 2.) Mr. Granberg's
18 testimony is not cumulative because it is unique evidence that establishes the effects of
19 the Project on Stockton. Furthermore, it is admissible in this hearing because it is the
20 type of evidence that "responsible persons are accustomed to rely in the conduct of
21 serious affairs." (Gov. Code, § 11513(c).) Thus, DWR's objection that Mr. Granberg's
22 testimony is cumulative should be overruled.

23 **D. Stockton Provided Sufficient Foundation for STKN_022**

24 DWR objected that exhibit STKN_022 lacks foundation. Stockton identified a
25 typographical error in Mr. Granberg's testimony on page 8, line 8, wherein "Exhibit
26 STKN_014" should read "Exhibit STKN_022." (See Errata for STKN_010.) Stockton is
27 filing the Errata for STKN_010 to correct this mistake, and the Declaration of Robert
28 Granberg Authenticating City of Stockton Exhibit Number STKN_022 to provide

1 authentication and foundation for the exhibit. By correcting this typographical error,
2 Stockton has provided a sufficient foundation for STKN_022.

3 **IV. CONCLUSION**

4 For the reasons outlined herein, and summarized above, the objections filed by
5 DWR regarding the testimony and exhibits submitted by Stockton should be overruled,
6 and its motion to strike should be denied.

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10 SOMACH SIMMONS & DUNN
A Professional Corporation

11 Dated: November 1, 2016

12 By


Kelley M. Taber
Attorney for City of Stockton

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):

**CITY OF STOCKTON'S RESPONSES TO DEPARTMENT OF WATER RESOURCES'
OBJECTIONS TO CITY OF STOCKTON'S PART 1B CASE 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 October 6, 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 November 1, 2016.

Signature: 
Name: Michelle Bracha
Title: Legal Secretary
Party/Affiliation: City of Stockton
Address: 500 Capitol Mall, Suite 1000
Sacramento, CA 95814