

State Water Resources Control Board

February 21, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING - RULING ON EVIDENTIARY OBJECTIONS TO ADMISSION OF TESTIMONY AND EXHIBITS INTO EVIDENCE, ESTABLISHMENT OF DEADLINE FOR REBUTTAL TESTIMONY AND EXHIBITS, AND NOTICE OF REBUTTAL HEARING DATES

This letter responds to objections received to the admission of evidence in the State Water Resources Control Board (State Water Board) hearing on the joint water right change petition (petition) filed by the Department of Water Resources (DWR) and the U.S. Department of Interior (DOI) (collectively petitioners) for the California WaterFix Project (WaterFix Project). This letter also rules on the testimony and exhibits offered into evidence by the parties participating in Parts 1A and 1B of the hearing, establishes the deadline for written rebuttal testimony and exhibits, and provides notice of hearing dates for the rebuttal phase of Part 1 of the hearing.

As explained in greater detail below, we received an excessive number of evidentiary objections that either lack merit or go to the weight of the evidence, rather than its admissibility. These types of objections do not benefit the objecting parties or aid us in our efforts to conduct a fair and efficient hearing. We recognize that the parties who filed extensive objections may have felt obligated to do so in order to preserve for the record certain issues concerning the relevance or reliability of the testimony and exhibits presented to date. The parties have had ample opportunity, however, to test the reliability of testimony through cross-examination, and they will have the opportunity to present rebuttal. Moreover, the parties will have the opportunity to articulate arguments in their closing briefs concerning both the key hearing issues in this proceeding, such as what constitutes injury to a legal user of water, and whether the evidence in the record is adequate to support factual findings relevant to the key hearing issues. In the future, we expect the parties to be more judicious with respect to the evidentiary objections that they raise, and adhere to the guidance in this ruling concerning the types of objections that should be addressed through cross-examination or rebuttal or reserved for closing briefs.

Deadline for Rebuttal Testimony and Exhibits

The deadline for receipt and service of parties' rebuttal exhibits for Part 1, including witnesses' written testimony and qualifications, as well as an updated exhibit identification index and a statement of service, is **12:00 noon, on March 23, 2017**.

As stated on page 2 of our [December 19, 2017 ruling](#), parties who presented a case-in-chief in Part 1 of the hearing or who indicated their intent to participate through cross-examination and/or rebuttal in their Notice of Intent to Appear (NOI) will be permitted to present rebuttal evidence. As a general reminder, rebuttal evidence is limited to evidence that is responsive to

evidence presented in connection with another party's case-in-chief, and it does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence. It also does not include repetitive evidence. Cross-examination of rebuttal evidence will be limited to the scope of the rebuttal evidence.

The File Transfer Protocol (FTP) site is available to provide service of written rebuttal testimony and other exhibits. On January 13, 2017, the hearing team notified the parties that their FTP folders were no longer publicly viewable and that they may upload and delete files from their FTP folder as needed in preparation for rebuttal. Please upload your exhibits well before the deadline above to ensure you do not have any issues uploading documents that would cause you to miss the deadline.

We received a letter dated February 16, 2017, from the Local Agencies of the North Delta et al. (LAND) requesting more than 30 days from the date of this ruling to prepare rebuttal testimony and exhibits. LAND asserted that 30 days is not enough time to review the Final Environmental Impact Report/Environmental Impact Statement (FEIR/EIS) for the WaterFix Project to determine if it contains new information that is relevant to the key issues in Part 1 of the hearing. LAND based its assertion on the length of the document and the fact that it does not show changes in redline or include a summary of the changes that have been made relative to the Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS). In addition to more time to prepare for rebuttal, LAND requested that we direct petitioners to provide a redline version of the FEIR/EIS showing changes that have been made to the document, and to disclose when petitioners plan to submit the document into evidence. San Joaquin County, the San Joaquin County Flood Control and Water Conservation District, and the Mokelumne River Water and Power Authority joined in this request.

This request is denied. LAND and the other protestants have had since December 22, 2016, when the FEIR/EIS was released, to review the document and begin to prepare for rebuttal. We recognize that the document is voluminous, but presumably the parties can focus on the sections of the document that may have a bearing on Part 1 hearing issues, and they do not need to review the entire document in order to prepare for rebuttal. That said, we appreciate the difficulty of attempting to ascertain what changes have been made to the FEIR/EIS without the benefit of a redline or summary describing any changes. Petitioners are strongly encouraged to provide the parties with a redline or summary of any substantive changes to the impact analysis or mitigation measures contained in the EIR/EIS that may have a bearing on the key hearing issues as soon as possible. LAND has not explained why petitioners should be required to disclose when they plan to submit the FEIR/EIS into evidence, and therefore we decline to do so.

Hearing Dates for Part 1 Rebuttal

Rebuttal testimony for Part 1 of the hearing will commence on **April 25, 2017, at 9 a.m.** and continue on the dates and the locations shown on Attachment A. Please note that, due to a lack of hearing room availability at the California Environmental Protection Agency Building, some hearing days are scheduled to be held at the Central Valley Regional Water Quality Control Board's offices in Rancho Cordova and at Sacramento City Hall. Petitioners will present their rebuttal testimony first, followed by cross-examination, any redirect, and any recross-examination, after which other parties will present rebuttal evidence in the order established for cross-examination for Part 1.

Ruling on Evidentiary Objections and Admission of Testimony and Exhibits into Evidence

In earlier rulings, we established deadlines for evidentiary objections in Part 1 of this hearing. Motions to disqualify witnesses or to exclude a witness' testimony, in whole or in part, were due by July 12, 2016, for Part 1A of the hearing and by September 21, 2016, for Part 1B. Before each party's presentation of a case-in-chief, the party was required to file any responses to any outstanding objections to the party's testimony or exhibits. The deadline for any other objections to testimony or exhibits that had been offered into evidence, including exhibits that were introduced during cross-examination, was December 30, 2016. The deadline for each party to submit responses to any additional objections to the party's testimony or exhibits that were filed during or after presentation of the party's case-in-chief was January 6, 2017.

We received numerous evidentiary objections and responses to objections for both Parts 1A and 1B. We issued rulings on specific objections made in Part 1A (Evidentiary Objections and Other Procedural Matters, July 22, 2016) and Part 1B (Ruling on Written Testimony Outside the Scope of Part 1 and Other Procedural Matters, October 7, 2016). In addition, we have ruled on various objections orally as necessary when issues arose during the hearing. The purpose of this ruling is to address all of the outstanding written objections that must be resolved in order to enter evidence into the record.

Preliminarily, we address certain categories of objections that were raised by more than one party. In the general discussion of these categories of objections, we cite some examples, but do not identify every objection that falls into each category. Following this general discussion, we address any remaining objections to the evidence presented by each party participating in Part 1 of the hearing, beginning with petitioners' joint case-in-chief, followed by the cases-in-chief presented in Part 1B. We also address any objections to exhibits that the parties introduced during cross-examination and offered into evidence. Although we have considered all of the objections, this ruling does not explicitly address every single objection. To the extent that any objection is not explicitly addressed, it is overruled. After ruling on the objections to the evidence presented by each party, we rule on the admission of the party's testimony and exhibits.

Adjudicative proceedings before the State Water Board are governed by the California Code of Regulations, title 23, section 648 et seq.; chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code); sections 801 to 805 of the Evidence Code; and section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648.) Sections 801 to 805 of the Evidence Code set forth requirements for expert and other opinion testimony. The State Water Board is not bound in its proceedings by other technical rules relating to evidence and witnesses that would apply in a court of law. (See Gov. Code, § 11513, subd. (c); Cal. Code Regs., tit. 23, § 648.) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. (Gov. Code, § 11513, subd. (c).) "The [hearing officer] has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission would necessitate undue consumption of time." (*Id.*, § 11513, subd. (f).)

As explained in a ruling in another recent proceeding, strict rules governing the admissibility of evidence do not apply in administrative proceedings in recognition of the fact that the hearing officer has expertise in the subject matter, and makes both the legal and factual determinations. "There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." (*United States v. Brown* (11th Cir. 2005) 415 F.3d 1257, 1269.) Because

the hearing officer is “presumably competent to disregard that evidence which should be excluded or to discount that evidence which has lesser probative value, it makes little sense, as a practical matter, for a judge in that position to apply strict exclusionary evidentiary rules.” (*Underwood v. Elkay Min., Inc.* (4th Cir. 1997) 105 F.3d 946, 949.)

[I]n an agency proceeding the gate keeping function to evaluate evidence occurs when the evidence is considered in decision-making rather than when the evidence is admitted. Even though it arises later in the administrative process than it does in jury trials, the [hearing officer’s] duty to screen evidence for reliability, probativeness, and substantiality similarly ensures that final agency decisions will be based on evidence of requisite quality and quantity.

(*U.S. Steel Min. Co., Inc. v. Director, Office of Workers’ Compensation Programs, U.S. Dept. of Labor* (4th Cir. 1999) 187 F.3d 384, 389.)

I. General Categories of Objections

A. Argumentative Objections

Many of the objections that we have received to a witness’ testimony, or to the PowerPoint presentation and other exhibits that accompany the testimony, are actually arguments over the content of the witness’ testimony or the underlying exhibits on which the witness is relying. Some of these objections are based on Evidence Code section 803, which provides that the subject matter underlying an expert opinion must be of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his or her testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion. This provision has led to a series of secondary objections to exhibits to support objections to expert testimony, none of which would be sustained individually, and certainly would not result in excluding whole portions of testimony and exhibits from the record. Whether they are characterized as objections as to relevance, reliability, lack of foundation, or speculation, objections that fundamentally are based on a disagreement with the merits of the content of testimony or exhibits go to the weight to be afforded the evidence, not its admissibility.

For example, in the Sacramento Valley Water Users’ (SVWU) objection to opinion testimony presented by petitioners that legal users will not be injured by the change, SVWU argued that petitioners’ boundary analysis is speculative, operation of the Coordinated Operating Agreement (COA) is not resolved, the mechanism for meeting Delta outflow goals under the boundary 2 scenario was not identified, and drought operations were not specified. (See also Sacramento Regional County Sanitation District’s Objections to Written Testimony and Exhibits Submitted by Petitioners [advancing same argument as SVWU]; City of Stockton Objections to Written Testimony and Exhibits Submitted by Petitioners at pp. 4-9 [testimony of DWR witnesses and associated exhibits must be excluded because they “lack foundation” establishing that the project will not injure any legal user of water]; California Sportfishing Protection Alliance (CSPA) et al. Motion to Disqualify Certain WaterFix Petitioners’ Witnesses and Testimony at pp. 3-10 [arguing testimony of certain DWR witnesses should be excluded based on various arguments concerning the adequacy of their analysis of the effects of WaterFix operations on legal users of water].)

Similarly, the Delta Flood Control Group (DFCG) argued that no proper basis exists for the expert opinion of John Bednarski, a witness for petitioners, regarding construction impacts and mitigation measures because of the WaterFix Project’s conceptual level of design and uncertainty concerning whether mitigation measures will be implemented. (DFCG Objections to

Written Testimony of John Bednarski and Joinder in Objections Filed by SVWU at p. 3.) And the San Joaquin Tributaries Authority (SJTA) argued that: (1) portions of the testimony of Maureen Sergent should be excluded as irrelevant and lacking foundation because she did not address a number of issues that SJTA contends are relevant to the issue of injury to legal users of water; (2) portions of the testimony of John Leahigh should be excluded because SJTA disagrees with his conclusions regarding the State Water Project's (SWP) and Central Valley Project's (CVP) past and anticipated future compliance with water quality objectives; and (3) portions of the testimony of Parviz Nader-Tehrani and Armin Munévar should be excluded because of alleged defects in their modeling analyses. (See also Friends of the River, et. al Joint Motion to Disqualify Certain Petitioners' Witnesses and to Exclude Certain Witness' Testimony in Whole or in Part, and Joint Objections at pp. 18-19 [Maureen Sergent's testimony must be excluded based on a legal argument that project constitutes the initiation of a new water right].)

Other parties objected to the testimony of some of petitioners' witnesses based on legal arguments concerning underlying exhibits supporting the witnesses' testimony. Alternatively, some parties objected to the exhibits associated with the testimony of petitioners' witnesses based on the parties' disagreement with either the content of the exhibits or the conclusions reached by petitioners' witnesses. For example, SJTA argued that DWR-401, a table depicting exceedances of water quality objectives, is inaccurate for a variety of reasons. On that basis, SJTA objected to any testimony that is based on DWR-401 as irrelevant, lacking foundation, and unqualified and inadmissible opinion, and SJTA objected to DWR-401, itself, as irrelevant. Similarly, the Pacific Coast Federation of Fishermen's Associations (PCFFA) and Friends of the River et al. moved to exclude the following exhibits on the grounds that they are preliminary and inadequate: SWRCB-3 (2015 Bay Delta Conservation Plan (BDCP)/California WaterFix RDEIR/SDEIS), SWRCB-4 (2013 BDCP Draft EIR/EIS), and SWRCB-5 (2013 draft BDCP). In addition, PCFFA and Friends of the River moved to exclude the following exhibits on the grounds that they are outdated: SWRCB-21 (State Water Board Decision 1641), SWRCB-27 (2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan)), and SWRCB-30 (1995 Bay-Delta Plan). (See also LAND Objections to Petitioners' Evidence [arguing petitioners have not proven no injury and therefore all of their evidence should be excluded]; SVWU's and City of Stockton's objections to DWR-324 on the grounds that it fails to satisfy the informational requirements of section 794, subdivision (a) of the State Water Board's regulations; South Delta Water Agency (SDWA) et al.'s objections to DWR-114 (Alternatives Comparison), DWR-117 (Adaptive Management Framework), and DWR-413 (South Delta Compliance) based on arguments concerning merits of the conclusions reached by DWR witnesses.)

In its master response to objections, DWR noted that "many of the objections raised by Protestants are presented as arguments against the hearing process, conclusory statements without supporting evidence, or disagreements with testimony improperly phrased as 'objections.' In many instances, the objecting parties are arguing the merits of the Petition." (See DWR's Master Response to Similar Objections Made by Protestants, p. 6.) Notwithstanding this observation, DWR, itself, submitted numerous argumentative objections to various Part 1B cases-in-chief. (See, e.g., DWR's Objections to Carmichael Water District Written Testimony and Exhibits, p. 2 [Steve Nugent testimony and exhibits do not include specific facts or information to support Mr. Nugent's conclusion that WaterFix would injure Carmichael Water District, and therefore testimony is irrelevant and should be excluded]; DWR's Objections to Testimony and Exhibits Submitted by Placer County Water Authority, p. 3 [testimony of Einar Maisch should be excluded because it mischaracterizes petitioners' testimony].) As another example, DWR repeatedly objected to and moved to strike various

parties' testimony, including the testimony of Marcus Yasutake, a witness for the City of Folsom, and the testimony of Richard Plecker, a witness for the City of Roseville, regarding exhibit DWR-514, Figure 14, which shows simulated end of September storage in Folsom Reservoir. DWR argued that these witnesses mischaracterized the modeling to claim that with the WaterFix Project, Folsom Reservoir storage would be drawn down to 90,000 acre-feet or less in five percent of the years, when all of the modeled scenarios, including the no action alternative, showed the reduced storage level in five percent of the years. DWR could have made this point in cross-examination of the witnesses, or could do so on rebuttal or in its closing brief, rather than by way of evidentiary objections.

San Luis and Delta Mendota Water Authority (SLDMWA) also submitted numerous argumentative and sometimes circular objections to witness testimony in Part 1B. For example, SLDMWA argued that Sacramento County Water Agency (SCWA) testimony that reverse flow events may require SCWA to shift to using its groundwater supplies lacks foundation showing that reverse flow events would cause the shut down of the Freeport Regional Water Project intake, and it is speculative that any shut down would require SCWA to shift to using its groundwater supplies. (See SLDMWA's Objections to Part 1B Parties' Case in Chief, p. 75.) Another example is SLDMWA's objections to the City of Antioch's witness testimony. (See *id.*, at p. 11 [Ron Bernal's testimony that the WaterFix Project will increase treatment costs and result in increased purchases of substitute water lacks foundation because there is no foundation showing the basis for the opinion that the project would increase treatment costs or result in increased purchases of substitute water].)

The types of arguments described above are not helpful or productive, and the sheer volume is burdensome, making it more time consuming to find and resolve more meritorious evidentiary issues. Evidentiary rules are important for ensuring fairness, efficiency, and protecting privileges. An evidentiary objection should not be used by a party to argue the merits of a case. As stated above, arguments concerning the merits of a witness' testimony or the contents of an exhibit are more properly addressed through cross-examination of the witness, presentation of a party's own case-in-chief, rebuttal, or legal briefs. Even if some of these objections would be considered valid in a superior court, the State Water Board generally prefers to admit all relevant evidence, applying the more liberal standards applicable to administrative proceedings. Accordingly, these argumentative objections as a general category are overruled to the extent that they seek to exclude testimony and associated exhibits from the evidentiary record altogether. We will consider what weight to afford the testimony and exhibits when formulating a decision based on the entire record.

B. Objections Based on Alleged Shifting of Burden of Proof

A number of objections stem from a renewed general complaint that the petitioners have not provided sufficient specificity concerning the WaterFix Project in order to show no injury, and some parties argue that this improperly shifts the burden of proof to protestants to prove injury. We disagree. As stated in our July 22, 2016 ruling, while parties may still have specific and various criticisms of petitioners' evidence and testimony, their case-in-chief was sufficient to allow parties to meaningfully participate in Part 1 of the hearing. Petitioners still bear the burden of establishing that the proposed changes will not injure legal users of water. Accepting evidence into the record is not the same as relying on specific testimony or exhibits to support a finding. The weight to give petitioners' evidence is for State Water Board deliberation upon conclusion of the hearing, and is not addressed in this ruling.

C. Objections to Petitioners' Modeling Evidence Based on the *Kelly* Rule

In Part 1A, several of the parties, including San Joaquin County and Save the California Delta Alliance (SCDA) challenged the admissibility of petitioners' expert testimony based on modeling data under the *Kelly* rule (formerly known as the *Kelly-Frye* rule). Petitioners used CalSim II, a computer model, to simulate the operations of the SWP and the CVP, together with the WaterFix Project, under various operational scenarios, and the potential effects on reservoir storage conditions, river flows, SWP and CVP exports and deliveries, and Delta inflows and outflows. Based on the output of the CalSim II modeling, petitioners used another model, DSM2, to simulate the potential effects of the WaterFix Project on Delta hydrodynamics and water quality. Petitioners used the modeling to show the comparative difference between the various scenarios and the no action alternative, not for purposes of predicting actual operations and effects. Petitioners presented exhibits summarizing the results of the modeling and expert opinion testimony based on the modeling in their case-in-chief.

Under the *Kelly* rule, expert testimony based on a new scientific technique is admissible only upon a showing that the technique has been generally accepted by the relevant scientific community. (*People v. Kelly*, *supra*, 17 Cal.3d at p. 30; *People v. Leahy* (1994) 8 Cal.4th 587, 604.) Parties argued that the modeling used to support the testimony of many of petitioners' expert witnesses constitutes a new scientific technique that has not been accepted in the relevant scientific community, and therefore the testimony and related exhibits must be excluded. SCDA argued further that the California Environmental Quality Act (CEQA) documentation for the WaterFix Project (SWRCB-3 and SWRCB-4) and the 2013 draft BDCP (SWRCB-5) should be excluded in their entirety because the relevant scientific community has found those documents to be unreliable and unacceptable, and the conclusions of the CEQA documents are based on the disputed modeling. In support of this argument, SCDA quoted from comments on the CEQA documents that were made by the U.S. Environmental Protection Agency and the Delta Independent Science Board.

As explained in more detail below, the *Kelly* rule does not apply to adjudicative proceedings before the State Water Board. Accordingly, petitioners were not required to make a preliminary showing that the computer modeling that their expert witnesses relied upon is generally accepted in the relevant scientific community. Moreover, petitioners' modeling evidence satisfies the applicable standards for admissibility set forth in Government Code section 11513 and Evidence Code section 801. The issues raised concerning the reliability of the computer modeling go to the weight, not the admissibility, of the testimony and exhibits that are based on the modeling. Likewise, the *Kelly* rule does not operate as a bar to the admissibility of petitioners' CEQA documents. SCDA's arguments concerning the reliability of those documents goes to their weight as exhibits.

The *Kelly* rule is a judicially created rule that the California Supreme Court has described as a conservative approach to determining the reliability of expert testimony regarding new scientific techniques. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 845; *People v. Kelly*, *supra*, 8 Cal.4th at p. 31.) The rule is intended to ensure that lay jurors are not misled by the "aura of certainty" or "mystic infallibility" that may surround scientific evidence, and do not give undue weight to evidence presented by experts with "impressive credentials" when the evidence is derived from a new scientific technique that is unproven and may be unreliable. (*People v. Kelly*, *supra*, 16 Cal.3d at pp. 31-32.) The *Kelly* rule is applicable only to new scientific techniques. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1156.) "General acceptance' under *Kelly* means a consensus drawn from a typical cross-section of the relevant, qualified scientific community." (*People v.*

Leahy, supra, 8 Cal.4th at pp. 611-612.) Unanimity of opinion within the scientific community is not required. (*Ibid.*)

With limited exceptions, the courts have not held that the *Kelly* rule applies in proceedings before administrative agencies. The parties cited to three cases in support of the argument that the *Kelly* rule applies in administrative proceedings: *Seering v. Department of Social Services* (1987) 194 Cal.App.3d 298; *Harris Transportation Co. v. California Air Resources Board* (1995) 32 Cal.App.4th; and *Texaco Producing, Inc. v. County of Kern* (1998) 66 Cal.App.4th 1029. The holding in *Seering* is distinguishable from this case, however, and the other two cases cited by the parties contain only dicta concerning the applicability of the *Kelly* rule in administrative proceedings.

1. The *Seering* Case Is Distinguishable

In *Seering*, the First District Court of Appeal held that the *Kelly* rule should have been applied to a psychiatrist's testimony in a day-care license revocation proceeding before an administrative law judge (ALJ) to the extent that the psychiatrist had relied on a new psychological syndrome in reaching his determination that a child in the day-care provider's care had been abused. (*Seering v. Department of Social Services, supra*, 194 Cal.App.3d 298, 313-314.) The court acknowledged that technical rules of evidence do not apply in administrative proceedings, but concluded that the purpose of the *Kelly* rule would be served by applying it in the administrative context. (*Id.* at p. 310.) In reaching this decision, the court relied heavily on two earlier decisions in child dependency cases that involved substantially similar factual and evidentiary issues: *In re Amber B.* (1987) 191 Cal.App.3d 682 and *In re Christine C.* (1987) 191 Cal.App.3d 676. In those cases, the court held that the *Kelly* rule should have been applied to expert testimony concerning whether child abuse had occurred to the extent that the testimony was based on a scientific method of proof. *In re Amber B.* and *In re Christine C.* had been tried before a judge, not a jury, and the court in *Seering* reasoned that an ALJ was no less likely to be misled by expert testimony based on a new scientific technique than a trial judge would be. (*Ibid.*)

Seering is distinguishable from this case because that case involved an administrative proceeding before an ALJ, who may not have had any scientific background. In adjudicative proceedings before the State Water Board, by contrast, the State Water Board Members who serve as hearing officers have technical expertise that enables them to evaluate the reliability of scientific evidence and ensures that they will not afford undue weight to evidence derived from unproven scientific techniques. (See Wat. Code, § 175 [providing that the five members of the State Water Board shall consist of one attorney qualified in the fields of water supply and water rights, one registered civil engineer qualified in the fields of water supply and water rights, one registered professional engineer experienced in sanitary engineering and qualified in the field of water quality, and one additional member qualified in the field of water quality].)¹ In addition, the hearing officers are assisted and advised in every adjudicative proceeding by a team comprised of professional attorneys, engineers, and scientists with the expertise necessary to evaluate whatever scientific information is presented in the proceeding. Accordingly, the notion that the hearing officers will be misled by the "aura of certainty" or "mystic infallibility" of scientific

¹ Only one Board Member is not required to have specialized experience. Notwithstanding this exception, the fifth Board Member typically has some level of technical expertise or experience, although he or she may not have an engineering or science degree.

evidence, and ascribe undue weight to testimony based on a new and unproven scientific techniques, is implausible.

Although State Water Board staff did not create CalSim II or DSM2, staff have an in-depth knowledge of the models, having used the models themselves for purposes of water quality control planning and implementation in the Delta. For example, the State Water Board used DWRSIM (a precursor to CalSim) for purposes of developing and implementing the 1995 Bay-Delta Plan. This process entailed collaboration with DWR staff, who ran model scenarios to achieve outcomes described by State Water Board staff. State Water Board staff used the output from the model runs to inform the development of the water quality objectives that were ultimately included in the 1995 Bay-Delta Plan, and the implementation of those objectives through water right decisions. As a former State Water Board staff engineer, Hearing Officer Doduc has personal experience working on the modeling for the 1995 Bay-Delta Plan. The State Water Board has continued to use these and other modeling tools to assist in ongoing water quality and water rights planning efforts, including updates to the Bay-Delta Plan.

State Water Board staff and the Board Members have developed a solid understanding of both the utility and the limitations of models such as CalSim II and DSM2. Hearing Officer Doduc, in particular, is familiar with the models and their limitations. (See, e.g., R.T. (Aug. 24, 2016) 48:7-49:7 [Hearing Officer Doduc facilitated cross-examination of one of DWR's modeling experts by explaining modeling issue]; R.T. (Dec. 14, 2016) 272:12-14.) For this reason, application of the *Kelly* rule in this proceeding to petitioners' testimony based on modeling results is unnecessary to ensure that the modeling evidence is afforded the proper weight. Unlike the situation in *Seering*, application of the rule in this proceeding would not serve its intended purpose. The nature of this proceeding is fundamentally different from the administrative proceeding in *Seering*, and therefore the holding in that case does not apply.

2. Other Case Authority Does Not Have Precedential Effect

In both of the other two cases cited by the parties, *Harris Transportation Co. v. California Air Resources Board* and *Texaco Producing, Inc. v. County of Kern*, the court stated that the *Kelly* rule applies to administrative proceedings, but the statements were dicta. In the first case, the plaintiffs argued that the *Kelly* rule applied to a test for measuring vehicle emissions that had been established in a regulation. Citing *Seering*, the court agreed as a general matter that the *Kelly* rule applies to administrative proceedings, but the issue was not germane to the court's decision because the issue in that case was whether the plaintiffs had failed the test prescribed by the regulation, not the validity of the regulation, itself, which the plaintiffs had not challenged. (*Harris Transportation Co. v. California Air Resources Board*, *supra*, 32 Cal.App.4th at p. 1478.) In the second case, Texaco argued that the appraisal methods used by expert witnesses in a proceeding before the Kern County Assessment Appeals Board violated the *Kelly* rule. The court in this case also cited *Seering* for the proposition that the *Kelly* rule applies to administrative proceedings, but the court held that the rule was inapplicable because the appraisal methods at issue did not constitute new scientific techniques. (*Texaco Producing, Inc. v. County of Kern*, *supra*, 66 Cal.App.4th at pp. 1047-1048). Because the statements in these two cases concerning the applicability of the *Kelly* rule to administrative proceedings were dicta,

they do not have precedential effect. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 509, p. 572.)²

3. CalSim II and DSM2 Are Not “New” and Meet the General Acceptance Test

For the reasons set forth above, we conclude that the *Kelly* rule does not apply to adjudicative proceedings before the State Water Board. Accordingly, the evidentiary objections based on the failure to comply with the *Kelly* rule are denied. Furthermore, even if the rule were generally applicable to administrative proceedings, it would not apply to the modeling evidence presented in this proceeding because CalSim II and DSM2 are not “new.” Moreover, application of the *Kelly* rule in this proceeding would not render petitioners’ modeling evidence inadmissible because both CalSim II and DSM2 have generally been accepted in the relevant scientific community as useful, albeit imperfect, tools for informing planning and regulatory decisions involving operations of the SWP and CVP.

CalSim II and DSM2 were developed over 20 years ago. These models have been in the public domain and widely used since then. (SWRCB 3, 2013 Public Draft BDCP EIR/EIS, Appendix 5A, Modeling Technical Appendix, pp. 5A-A5, 5A-A35; DWR 71, p. 4; CSPA 21, pp. 2, 4.) Accordingly, the models do not constitute a “new scientific technique.” In addition, CalSim II has been generally accepted in the relevant scientific community as the best available tool for purposes of simulating SWP and CVP operations, and DSM2 has been generally accepted as the best available tool for simulating Delta hydrodynamics and water quality. DWR’s modeling experts testified to that effect. (DWR 71, p. 3; DWR 66, p. 3.) Perhaps more significantly, credible expert witnesses for some of the protestants also relied on the models for purposes of conducting their own analyses, and confirmed that the models are reliable, provided that they are used appropriately. (R.T. (Oct. 21, 2016) 5:15-6:18, 75:15-19, 77:4-16 [Dan Easton and Walter Bourez, expert witnesses for SVWU, testified that, with proper oversight, CalSim II does a good job of estimating long-term SWP and CVP operations]; R.T. (Dec. 14, 2016) 256:1-22 [Dr. Susan Paulsen, an expert witness for the City of Antioch, testified that DSM2 is not perfect, but the model is relatively well understood, and one of the best if not the best tool to answer questions about Delta water quality and flows].)

The expert witness testimony and other evidence summarized above supports the conclusion that petitioners’ modeling evidence would satisfy the *Kelly* requirement of general acceptability in the scientific community, if the rule were applicable in this proceeding.

D. Other Objections to Petitioners’ Testimony and Exhibits Based on Computer Modeling

In addition to arguments based on the *Kelly* rule, the parties made a number of other objections to petitioners’ testimony and exhibits based on the modeling for the WaterFix Project. SVWU and others objected on the grounds that the modeling evidence lacks foundation because the underlying factual basis had not been submitted. SVWU argued that petitioners should have

² In addition to relying on case law, SCDA argued that Evidence Code sections 801-805 require application of the *Kelly* rule to adjudicative proceedings before the State Water Board. This argument is not supported, however, by the plain language of the applicable sections of the Evidence Code. (See *People v. Leahy*, *supra*, 8 Cal.4th at pp. 598-599 [explaining that principles of stare decisis favored retention of *Kelly* rule in court trials, notwithstanding the fact that Evidence Code sections 720 and 801, which govern admissibility of expert testimony, do not expressly establish general acceptance as an absolute prerequisite to admissibility, and nothing in the legislative history of the Evidence Code indicates that the general acceptance standard was intended].)

included a technical memorandum describing the modeling approach or assumptions and data tables for critical modeling results such as end of month storage levels. Similarly, SVWU and others argued that petitioners did not clearly identify and explain the logic, assumptions, development, and operation of the modeling as required by the hearing notice. Other parties, including CSPA et al. and PCFFA, objected to inclusion of the modeling evidence on the grounds that it is unreliable. In support of this objection, the parties cited peer review reports that were critical of CalSim II in general or of the modeling for the WaterFix Project in particular. They also argued that the models have not been adequately validated, calibrated, or peer reviewed, and that the 18-year simulation period for the DSM2 model was inadequate. Finally, Deirdre Des Jardins moved to strike DWR-505, DWR 514, table 2, and related portions of Mr. Munévar's testimony, on the grounds that the exhibits and testimony are irrelevant because they concern a 2003 version of CalSim II, which is not the same version that was used by petitioners for purposes of analyzing the WaterFix Project.³

All of these arguments go to the weight of the evidence, not its admissibility. Given the general acceptance of CalSim II and DSM2 in the relevant scientific community, as described above, it follows that petitioners' modeling evidence also satisfies the less onerous standards for admissibility set forth in Government Code section 11513 and Evidence Code section 801. The modeling results are "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs..." and therefore exhibits containing the modeling results are admissible under Government Code section 11513. Evidence Code section 801 governs expert witness testimony, and provides that it may be based on any matter perceived by or known to a witness, "whether or not admissible, that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801, subd. (b).) The reliance of petitioners' witnesses on the modeling results was reasonable, and therefore their testimony is admissible under Evidence Code section 801. We will determine the proper weight to afford petitioners' modeling evidence after all the parties have had the opportunity to test the reliability of petitioners' evidence through cross-examination, rebuttal, and the presentation of their own cases-in-chief.

Although petitioners did not submit the raw modeling data as an exhibit in advance of the hearing, or a technical memorandum describing in detail the model runs that they conducted, the other parties have had an adequate opportunity to analyze petitioners' modeling data for purposes of participating in the hearing. All of the modeling input and output files were posted on our website in May 2016, before Part 1A of the hearing began. (R.T. (Aug. 24, 2016) 211:25-212:11). Using the modeling data, expert witnesses for SVWU were able to analyze and critique petitioners' CalSim II model runs for purposes of their case-in-chief. Likewise, expert witnesses for NDWA, SDWA, and the City of Antioch were able to prepare their own analysis of potential water quality impacts in the Delta based on DSM2 modeling results made available by DWR. (See also ARWA-100 [describing analysis performed by Jeffrey Weaver, expert witness for American River Water Agencies (ARWA), based on CalSim II modeling results].)

PCFFA and Ms. Des Jardins argued that they were deprived of the right to cross-examine petitioners' witnesses regarding the modeling because the underlying data were not in evidence. This argument lacks merit. The parties had access to the underlying data, and were free to cross-examine petitioners' modeling experts on any relevant matter, irrespective of whether it had been offered or accepted into evidence. In fact, both PCFFA and Ms. Des Jardins cross-examined petitioners' witnesses extensively, and they were not

³ Petitioners used both a 2010 version of CalSim II and a recently updated 2015 version.

precluded from questioning the witnesses concerning the underlying modeling data.
(R.T. (Aug. 25, 2016) 259:13-266:13; R.T. (Aug. 26, 2016) 26:16-113:7, 251:23-284:17.)

E. Objections Based on Qualifications of Expert Witnesses

We received numerous objections challenging the qualifications of expert and other witnesses who testified during both Part 1A and Part 1B of the hearing, none of which support the wholesale exclusion of all or a part of any of the witnesses' testimony from the record. These objections to the threshold qualifications of a witness as a general category are overruled to the extent that they seek to exclude witness testimony altogether. We are not bound in our proceedings by Evidence Code section 720, which requires a court to qualify an expert witness prior to allowing him or her to testify. Instead, we will consider each witness' qualifications in determining what weight to afford the witness' testimony. For expert witness testimony, we will determine based on our review of the record, after the submission of all relevant evidence, whether the expert's opinion is "based on a matter (including [the expert's] special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates" (Evid. Code, § 801, subd. (b).)

F. Objections to Lay Opinion

A number of parties, including SLDMWA, made objections to various testimony as inadmissible lay opinion because there is no foundation showing that certain witnesses have personal knowledge or expertise in the subject matter of their testimony. (See, e.g., SLDMWA's Objections to Part 1B Parties' Cases in Chief at p. 38 [testimony of Marcus Yasutake, the City of Folsom's Environmental and Water Resources Director, concerning potential difficulty using the municipal and industrial intake pipe at Folsom Reservoir when there is not enough water above the intake is inadmissible lay person opinion because there is no foundation showing that Mr. Yasutake has personal knowledge or expertise regarding potential damage to the intake pipe]; *id.* at p. 55 [testimony of Steve Mello, a farmer within the North Delta, concerning how the use of water degraded by salt compounds affects the long-term productivity of the soil is inadmissible lay person opinion because there is no foundation showing that Mr. Mello has personal knowledge or expertise regarding water quality or agro-economics]; *id.* at p. 80 [testimony of Frank Morgan, a Delta resident and boat tour operator, that the WaterFix Project will exacerbate blue-green algae growth by decreasing fresh water flows is inadmissible lay person testimony because there is no foundation showing that Mr. Morgan has personal knowledge regarding water quality, Delta hydrology, or blue-green algae].)

The rules governing adjudicative proceedings before the State Water Board do not prohibit lay person opinion. In addition, lay opinion that is based on a witness' experience may have probative value, even if the witness does not qualify or has not been designated as an expert. With a few exceptions, parties have responded to the objections to lay opinion testimony, listing ample qualifications supporting each witness' testimony. In general, water district managers, Delta farmers, Delta residents, and others with experience in their respective field or personal experience from living and working in the Delta have a level of expertise, even if they are not formally designated as expert witnesses. Their opinions based on their experience have value, and may assist the Board in its consideration of factual and legal issues. Accordingly, the objections to lay opinion testimony as a general category are overruled. This is consistent with previous oral rulings that occurred in the hearing for specific witnesses. (See, e.g., R.T.

(Dec. 13, 2016) pp. 102, 108 [objections to the qualification of witness Ms. Schifferle noted]; *id.* at pp. 119-121 [objections to qualifications of witness Deidre Des Jardins noted].)

We are mindful of the fact that some of the lay opinion testimony that has been presented so far in this proceeding is predicated on factual assumptions that are disputed, and we will take that into consideration when evaluating what weight, if any, to afford the testimony.

G. Objections to Legal Conclusions and Ultimate Issue Opinions

We have received numerous objections to testimony on the grounds that it contains legal conclusions and opinions concerning one of the key hearing issues in this proceeding that are to be decided by the State Water Board, such as the issue of whether the proposed changes in point of diversion for the WaterFix Project would result in injury to legal users of water. Parties argued that expert testimony has limits, including a prohibition against an expert's opinion on a question of law. (See, e.g., SVWU Objections to Petitioners' Written Testimony and Exhibits, p. 6 ["[t]his legal principle exists so that parties cannot sneak legal conclusions into evidence under the guise of expert opinion"]; see also City of Antioch's Motion To Disqualify Maureen Sergent's Testimony [arguing that Maureen Sergent's testimony is improper legal opinion as to whether project operations will result in injury to legal users of water]; DWR's Objections to Carmichael Water District Written Testimony and Exhibits, p. 2 [arguing that testimony that petitioners have not met their burden of showing that the WaterFix Project will not cause injury to CWD and other legal users of water is an inadmissible legal conclusion].)

These objections lack merit because opinions on key hearing issues are admissible, and the rule against legal opinion testimony is a judicial rule that does not apply to administrative proceedings. In both judicial and administrative proceedings, testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. (Evid. Code, § 805.) An expert's opinion may be based on any relevant matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing. (Evid. Code, § 801.)

A common law rule prohibits expert witnesses from being called in jury trials to testify concerning their legal opinions because that could confuse the jury and usurp the judge's authority to instruct the jury as to the law applicable to the facts. (See *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178-1182.) This rule does not apply to administrative proceedings, however, and application of the rule would serve no purpose in an administrative proceeding where the same body makes both the factual and the legal determinations.

In State Water Board proceedings, expert witnesses may testify concerning mixed issues of law and fact, such as the issue whether the proposed changes will result in injury to other legal users of water. We are capable of distinguishing and disregarding testimony that is essentially legal argument, and to reach our own determinations on pure questions of law. Rather than attempting to parse the testimony, however, to separate and exclude testimony concerning pure legal issues from testimony concerning mixed issues of law and fact, we will disregard testimony that has no probative value. Accordingly, the objections to testimony containing legal conclusions as a general category are overruled.

H. Objections to Testimony on Contracts and Agreements

We also received objections to testimony regarding the content of certain writings based on the best evidence rule. For example, SVWU objected to DWR's testimony regarding the Feather

River Service Area settlement contracts, arguing that testimony as to the content of a writing is typically less reliable than the actual document. (SVWU Objections to Petitioners' Written Testimony and Exhibits, p. 10; see also San Joaquin County Protestants' Objections to Written Testimony and Exhibits, pp. 6, 10-16; PCFFA Motion to Disqualify Witnesses and Exclude Testimony and Exhibits, pp. 22-23 ["Ms. Pierre's testimony purporting to characterize the legal effect of various agreements cannot be used to prove the contents of those agreements where those agreements are also submitted as exhibits".]) DWR responded that Evidence Code section 1523 does not apply to administrative hearings, and that the settlement agreements form the bases for the witnesses' expert opinion. (DWR's Response in Opposition to SVWU's Objections and Joinders, pp. 8-10.) The parties submitted many more objections of this nature in both Parts 1A and 1B.

As stated by DWR, we are not bound in our proceedings by Evidence Code section 1523, which prohibits oral testimony to prove the content of a writing except in certain circumstances. Further, given the statutory findings that the State Water Board must make in order to approve a change petition, and the key hearing issues, testimony that relates to contracts or agreements between petitioners and other parties is permissible if it is relevant to the issue of whether the WaterFix Project will result in injury, and is otherwise admissible. While the State Water Board is capable of interpreting contracts based on the language of the contracts themselves, it is also relevant and helpful to hear testimony from parties on their understanding of contracts to which they are signatory, how those contracts have been interpreted in the past, and how the WaterFix Project could affect performance under those contracts. To the extent that any testimony interpreting a contract or other document is inconsistent with the plain language of the document, itself, we will disregard the testimony. For the same reasons, excluding testimony concerning documents other than contracts based on the best evidence rule is unnecessary. Accordingly, objections based on the best evidence rule as a general category are overruled.

I. Objections on the Grounds of Relevance

We received numerous objections to testimony and exhibits based on relevance. Many of these objections fall into the category of argumentative objections discussed above. Some warranted a closer examination and are discussed individually below by case-in-chief. We also received several relevance objections to testimony that did not establish a direct link to a key issue in Part 1 of the hearing. For example, DWR objected to the testimony and exhibits submitted by the Sacramento Valley Group (SVG) on the grounds that the testimony and exhibits identified the water rights held or claimed by the water users within the SVG, but did not show how those water users would be injured by the WaterFix Project. (DWR's Objections to SVG Written Testimony and Exhibits, pp. 2-3.)

Evidence is relevant if it has a "tendency in reason to prove or disprove any disputed fact of consequence to the determination of the action." (Evid. Code, § 210.) It is not necessary or required that every witness' testimony contain a direct link to a key issue. Likewise, exhibits may be relevant even though they do not explicitly address or discuss a key hearing issue. A witness' testimony or an exhibit may contain only a piece of information that is connected to the case a party intends to make through other testimony or evidence in the record, or through an opening statement or closing brief. Accordingly, objections to testimony or exhibits on the grounds that they do not explicitly address a key hearing issue are overruled as a general category.

Before Part 1B of the hearing began, we also received various relevance objections to testimony and evidence that falls outside the scope of Part 1 of the hearing. (See, e.g., DWR's Objections to Testimony and Exhibits Submitted by City of Brentwood (Group 10) and Motion to

Strike, p. 2 [City's concern that water purchases may be more expensive is a financial injury not relevant to the current Part 1 proceedings]; SLDMWA's Objections to Part 1B Parties' Cases-in-Chief, p. 13 [objecting to testimony about costs or land impacts associated with seepage that may occur during construction as irrelevant]; *id* at p. 65 [objecting to testimony about economic impacts to restaurant as not relevant]; DWR's Objections to Restore the Delta Case in Chief-Part 1B, p. 4 [objecting to witnesses presenting only generalized concerns about impacts to environmental justice communities without showing "specific evidence or information useful to the trier of fact on the issues of Part 1 of this proceeding, which is whether there is a potential impact to human uses of water including associated legal users of water, and if so, what measures should be taken to avoid such injury"]; DWR's Objections to North Delta CARES Case-in-Chief Part 1B, p. 3 [objecting to testimony related to economic and construction impacts]).

We addressed these objections in our October 7, 2016 ruling. In that ruling, we reiterated that parties participating in Part 1 can address potential impacts to human uses that extend beyond the strict definition of legal users of water, including flood control issues and environmental justice concerns, except to the extent that a human use is associated with the health of a fishery or recreation. We also stated that we would permit testimony concerning construction-related impacts in Part 1, except for construction-related impacts to fish, wildlife, recreation, or other public trust resources, although we encouraged testimony on construction-related impacts to be presented in Part 2. In addition, we stated that we would permit testimony concerning the potential, indirect economic impacts attributable to the proposed changes in point of diversion to be presented in Part 1.

On the other hand, we stated that the scope of Part 1 does not encompass the economic feasibility of the WaterFix Project, consistency of the project with the Delta Reform Act, the benefits of approving the project, or the potential impacts of conditions of approval. We reminded the parties once again that the adequacy of DWR's EIR for purposes of CEQA compliance is not a key hearing issue, and directed the parties not to present evidence or argument on that issue. We directed several parties to revise portions of their written testimony and to withdraw associated exhibits to conform with the scope of Part 1. We also directed Westlands Water District (Westlands) and Friant Water Authority (Friant) to withdraw their cases-in-chief in their entirety, and advised that they would be permitted to resubmit their testimony in Part 2.

Objections to testimony or exhibits outside the scope of Part 1 that were submitted before our October 7, 2016 ruling will not be revisited in this ruling, except to the extent that issues remain concerning compliance with our ruling and subsequent direction that was given during the course of the hearing and by emails dated November 16 and November 23, 2016. DWR's specific objections to testimony of Mr. Elliot (LAND-25), Mr. Van Loben Sels (LAND-30) and others regarding potential construction-related impacts on Delta agriculture and its heritage were overruled orally during the hearing. (R.T. (Nov. 4, 2016) p. 4). DWR's most recent set of written objections, filed after the presentation of cases-in-chief in Part 1B, includes objections to a number of exhibits containing comments on the environmental documents for the WaterFix Project that are based in part on relevancy and scope. These are addressed under the objections to individual cases-in-chief, below.

J. Objections for Lack of Foundation and Authentication

We received many objections to exhibits for lack of proper foundation or authentication. In Part 1A, for example, Islands, Inc., CSPA et al. and PCFFA objected to a long list of petitioners' exhibits, arguing that they contain no identifying information, lack foundation, or lack sufficient

authentication to be admitted. In Part 1B, DWR objected to any exhibit that was not referenced in witness testimony. (See generally DWR's Objections to Exhibits Submitted in Support of Protestants' Cases-in-Chief [exhibits not referenced in direct testimony or utilized on cross-examination lack foundation and demonstrated relevance to the proceeding, and therefore should be excluded from the evidentiary record].)

As hearing officers, we have flexibility to admit evidence and make determinations as to its credibility. Certain basic requirements must be met to constitute substantial evidence upon which the State Water Board can rely. Documents and other exhibits must have some foundational support to be properly admitted. (See e.g. *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 350 [unauthenticated video tapes irrelevant to administrative proceeding].) However, there is no requirement under State Water Board regulations or Chapter 4.5 of the Administrative Procedure Act that a proper trial-like foundation be made for exhibits and evidence. Nor does every exhibit require "sponsoring" testimony. Some exhibits may not require authentication and their relevance may be self-evident or explained elsewhere, such as in a closing brief. We have carefully reviewed exhibits to ensure that each exhibit either contains independent identification of the content and source of information, or was discussed, if not formally authenticated, by a witness. Exhibits that warrant further discussion, or that were found to be lacking, are identified individually below by case-in-chief.

K. Objections on the Grounds of Hearsay

We received numerous hearsay objections to various types of testimony and exhibits. "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay evidence is generally not admissible in court because of its inherent unreliability. There are numerous exceptions to the hearsay rule based on the rationale that, even though certain types of statements may be made out of court, they are still reliable. Unlike judicial proceedings, hearsay evidence is admissible in adjudicative proceedings, except that, if a party makes a timely objection to hearsay evidence, the evidence may only be used for the purpose of supplementing or explaining other evidence, and "shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Gov. Code, § 11513, subd. (d).)

In the following three subsections, we address several categories of hearsay objections that we have received, including hearsay objections to testimony based on technical reports, hearsay objections to testimony based on other testimony, and hearsay objections to PowerPoint presentations and written testimony. As explained in the fourth subsection, below, we will take into account any remaining hearsay objections when reviewing the evidence and making findings as part of a final decision.

1. Hearsay Objections to Testimony Based on Technical Reports

In objections filed before Part 1B of the hearing began, SLDMWA objected on the grounds of hearsay to the testimony of certain expert witnesses that summarized the findings in technical reports. Specifically, SLDMWA objected to the testimony of Walter Bourez, an expert witness for SVWU employed by MBK Engineers, to the extent that his testimony summarized findings contained in the following technical reports: Exhibit SVWU-102 (MBK Report on BDCP modeling, June 20, 2014), Exhibit SVWU-104 (MBK Technical Comments on Coordinated Long-Term Operation of CVP and SWP, Draft EIS, Sept. 29, 2015), Exhibit SVWU-107 (MBK California WaterFix Modeling Review, August 30, 2016), Exhibit SVWU-108 (MBK Technical Memorandum with example 2-year injury), and Exhibit SVWU-109 (MBK Technical

Memorandum regarding B1, H3, and H4 scenarios). (SLDMWA's Objections to Part 1B Parties' Case-in-Chief at pp. 84-85). In addition, SLDMWA objected to the testimony of Dr. Susan Paulsen, an expert witness for the City of Antioch and the City of Brentwood, to the extent that her testimony incorporated details from two technical reports (Exhibit Antioch-202 and Exhibit Brentwood-102) that she prepared to support her testimony in her capacity as a principal with Exponent, Inc., a consulting firm that had been retained by the two cities. (SLDMWA's Objections to Part 1B Parties' Case-in-Chief at pp. 11-12, 15-16).

In objections filed after the SVWU and the City of Antioch completed their cases-in-chief, SLDMWA and Westlands also objected to the admission of numerous exhibits, including the reports cited in Mr. Bourez's testimony and Antioch-202. In addition to the MBK reports listed above, SLDMWA and Westlands objected to SVWU-103 (MBK Technical Comments on the BDCP/California WaterFix Partially Recirculated DEIR/Supplemental DEIS, October 28, 2015). (SLDMWA and Westlands' Objections to Exhibits Submitted for Admission into Evidence by Groups 7 and 9 at the Close of their Part 1B Cases in Chief at pp. 2-4; SLDMWA and Westlands' Objections to Exhibits Submitted for Admission by Groups 18, 19, 21, 24, 27, 31, 32, 37, 38, 39 into Evidence at the Close of Part 1B Cases-in-Chief at pp. 9-10.)

In response, SVWU argued that the exhibits constitute part of their witnesses' testimony, and that hearsay is admissible to supplement other evidence. Likewise, Antioch argued that Antioch-202, and the following exhibits are part of Dr. Paulsen's testimony: Antioch 202-Errata, Antioch-208 (Exponent table – water year classifications and indices, 1906-2015), Antioch 217 (Exponent report on BBID), Antioch-218 (Protest letter from City of Antioch (including report by Exponent)), Antioch-219 (City of Antioch and Exponent comments on RDEIR/SDEIS), and Antioch-231 (2010 Testimony by City of Antioch to State Water Board).

SLDMWA and Westlands' objections to the testimony and exhibits of North Delta Water Agency (NDWA), SDWA, and the California Water Impact Network (C-WIN) present similar issues. SLDMWA objected to the following exhibits on the grounds of hearsay: NDWA-32 and NDWA-32-errata (MBK Technical Comments on CWF BA Modeling, August 29, 2016), NDWA-35 (NDWA Comment Letter for 2014 BDCP DEIR/DEIS), NDWA-36 (NDWA Comment Letter for 2015 BDCP RDEIR/SDEIS), NDWA-37 (CVFCA Comment Letter for 2014 BDCP), and NDWA-38 (CVFCA Comment Letter for 2015 BDCP RDEIR/SDEIS). SLDMWA and Westlands also objected on the grounds of hearsay to many of SDWA's and C-WIN's exhibits, including SDWA-78-Errata (Burke Technical Report) and CWIN-6 and CWIN-6-Revised (ECONorthwest Report on Change in Point of Diversion and No Injury Rule).

NDWA, SDWA, and C-WIN had different responses to SLDMWA and Westlands' hearsay objections. NDWA argued that NDWA-32 and NDWA-32-errata are part of the testimony of Gary Kienlen, an expert witness for NDWA, and NDWA-35 through NDWA-38 are part of the testimony of NDWA's witness Melinda Terry. SDWA argued that SDWA-78-Errata is not hearsay because it supports the testimony of Thomas Burke, an expert witness for SDWA. CWIN argued that an expert may base his or her opinion on technical reports and scientific literature. The objections to these exhibits are discussed here to the extent that they relate to witness testimony. The remaining hearsay objections that pertain to protestants' exhibits are discussed below.

a) Reliance on Technical Reports that Are Part of Testimony

During the hearing, an attorney for DWR objected to Mr. Bourez's oral summary of his direct testimony on the grounds that it exceeded the scope of his written, direct testimony. In response, the attorney for SVWU argued that SVWU-107, SVWU-108, and SVWU-109 were

part of Mr. Bourez's testimony. Hearing Officer Doduc agreed with this argument and overruled the objection on that basis. (R.T. (Oct. 20, 2016) 35:23-38:6.) Because SVWU-107, SVWU108, and SVWU-109 are part of Mr. Bourez's testimony, those exhibits are not hearsay. We also find that Antioch-202, Antioch-202-Errata, Antioch-208, and Brentwood-102 constitute part of Dr. Paulsen's testimony; NDWA-32 and NDWA-32-errata are part of Mr. Kienlen's testimony; SDWA-78-Errata is part of Mr. Burke's testimony; and CWIN-6 and CWIN-6-Revised are part of the testimony of Dr. Ed Whitelaw, who was an expert witness for C-WIN.

Expert testimony that incorporates a technical report that was prepared by the witness to support his or her testimony is essentially a part of the witness' testimony. Here, Mr. Bourez and his colleague, Mr. Easton, who also testified on behalf of SVWU, conducted the analyses described in Exhibits SVWU-107, SVWU-108, and SVWU-109 for purposes of this hearing, and prepared those three technical reports concurrently with Mr. Bourez's written testimony. (R.T. (Oct. 20, 2016) 26:15-27:5; SVWU-107, p. 1 [summarizing analysis of modeling used for petitioners' testimony and exhibits].) Likewise, Dr. Paulsen conducted the analysis of DSM2 modeling results described in the Exponent reports for purposes of this hearing and prepared the reports to support her testimony. (In fact, she referred to the reports as "my testimony." (Antioch-202, p. 4; Brentwood-102, p. 2.)) Mr. Kienlen and his colleague, Shankar Parvathinathan, who also testified on behalf of NDWA, conducted the analysis of DSM2 modeling results described in NDWA-32 and NDWA-32-errata, and prepared those exhibits for purposes of the hearing. (R.T. (Oct. 28, 2016) 73:19-86:5.) The same is true with respect to the technical report prepared by Mr. Burke on behalf of SDWA, and the technical report prepared by Dr. Whitelaw on behalf of C-WIN. (SDWA-76-Errata, p. 2; CWIN-6-Revised, p. 2.) Accordingly, the analysis and conclusions set forth in the reports and summarized in Mr. Bourez's, Dr. Paulsen's, Mr. Kienlen's, Mr. Burke's and Dr. Whitelaw's testimony should be treated as part of their expert opinion testimony. The content of the reports should not be considered hearsay merely because those expert witnesses elected to present their analyses in a more accessible format by summarizing their conclusions in their written testimony, and describing the technical details of their analyses in more lengthy reports.

b) Reliance on Technical Reports that Are Not Part of Testimony

The other reports that the parties claimed are part of their witnesses' testimony present a closer question because they were not prepared specifically for this hearing. Although Mr. Bourez was the primary author of SVWU-102 and SVWU-103, and he coauthored SVWU-104 (R.T. (Oct. 20, 2016) 60:2-62:10; 93:16-94:19), those documents were prepared for another purpose and were not prepared concurrently with Mr. Bourez's written testimony. Accordingly, we disagree with SVWU's argument that SVWU-102, SVWU-103, and SVWU-104 became part of Mr. Bourez's testimony in their entirety by virtue of the fact that he referred to those documents and summarized their findings in his testimony. Likewise, we disagree with the City of Antioch's argument that Antioch-217, Antioch-218, Antioch-219, and Antioch-231 became part of Dr. Paulsen's testimony by virtue of the fact that those exhibits were prepared in whole or in part by Dr. Paulsen and incorporated into her direct testimony. For the same reasons, we disagree with NDWA's argument that NDWA-35 through NDWA-38 are part of Ms. Terry's testimony.

It merits note that our determination with respect to these exhibits is supported by sound pragmatic and policy considerations. It would cause confusion and unfairness to the other parties if witnesses were permitted to transform documents prepared for purposes other than the hearing into testimony simply by referring to the documents or incorporating them by reference into their testimony. Such a practice would create uncertainty concerning the scope

of witnesses' testimony to the extent that it is unclear whether witnesses intend to incorporate documents wholesale into their written testimony or simply intend to rely upon them. Similarly, it would create uncertainty concerning the content of witnesses' testimony to the extent that witnesses purport to incorporate into their testimony documents that are not written in the form of testimony. Uncertainty concerning the scope and content of witnesses' testimony would make it difficult for opposing parties to prepare for cross-examination and rebuttal. In addition, allowing witnesses to readily transform lengthy documents into testimony could be burdensome to the other parties and the State Water Board. Although documents prepared for another purpose may not be transformed into testimony wholesale by incorporating them by reference, witnesses may rely on such documents in support of their testimony, or submit them as exhibits.

Although we find that SVWU-102, SVWU-103, and SVWU-104 are not part of Mr. Bourez's testimony, and Antioch-217, Antioch-218, Antioch-219, and Antioch-231 are not part of Dr. Paulsen's testimony, as expert witnesses it was reasonable for Mr. Bourez and Dr. Paulsen to rely on those reports to support their opinions concerning the modeling conducted by petitioners for the WaterFix Project. (See Evid. Code, § 801, subd. (b).) (Ms. Terry was not designated as an expert witness, and therefore Evidence Code section 801 does not appear to be applicable to her testimony.) Mr. Bourez's and Dr. Paulsen's expert opinions, which are summarized in their written, direct testimony, are not hearsay. Likewise, none of their opinions based on their reports that they have expressed during cross-examination are hearsay. (See *People v. Cooper* (2007) 148 Cal.App.4th 731, 746-747 [experts may rely on hearsay or other inadmissible evidence in formulating their opinions]; see also *People v. Bui* (2001) 86 Cal.App.4th 1187, 1196 [upholding admission of expert opinion testimony based on scientific literature, statistical data, and epidemiological studies because those are the type of matter that reasonably may be relied on by an expert in forming an opinion].)

For the foregoing reasons, SLDMWA's hearsay objections to Mr. Bourez's and Dr. Paulsen's testimony are overruled. In addition, the hearsay objections to Exhibits SVWU-107, SVWU-108, SVWU-109, Antioch-202, Antioch-202-Errata, Antioch 208, NDWA-32, NDWA-32-errata, SDWA-78-Errata, CWIN-6, and CWIN-6-Revised are overruled because those exhibits are part of expert witness testimony.

2. Hearsay Objections to Testimony Based on Other Testimony

SLDMWA also submitted hearsay objections to other witness testimony to the extent that it relied on the work and testimony of MBK Engineers. (See, e.g., SLDMWA's Objections to Part 1B Parties' Case in Chief, p. 30 [objecting to Carmichael Water District's witness Steve Nugent testimony concerning adequacy of petitioners' modeling based upon the expert work of and testimony by MBK Engineers]; *id.* at p. 41 [Glen-Colusa Irrigation District's witness Thaddeus Bettner's testimony is hearsay to the extent that it relies on the work and testimony of MBK Engineers].) PCFFA made several similar hearsay objections based on testimony that cross-references and relies on testimony of other witnesses in this hearing. (See Motion of Protestants PCFFA and Institute for Fisheries Resources to Disqualify Witnesses and Exclude Testimony and Exhibits, p. 25 [Mr. Leahigh's reliance on the modeling testimony of Mr. Munévar and Mr. Nader-Tehrani must be stricken as inadmissible hearsay]; *id.* at p. 31 [Ms. Sergent's statements purporting to summarize the testimony of Mr. Leahigh, Mr. Munévar, and Mr. Nader-Tehrani inadmissible hearsay]; *id.* at p. 32 [hearsay objection to Ray Sahlberg's testimony to the extent it relies on the testimony of Ron Milligan].)

Hearsay evidence is defined as "evidence of a statement that was made *other than by a witness while testifying at the hearing* and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, emphasis added.) In other words, hearsay is an out-of-court statement, or

a statement made outside this hearing, offered to prove the truth of the matter stated. The testimony of witnesses in this hearing does not meet the definition of hearsay evidence, except to the extent that witnesses narrate statements made by third parties outside this hearing. Therefore, testimony that relies on the opinions expressed by other witnesses in this hearing does not incorporate hearsay. Accordingly, hearsay objections to testimony that relies on other witnesses' testimony as a general category are overruled.

3. Hearsay Objections to PowerPoint Presentations and Written Testimony

SLDMWA and Westlands objected to many of the witnesses' PowerPoint presentations on the grounds of hearsay. With the exception of one PowerPoint presentation presented by one of SDWA's witnesses, these objections lack merit. Specifically, SLDMWA and Westlands' objections to the following exhibits lack merit: SVWU-110, PCWA-071, ARWA-102, SCWA-34, SCWA-48, SCWA-48-errata, SCWA-49, Folsom-3, Folsom-3-errata, SSWD-3, CitySac-3, CitySac-10, EBMUD-100, EBMUD-101, EBMUD-102, SDWA-77-Errata, SDWA-135R, AQUA69, and PCFFA-77. These exhibits are all PowerPoint presentations for witnesses who testified during the hearing. They consist of graphics and bullets summarizing the witnesses' testimony.⁴ Graphics are not evidence of a "statement" subject to the hearsay rule, and summaries of testimony are not hearsay, either. (See Evid. Code, § 225 [defining "statement" as used in the hearsay rule to mean oral or written verbal expression or nonverbal conduct intended as a substitute for oral or written verbal expression]; *Browne v. Turner Const. Co.* (2005) 127 Cal.App.4th 1334, 1348 [testimony that does not recount a "statement" is not hearsay].) It is possible that some of the testimony and associated PowerPoint presentations include isolated hearsay statements, but SLDMWA and Westlands have not identified any, and it was incumbent on them to specify the basis for their objection. (See *Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 764 [stating general rule that specific and timely objection to admission of evidence must be made at trial to preserve issue on appeal].) Accordingly, SLDMWA and Westlands' objections to the PowerPoint presentations listed above are overruled.

We also overrule SLDMWA and Westlands' hearsay objections to SDWA-151-FR (Nomellini Written Summary of Testimony); CWIN-5 (Ed Whitelaw Testimony); NDC-4, NDC-4-Errata.1, and NDC-4-Errata.2 (Barbara Daly testimony); and NDC-6 (Mark Pruner testimony). Judging from the fact that SLDMWA and Westlands did not object to the written, direct testimony of other witnesses on the grounds of hearsay, these exhibits may have been listed in error. Regardless, these objections are overruled because Mr. Nomellini, Dr. Whitelaw, Ms. Daly, and Mr. Pruner appeared during the hearing, affirmed their written, direct testimony as true and correct, summarized their direct testimony, and were subject to cross-examination. Therefore, their testimony is not hearsay.

4. Remaining Hearsay Objections to Testimony and Exhibits

In addition to the testimony discussed above, DWR and SLDMWA objected to portions of the testimony of numerous other witnesses on the grounds that the testimony included or relied on hearsay. In addition, SLDMWA and Westlands submitted hearsay objections to the admission into evidence of numerous exhibits submitted by various parties at the close of their cases-in-chief for Part 1B of the hearing. (See *Objections to Exhibits Submitted for Admission into Evidence by Groups 7 and 9 [SVWU and NDWA]* at the Close of Their Part 1B Cases-in-Chief;

⁴ The one exception is SDWA-152-R (Nomellini PowerPoint – Revised 11/09/2016). Unlike the other PowerPoint presentations, this exhibit includes numerous excerpts from various documents, which may contain hearsay statements. SLDMWA and Westlands' hearsay objections to this exhibit are noted for the record.

Objections to Exhibits Submitted for Admission into Evidence by Groups 15 and 22 [East Bay Municipal Utility District (EBMUD) and City of Stockton] at the Close of Their Part 1B Cases-in-Chief; Objections to Exhibits Submitted for Admission by Groups 18, 19, 21, 24, 27, 31, 32, 37, 38, 39 [LAND, SDWA, City of Antioch, CSPA et al., Restore the Delta (RTD), Deirdre Des Jardins (DDJ), PCFFA, and North Delta Cares (NDC)] into Evidence at the Close of Part 1B Cases-in-Chief.⁵

In response, the opposing parties argued that some of the objections are untimely and lack specificity. The parties also argued that certain exhibits do not constitute hearsay, or that an exception to the hearsay rule applies, such as the exception for official records or admissions against a party's interest. In addition, many parties pointed out that expert witnesses may properly rely on hearsay in forming their expert opinions. (Evid. Code, § 801, subd. (b).) Finally, many parties argued that, even if testimony or exhibits are hearsay, hearsay evidence is admissible under Government Code section 11513. As set forth above, section 11513 provides that hearsay evidence may be used to supplement or explain other evidence, but over timely objection shall not be sufficient in itself to support a finding. (Gov. Code, § 11513, subd. (d).)

Preliminarily, all of the hearsay objections appear to be timely. Pursuant to Government Code section 11513, hearsay objections are timely if made before submission of the case or on reconsideration. (Gov. Code, § 11513, subd. (d).) Pursuant to the deadlines established for this proceeding, only objections that sought to disqualify a witness or to exclude a witness' testimony, in whole or in part, were due by July 12, 2016 for Part 1A of the hearing, and by September 21, 2016 for Part 1B of the hearing. Objections that go to the weight of the evidence and objections to exhibits were not due until December 30, 2016.

Although the hearsay objections appear to be timely, it is unnecessary to rule on all of the outstanding hearsay objections at this stage in the proceeding. With the exception of the general categories of objections addressed above and any objections addressed in connection with an individual case-in-chief, the hearsay objections are noted for the record and will be taken into consideration when reviewing the evidence and making findings. Before relying on any testimony or exhibits to which a timely hearsay objection has been made, we will evaluate whether the testimony or exhibit contains hearsay statements, and whether an exception to the hearsay rule applies. Consistent with Government Code section 11513, we will not rely solely on hearsay evidence to support a finding. In evaluating any witness testimony that relies on hearsay evidence, we will take into consideration whether the witness qualifies as an expert, and whether the evidence "is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates" (Evid. Code, § 801, subd. (b).)

II. Objections to Individual Cases-in-Chief and Admission of Testimony and Exhibits into Evidence

To the extent that evidentiary objections are not addressed above, they are addressed below by case-in-chief. Any exhibits that are excluded from the evidentiary record will be included in the larger administrative record, but they will not be considered evidence.

⁵ Although SLDMWA and Westlands included Group 18 (SJTA) and Group 24 (North San Joaquin Water Conservation District and the County of San Joaquin et al.) in the title of their third set of objections, they did not include any of those parties' exhibits in the list of exhibits to which they objected.

Group 1

California Department of Water Resources

Most of the objections to DWR's testimony and exhibits are addressed in the general discussion, above. The remaining objections are addressed below.

Objections to Testimony

RTD objected to references in John Leahigh's testimony to a draft ICF report on sources of salinity in southern Delta because the report had not been offered into evidence. Similarly, PCFFA objected to a reference in Mr. Munévar's testimony to a report because it had not been admitted into evidence or authenticated. PCFFA argued further that references to websites in Mr. Munévar's testimony and the testimony of Mr. Leahigh and Ms. Sergent should be stricken because the websites have not been authenticated. These objections are overruled because experts may rely on information outside the record in formulating their opinion. (Evid. Code, § 801, subd. (b).) Moreover, the report cited in Mr. Munévar's testimony was published in the Journal of Water Resources Planning and Management, and the websites cited were all government websites. These are reputable sources that do not warrant formal authentication.

The City of Antioch (Antioch) objected to portions of Maureen Sergent's testimony during cross-examination. Antioch argued that Ms. Sergent's testimony concerning the number of "usable days" at Antioch, mitigation of harm to Antioch under a 1968 agreement between DWR and Antioch, and the water quality impacts of a 2016 agreement between DWR and Contra Costa Water District (CCWD) should be stricken because those issues were not part of Ms. Sergent's direct testimony or DWR's case-in-chief. This argument lacks merit because cross-examination may exceed the scope of direct testimony, as well as a party's case-in-chief. (See Gov. Code, § 11513, subd. (b).)

Objections to Exhibits

Islands, Inc. objected to DWR-106, a document prepared by the Governor's Delta Vision Blue Ribbon Task Force entitled *Our Vision for the California Delta*, and DWR-107, the CALFED Programmatic Record of Decision on the grounds of relevancy. These objections are overruled. Both of these documents include a discussion of dual conveyance and the potential impacts on Delta water quality, among other things, which is relevant to the issue of injury to legal users of water.

Islands, Inc. also objected to DWR-113 and DWR-116 on the grounds of relevancy. These objections are overruled. DWR-113 is a letter dated April 19, 2011, from the State Water Board to DWR regarding the environmental analysis for the BDCP. As explained in the written testimony of Jennifer Pierre, the letter is relevant to the various operational scenarios evaluated by DWR in its case-in-chief. (DWR-51, p. 11.) DWR-116 is a table of operating criteria. This exhibit provides a useful summary of the different operational criteria that were assumed for purposes of modeling different operational scenarios. It is relevant to DWR's analysis of the potential effects of the California WaterFix Project.

RTD objected to DWR-301, pp. 22-23 and the related testimony of Maureen Sergent (DWR-53) on the grounds of relevancy and lack of specificity. This objection is overruled. Pages 22-23 of DWR-301 contain maps of salinity intrusion contained in the Delta Atlas. The relevancy of the maps is explained at page 14, lines 3-26 of Ms. Sergent's written testimony. The fact that the

maps do not indicate the exact dates of maximum salinity intrusion does not render them unreliable or inadmissible.

Several parties objected to DWR-401, DWR-402, DWR-403, DWR-413, and DWR-4, slides 19-21, 24-26 on the grounds of relevance and reliability. These objections are overruled. These exhibits consist of charts and tables depicting historic compliance with water quality objectives. Although the parties may disagree with the content of these exhibits, or with the weight we should accord them, they are relevant to the SWP's and CVP's ability to comply with water quality objectives in the future.

RTD objected to DWR-406, 407, 408, 409, and 410, which are graphs depicting precipitation and temperature data, and the related testimony of John Leahigh (DWR-61) on the grounds that the graphs are missing information and the testimony and exhibits assume facts not in evidence concerning how the SWP and CVP are operated. This objection is overruled. RTD may disagree with the significance that Mr. Leahigh placed on the data, but the data are relevant to the SWP's and CVP's assertion that they are able to meet water quality objectives both during the drought and in the future. In addition, the data depicted on the graphs were adequately explained in Mr. Leahigh's written and oral testimony. (DWR-61, pp. 13-15; R.T. (Aug. 10, 2016) 84:19-89:19.)

RTD's objection to DWR-411, DWR-4, slide 36, and the related testimony of John Leahigh (DWR-61) is overruled. DWR-411 is a graph showing conceptual CWF operation (12/1/15-4/30/16). RTD objected that the exhibit is unclear, but the basis for the objection is, itself, unclear. The exhibit was authenticated and the information depicted on the graph adequately described in the written and oral testimony of Mr. Leahigh. (R.T. (Aug. 10, 2016) 91:14-94:3.)

RTD's objection to DWR-412, DWR-4, slide 37, and the related testimony of John Leahigh (DWR-61) on the grounds of relevance is overruled. The relevance of this exhibit is described in Mr. Leahigh's testimony.

LAND objected to the admission of DWR-500 because it was not submitted as an exhibit by the May 31, 2016 deadline for petitioners' written testimony and exhibits for Part 1A of the hearing. A number of other parties joined in this objection. These objections have merit. DWR-500 consists of modeling files described as "Physical Modeling to Support CWF Water Right Petition and modeling file attachments for Alternatives H3, H4, Boundary 1, Boundary 2, No Action with Fall X2-CalSim, and No action with Fall X2-DSM2." This material was posted on our website and made available to the parties on May 25, 2016, but DWR did not identify this material as an exhibit and offer it into evidence until September 27, 2016, at the close of petitioners' case-in-chief.

We required written testimony and exhibits to be submitted before the hearing in order to discourage the introduction of surprise testimony and exhibits, consistent with State Water Board policy. (See Cal. Code of Regs., tit. 23, § 648.4, subs. (a) & (c).) In a September 28, 2016 letter formally offering its exhibits into evidence, DWR argued that Exhibit DWR-500 is not surprise evidence because it has been available since May 16, 2016. An important distinction must be made, however, between material that is publicly available and material that is designated as an exhibit.

In this case, several parties requested that the July 12, 2016 deadline for evidentiary objections be extended so that they would have more time to review the modeling files that petitioners had made available. We granted a 27-day extension, but denied requests to further extend the deadline and to delay the beginning of the hearing, in part because the modeling files had not

been designated as an exhibit. (Hearing Officer Tam M. Doduc, letter to Service List, June 10, 2016.) In addition, although the parties were permitted to cross-examine petitioners' witnesses concerning the modeling files, and some of them did so, LAND suggests that they might have cross-examined petitioners' witnesses more thoroughly concerning authentication and related issues if the files had been designated as an exhibit. LAND also maintains that they relied on petitioners' original exhibit list in preparing their own case-in-chief. For these reasons, we agree that admission of DWR-500 into evidence would be prejudicial to the other parties in this phase of the hearing, notwithstanding the fact that the modeling files were made available to the parties before the hearing. The objections to DWR-500 are sustained.

RTD's relevancy objections to DWR-511, DWR-513, Figures W1-W5, and the related testimony of Dr. Parviz Nader-Tehrani (DWR-66) are overruled. DWR-511 is a draft DWR memorandum concerning the use of different time periods for the CalSim II and DSM2 modeling for BDCP. DWR-513, Figures W1-W5 depict modeled water levels below the proposed new points of diversion for the California WaterFix Project. These exhibits were authenticated and their relevance explained by Dr. Nader-Tehrani. (DWR-66, pp. 2-4.) RTD's arguments concerning the content of these exhibits and the related testimony go to the weight of the evidence.

SJTA's relevancy objection to DWR-514, Figures 12, 13, 14, and 15 is overruled. Contrary to SJTA's contention, the absence of data concerning storage at New Melones in this exhibit does not render the data concerning storage at other reservoirs irrelevant.

In addition to the specific objections discussed above, Islands, Inc. also objected to many of DWR's exhibits on the grounds of "improper opinion, unqualified expert, offers legal opinions, and speculative," without further elaboration. The objections to DWR's exhibits, as opposed to testimony, on the grounds that they offer improper opinions from unqualified experts are inapposite and overruled. To the extent that the exhibits contain legal interpretations or speculation, the objections go to the weight of the evidence, not its admissibility.

DWR's September 28, 2016 letter offering exhibits for entry into evidence did not include the following exhibits: DWR-1 errata, DWR-1 errata corrected, DWR-2 errata, DWR-4 errata, and DWR-5 errata. During the hearing, DWR verbally offered DWR-1 errata corrected, DWR-2 errata, DWR-4 errata, and DWR-5 errata into evidence. (R.T. (Sept. 27, 2016) 108:18-24.) DWR also indicated in a February 9, 2017 letter that they intended to offer into evidence all versions of their first five exhibits. DWR also pointed out that parties referred to the original versions of these exhibits as well as errata and corrected versions during the course of the hearing. Accordingly, both the original and corrected versions of these exhibits will be admitted into evidence.

Disposition: The testimony and exhibits listed on DWR's Exhibit Identification Index submitted on September 28, 2016, are accepted into the evidentiary record, with the exception of DWR-500. In addition, exhibits DWR-1 errata, DWR-1 errata corrected, DWR-2 errata, DWR-4 errata, and DWR-5 errata are accepted into evidence.

Group 2

Department of Interior

The objections to DOI's testimony and exhibits are addressed in the discussion of general categories of objections, above. Consistent with that discussion, all of DOI's exhibits are admissible.

Disposition: The testimony and exhibits listed on DOI's Exhibit Identification Index submitted on September 28, 2016, are accepted into evidence, except that instead of DOI-5, DOI-5 errata (submitted on July 27, 2016) is accepted into the evidentiary record.

Group 3

The State Water Contractors

The State Water Contractors participated in this part of the hearing through cross-examination. They did not present any testimony or offer any exhibits into the evidentiary record.

Group 4

San Luis and Delta-Mendota Water Authority

SLDMWA offered into evidence several exhibits that SLDMWA introduced during cross-examination. Placer County Water Agency (PCWA) objected to SLDMWA's exhibit SLDMWA-4 for lack of foundation. Exhibit SLDMWA-4 is the Certification of Self-Certified Conservation Standard submitted by PCWA to the State Water Board on June 22, 2015, pursuant to the State Water Board's drought emergency conservation regulations. PCWA argued that on cross-examination, PCWA's witness Andrew Fecko was not familiar with this document and, therefore, could not testify to its contents or its authenticity. Exhibit SLDMWA-4 does not require formal authentication, however, because it appears to be a correct copy of the certification that was submitted by PCWA to the State Water Board and is available to download from the State Water Board's website at http://www.waterboards.ca.gov/water_issues/programs/conservation_portal/emergency_regulation.shtml. Accordingly, PCWA's objection is overruled.

Disposition: The exhibits listed on SLDMWA's exhibit identification index submitted on December 21, 2016, are admitted into the evidentiary record.

Group 5

Westlands Water District

Consistent with our October 7, 2016 ruling, Westlands did not submit any direct testimony or exhibits during Part 1 of the hearing. Westlands did, however, offer exhibits used during cross-examination into the record by letter dated December 21, 2016. That list included exhibits that pertained to Westlands' original case-in-chief, which were excluded by our October 7 ruling. Nevertheless, we did not receive any objections to Westlands' December 21 list of exhibits. On February 17, 2017, Westlands corrected its exhibit list by removing exhibits WWD-1 through WWD-6 and including only exhibits used during cross-examination.

Disposition: Exhibits WWD-7 through WWD-14 are admitted into the evidentiary record.

Group 6

The Coalition for a Sustainable Delta

The Coalition for a Sustainable Delta did not present any testimony or offer any exhibits into evidence during this part of the hearing.

Group 7

Sacramento Valley Water Users

Most of SLDMWA's and Westlands' objections to SVWU's testimony and exhibits are addressed in the general discussion. The only objection that remains unaddressed is SLDMWA's objection to portions of Walter Bourez's testimony. SLDMWA argued that Mr. Bourez's testimony concerning BDCP modeling would result in undue consumption of time, and his testimony concerning SVWU-104 is irrelevant because SVWU-104 did not concern the operations of WaterFix. (SLDMWA's Objections to Part 1B Cases in Chief, p. 85.) In his testimony, however, Mr. Bourez explained the relevance of the BDCP modeling and SVWU-104 to the modeling conducted for WaterFix. (SVWU-100, p. 4.) Accordingly, this objection is overruled.

Disposition: SVWU-1 was offered and accepted into evidence during Part 1A of the hearing on July 29, 2016. (R.T. (Jul. 29, 2016) 125:23-127:10.) The remaining testimony and exhibits listed on SVWU's exhibit identification index submitted on November 2, 2016, are admitted into the evidentiary record.

Sacramento Valley Group

DWR objected to Marc Van Camp's testimony on behalf of the SVG and all of the SVG exhibits on the grounds of relevance because the testimony and exhibits do not provide details or information explaining how the water users within the SVG would be injured by the WaterFix Project. This objection is addressed above in the general discussion of objections on the grounds of relevance, and is overruled for the reasons stated in that section.

DWR cited only to its master objections in support of its remaining objections to Mr. Van Camp's testimony. To the extent that those objections are not addressed in the general discussion above, they are overruled for lack of specificity or substantiation.

SLDMWA's hearsay objection to SVG-20-073 (Joint Water Districts Board Hydrology Report, 2015) is also addressed in the general discussion.

Disposition: The testimony and exhibits listed on SVG's exhibit identification index submitted on November 2, 2016, are admitted into the evidentiary record.

Glenn-Colusa Irrigation District

SLDMWA's objection to the testimony of Thaddeus Bettner, expert witness for Glenn-Colusa Irrigation District (GCID), is addressed in the general discussion.

In addition to its own exhibits, GCID also offered into evidence SVWU-100 through SVWU-110, which were also offered into evidence by SVWU. DWR objected to the inclusion of duplicative exhibits. We assume, however, that GCID and other members of SVWU do not seek to have duplicate copies of SVWU's exhibits admitted into evidence, and we will exclude duplicates from the record. We have attempted to identify and exclude duplicate copies of exhibits offered into evidence by other parties to avoid redundancy in the record, as noted in the dispositions below.

Disposition: The testimony and exhibits listed on GCID's exhibit identification index submitted on November 2, 2016, are admitted into the evidentiary record, except that duplicate copies of SVWU-100 through SVWU-110 are not admitted on behalf of GCID.

Anderson-Cottonwood Irrigation District, Reclamation District 1004, Western Canal Water District, Richvale Irrigation District, Butte Water District, Plumas Mutual Water Company

DWR objected to the testimony of Donnie Stinett, Mark Orme, and Sean Early on behalf of Richvale Irrigation District and Butte Water District. DWR argued that their testimony is irrelevant because their conclusions regarding injury were based on MBK modeling and the witnesses did not specify how the WaterFix Project would cause injury. These objections are addressed above in the general discussion of objections on the grounds of relevance, and are overruled for the reasons stated in that section.

DWR also objected to MLF-1 through MLF-5 as lacking foundation or relevance because these exhibits were not referenced in direct testimony or used during cross-examination. Contrary to this assertion, however, MLF-1 through MLF-5 were used during the cross-examination of DWR's witnesses John Leahigh and Maureen Sergent. The exhibits are relevant, and they were authenticated during cross-examination. (R.T. (Aug. 10, 2016) 199:1-202:8 [MLF-1]; R.T. (Sept. 22, 2016) 129:4-8 [MLF-2]; *id.* at 175:1-17 [MLF-3]; *id.* at 136:5-14 [MLF-4]; *id.* at 172:9-15 [MLF-5].) Accordingly, DWR's objection to these exhibits is overruled.

Disposition: The testimony and exhibits offered into evidence by Anderson-Cottonwood Irrigation District, Reclamation District 1004, Western Canal Water District, Richvale Irrigation District, Butte Water District, and Plumas Mutual Water Company as described in their letter dated November 2, 2016, are admitted into the evidentiary record, except that duplicate copies of SVWU-1, SVWU-2, and SVWU-100 through SVWU-110 are not admitted on behalf of these parties, and only one set of MLF-40 through MLF-48 is admitted on behalf of both Richvale Irrigation District and Butte Water District.

Biggs-West Gridley Water District

DWR's objected to the testimony of Eugene Massa, Jr., a witness for Biggs-West Gridley Water District (BWGWD) on the grounds of relevance because his conclusion regarding injury was based on MBK modeling and he did not specify how the WaterFix Project would cause injury. This objection is addressed above in the general discussion of objections on the grounds of relevance, and is overruled for the reasons stated in that section.

SLDMWA's hearsay objection to Mr. Massa's testimony is addressed in the general discussion of hearsay objections, above.

Disposition: The testimony and exhibits listed on BWGWD's exhibit identification index submitted on November 2, 2016, are admitted into the evidentiary record, except that duplicate copies of SVWU-100 through SVWU-110 and MLF-40 through MLF-48 (also submitted by Richvale Irrigation District and Butte Water District) are not admitted on behalf of BWGWD.

American River Water Agencies (ARWA): City of Folsom, City of Roseville, San Juan Water District, Sacramento Suburban Water District, City of Sacramento, and Sacramento County Water Agency

DWR's, SLDMWA's, and Westlands' written objections to the testimony and exhibits submitted by the City of Folsom, the City of Roseville, San Juan Water District, Sacramento Suburban Water District, the City of Sacramento, and SCWA are addressed in the general discussion, above, with the exception of DWR's objection to Roseville-3, CITYSAC-17, CITYSAC-22 through CITYSAC-24, CITYSAC-33, CITYSAC-34, and SCWA-1. DWR objected to Roseville-3, CITYSAC-17, CITYSAC-22 through CITYSAC-24, and SCWA-1 as lacking foundation or

relevance because those exhibits were not referenced in direct testimony or used during cross-examination. DWR's objections to these exhibits lack merit.

Roseville-3 is a table showing the City of Roseville's recent water deliveries. Contrary to DWR's assertion, Roseville-3 was discussed in the direct testimony of Richard Plecker, the City of Roseville's Environmental Utilities Director. (Roseville-1e, p. 1.) Mr. Plecker's testimony provided foundation for the exhibit and explained its relevance.

CITYSAC-17 is the City of Sacramento's operating contract with the U.S. Bureau of Reclamation. Contrary to DWR's assertion with respect to this exhibit, James Peifer, Principal Engineer and Policy and Legislation Manager for the City of Sacramento, discussed the contract in his direct testimony, although he did not cite to the document by exhibit number. (CITYSAC1, pp. 4-5.) CITYSAC-22 through CITYSAC-24 do not require "sponsoring" testimony. These exhibits are technical memorandums prepared for the City of Sacramento concerning the effect of low flow conditions on the city's intake facilities on the American and Sacramento Rivers. Formal authentication of these documents was unnecessary and their relevance to the city's claim of injury is self-evident.

SCWA-1 is a figure depicting the location of two of the SCWA's groundwater wells. Contrary to DWR's assertion, SCWA-1 was used during cross-examination of DWR's witnesses John Bednarski and Gwendolyn Buchholz. (R.T. (Aug. 5, 2016) 89:13-95:21.) Foundation for the exhibit was provided and its relevance explained during cross-examination.

CITYSAC-33 and CITYSAC-34 are the City of Sacramento's comments on the BDCP DEIR/DEIS and the RDEIR/SDEIS. DWR argued that these exhibits are irrelevant because challenges to the environmental review process are outside the scope of the hearing and that the comments themselves lack evidentiary support. These exhibits were not submitted in support of a CEQA challenge, however, and their relevance is explained by the city's witness, Bonny L. Starr. (CITYSAC-8, p. 22.)

For the foregoing reasons, DWR's objections to Roseville-3, CITYSAC-17, CITYSAC-22 through CITYSAC-24, CITYSAC-33, CITYSAC-34, and SCWA-1 are overruled.

In addition to written objections, DWR made an oral objection during the hearing, which was joined by the State Water Contractors, to the redirect testimony of Jeffrey Weaver, an expert witness for the American River Water Agencies (ARWA). During cross-examination, Mr. Weaver had conceded that he had incorrectly determined the water year classification for 1932 in his analysis of the petitioners' modeling results for Folsom Reservoir operations and flows below Nimbus Dam. On redirect, Mr. Weaver explained why he believed that his mistake did not change his analysis or conclusions. (R.T. (Oct. 27, 2017) 11:18-17.7, 21:14-23:5, 27:4-13.) DWR and the State Water Contractors argued that Mr. Weavers had changed his opinion, and his testimony on redirect was impermissible surprise testimony. (*Id.* at 23:12-24:14, 25:19-26, 31:19-23.) This argument lacks merit, however, because the State Water Board's policy of discouraging surprise testimony does not preclude surprise testimony during cross-examination, redirect examination, or recross-examination. It was appropriate for the ARWA parties to respond to information that was revealed during cross-examination of Mr. Weaver through redirect examination.

Disposition: BKS-1 through BKS-3 were offered and accepted into evidence during Part 1A of the hearing on July 29, 2016. (R.T. (Jul. 29, 2016) 126:7-127:12.) The remaining testimony and exhibits listed on the exhibit identification indices submitted on November 2, 2016, by the City of Folsom, the City of Roseville, San Juan Water District, Sacramento Suburban Water

District, the City of Sacramento, and SCWA, are admitted into the evidentiary record, except that CITYSAC-31 is not accepted in the evidentiary record because it was not offered into evidence by the City of Sacramento, and a duplicate copy of DWR-552, duplicate copies of ARWA-100 through ARWA-106, and duplicate copies of SVWU-1, SVWU-2, and SVWU-100 through SVWU-110 are not admitted on behalf of these parties.

Placer County Water Agency

DWR's, SLDMWA's, and Westlands' objections to the testimony and exhibits submitted by Placer County Water Agency (PCWA) are addressed in the general discussion, above.

Disposition: The testimony and exhibits listed on PCWA's exhibit identification index submitted on November 2, 2016, are admitted into the evidentiary record, except that a duplicate copy of SWRCB-84 (also submitted by DWR) and duplicate copies of ARWA-100 through ARWA-106 (also submitted by the ARWA group), and duplicate copies of SVWU-1, SVWU-2, and SVWU-100 through SVWU-110 are not admitted on behalf of PCWA.

Carmichael Water District

DWR's and SLDMWA's objections to the testimony and exhibits submitted by Carmichael Water District (CWD) are addressed in the general discussion, above.

Disposition: The testimony and exhibits listed on CWD's exhibit identification index submitted on November 2, 2016 are admitted into the evidentiary record, except that duplicate copies of SVWU-1, SVWU-2, and SVWU-100 through SVWU-110 are not admitted on behalf of CWD.

Group 8

Tehama-Colusa Canal Authority

Hearing Officer Doduc ruled on the objections to the testimony of Tehama-Colusa Canal Authority's (TCCA) witness, Jeffrey P. Sutton, during the hearing. Hearing Officer Doduc sustained SLDMWA's relevancy objection to the portion of Mr. Sutton's testimony concerning the potential impact of Delta flow criteria on TCCA members because that issue is outside the scope of Part 1 of the hearing. Hearing Officer Doduc admitted into the evidentiary record the remainder of Mr. Sutton's testimony and TCCA's exhibits. (R.T. (Oct. 26, 2016) 120:8-121:14.)

Group 9

North Delta Water Agency and Member Districts (Reclamation Districts 999, 2060, 2068)

SLDMWA's objections to North Delta Water Agency's (NDWA) testimony and exhibits are addressed in the general discussion, above.

DWR's objections to some of NDWA's exhibits remain to be addressed. DWR objected to NDWA-35, NDWA-36, NDWA-41, NDWA-42, and NDWA-43 as lacking foundation or relevance because those exhibits were not referenced in direct testimony or used during cross-examination. NDWA-35 and NDWA-36 are NDWA's comments on the BDCP EIR/EIS and RDEIR/SDEIS, respectively. In addition, DWR objected to NDWA-37 and NDWA-38, which are comments on the BDCP EIR/EIS and RDEIR/SDEIS that were submitted by the California Central Valley Flood Control Association (CCVFCA). DWR argued that these two exhibits should be excluded because challenges to the environmental review process are outside the

scope of Part 1 of the hearing, and NDWA's witnesses did not establish how the comments are relevant.

Contrary to DWR's assertions, all of these exhibits are discussed in the direct testimony of NDWA's witnesses. Melinda Terry discussed the comment letters, NDWA-35, NDWA-36, NDWA-37, and NDWA-38, in her direct testimony. (NDWA-7, p. 2.) Ms. Terry signed NDWA-35 and NDWA-36 as Manager of NDWA, and she signed NDWA-37 and NDWA-38 as Executive Director of CCVFCA. Ms. Terry cited these exhibits as evidence of her experience participating in other planning processes related to the WaterFix Project. Ms. Terry did not allege that the environmental documentation for the WaterFix Project is inadequate for purposes of CEQA or NEPA, or cite to these exhibits in support of such an allegation. Although DWR may disagree with the merits of the comments made in these exhibits, they are relevant both to Ms. Terry's qualifications as a witness and NDWA's claim of injury.

Tom Slater, President of the Board of Trustees of Reclamation District 999 and a Delta farmer, authenticated and explained the relevance of NDWA-41, NDWA-42, and NDWA-43 in his testimony. NDWA-41 is a map that he prepared depicting the district's siphons, and NDWA-42 and NDWA-43 are two photographs that he took of a siphon. (NDWA-10, pp. 3-4.)

For the foregoing reasons, DWR's objections to NDWA-35, NDWA-36, NDWA-37, NDWA-38, NDWA-41, NDWA-42, and NDWA-43 for lack of foundation and relevance are overruled.

Disposition: The testimony and exhibits listed on NDWA's exhibit identification index submitted on November 9, 2016 are admitted into the evidentiary record.

Group 10

City of Brentwood

SLDMWA's hearsay objection to Susan Paulsen's testimony and DWR's objections to the testimony of Chris Ehlers on the grounds of relevancy, speculation, and lack of foundation, are addressed in the general discussion, above.

DWR also argued that the City of Brentwood does not have standing to participate in Part 1 of this proceeding because the city does not hold a surface water right. Participation in this proceeding is not limited to surface water right holders, however, and therefore DWR's objection is overruled.

DWR objected to exhibit Brentwood-104, which is the City's comment letter on the WaterFix Project EIR. DWR argued that this letter "incorporates general testimony of unknown relevance and constitutes impermissible surprise testimony because it is impossible to determine exactly which parts of the incorporated testimony the witness actually intends to use as direct testimony, and what additional conclusions are made for purposes of this hearing." DWR also argued that Brentwood-104 lacks foundation and demonstrated relevance. (DWR's Objections to Testimony and Exhibits Submitted by City of Brentwood (Group 10) and Motion to Strike, p. 4.) This objection lacks merit because the City of Brentwood does not purport to incorporate Brentwood-104 into testimony, and this exhibit was submitted by the due date for the city's case-in-chief. Accordingly, Brentwood-104 does not constitute surprise testimony. In addition, Brentwood-104 does not require formal authentication, and it is relevant to the potential impacts of the WaterFix Project on the city. DWR's objection to this exhibit is overruled.

DWR also objected to Brentwood-101, 102, 103, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, and 117 because the City of Brentwood failed to provide any witness testimony

authenticating any of its exhibits as being “true and correct copies.” In fact, Brentwood-101 (Dr. Paulsen’s *curriculum vitae*) and Brentwood-102 (Dr. Paulsen’s report) are authenticated in Dr. Paulsen’s testimony. (Brentwood-100, pp. 1-2.) We find nothing unnecessary or improper about the remaining exhibits, and these objections are overruled, with one exception. Submittal of Brentwood-103, the Notice of Petition and Notice of Public Hearing and Pre-Hearing Conference, was not necessary or proper because that document is already a part of the administrative record and it is not evidentiary in nature.

Disposition: The testimony and exhibits listed on City of Brentwood’s Identification Index dated December 21, 2016, are accepted into the evidentiary record, with the exception of Brentwood103.

Delta Flood Control Group (Brannan-Andrus Levee Maintenance District, Reclamation District 407, Reclamation District 2067, Reclamation District 317, Reclamation District 551, Reclamation District 563, Reclamation District 150, Reclamation District 2098)

DWR’s and SLDMWA’s objections to the Delta Flood Control Group’s (DFCG) testimony and exhibits are addressed in the general discussion, above, with the exception of DWR’s objections to exhibits DFCG-8 through DFCG-11. DFCG-8 through DFCG-10 depict photos of levees cracking on Grand Island during the recent drought, and exhibit DFCG-11 is a report prepared by DWR concerning the incident. DWR argued that these exhibits are irrelevant because they show damage caused by trees, not construction. As explained by DFCG’s witness Gilbert Cosio, Jr., however, the levee damage depicted and described in DFCG-8 through DFCG-11 was caused by a lowering of the groundwater table, which can be caused by trees or by construction. (R.T. (Oct. 28, 2016) 218:21-219:10, 230:15- 233:21.) Accordingly, the exhibits are relevant to the potential construction-related impacts of the WaterFix Project, and DWR’s objection is overruled.

Disposition: The testimony and exhibits listed on DFCG’s Identification Index submitted on November 9, 2016, are admitted into the evidentiary record.

Group 11

The Water Forum

The Water Forum submitted a NOI, but did not submit any testimony or exhibits.

Group 12

County of Colusa

The County of Colusa submitted a NOI, but did not submit any testimony or exhibits in Part 1 of the hearing.

Group 13

Sacramento Regional County Sanitation District

DWR objected to all of Sacramento Regional County Sanitation District’s testimony and exhibits, which concern recycled water projects, as irrelevant because the district has not submitted any evidence that would support claims of damages, harm, impact, or injury to the district. (DWR’s Objections to Sac. Regional Sanitation District Case-in-Chief Part 1B, p. 3.) DWR acknowledged that the district’s opening statement asserts that the WaterFix Project would

injure the district's right to treated wastewater, but noted that an opening statement is not testimony or evidence. DWR also argued that any claim of injury improperly assumes that DWR will rely on the district's treated wastewater discharges to meet DWR's obligations. Likewise, SLDMWA objected to Christoph Dobson's testimony about certain recycled water projects as irrelevant because those projects have not been approved or funded and are unrelated to the issue of injury to legal users of water.

These objections lack merit because, as explained in the general discussion above, it is not necessary or required that every witness' testimony contain a direct link to a key issue. A witness may present only a piece of information that is connected to the case a party intends to make through subsequent testimony, or in an opening statement or closing brief. Moreover, DWR's and SLDMWA's arguments concerning the relevancy of recycled water projects to the district's claim of injury go to the merits of the district's claim, not the admissibility of the district's testimony and exhibits. Accordingly, DWR's and SLDMWA's objections are overruled.

Disposition: The testimony and exhibits listed on Sacramento Regional County Sanitation District's Exhibit Identification Index dated November 16, 2016, are admitted into the evidentiary record.

Group 14

County of Yolo

The County of Yolo did not submit any testimony or exhibits in Part 1 of the hearing.

Group 15

East Bay Municipal Utility District

SLDMWA and Westlands' hearsay objections to EBMUD's exhibits are addressed in the general discussion of hearsay exhibits, above.

SLDMWA also objected to Eileen M. White's testimony about possible physical effects and damage from construction and operation of the WaterFix Project to EBMUD's current Mokelumne Aqueduct pipelines. SLDMWA argued that Ms. White's testimony is irrelevant because her testimony does not concern injury to EBMUD's water rights, she speculates on future effects to EBMUD's existing facilities, and she improperly assumes that petitioners will construct or operate the WaterFix Project facilities in a negligent or illegal manner. SLDMWA also objected to Xavier Irias' testimony as irrelevant because it speculates on future effects to EBMUD's existing facilities and a nonexistent EBMUD tunnel. These issues go to the merits of EBMUD's case-in-chief, not the admissibility of the witnesses' testimony. Accordingly, SLDMWA's objections are overruled.

DWR objected on the grounds of relevance to EBMUD-X1, EBMUD-X2 and EBMUD-X3 because they were not referenced in direct testimony or used during the course of cross-examination. EBMUD-X1 and EBMUD-X2 are identifiable of the face of the documents. Further, all three exhibits were identified and discussed in the course of EBMUD's cross-examination of DWR's witness, Dr. Nader-Tehrani. (R.T. (Aug. 24, 2016) 90:10-91:24, 93:11-94:11, 106:25-109:1) The exhibits were authenticated and their relevance explained, and therefore DWR's objection is overruled.

DWR also objected to EBMUD-176, EBMUD's comments on the BDCP EIR/EIS, as being outside the scope of Part 1 of this proceeding, duplicative, and unnecessary. Two of EBMUD's

witnesses, Benjamin S. Bray and Mr. Irias, cited this comment letter in portions of their testimony concerning the potential effects of the WaterFix Project on EBMUD's interests. EBMUD-176 was not offered in support of a CEQA challenge. In addition, EBMUD-176 supplements the witnesses' testimony, and is not entirely duplicative or unnecessary. DWR's objection is overruled.

Disposition: The testimony and exhibits listed on EBMUD's Exhibit Identification Index submitted on November 9, 2016, are admitted into the evidentiary record.

Group 16

South Valley Water Association, Friant North Authority, and the Friant Water Authority

By letters dated October 13, 2016, South Valley Water Association and its participating members, the Friant North Authority, and the Friant Water Authority withdrew their protests and any materials submitted in connection with their protests. These parties have not offered any testimony or exhibits.

Group 17

San Joaquin River Exchange Contractors Water Authority

The San Joaquin River Exchange Contractors Water Authority (SJRECWA) sought to subpoena DWR's witnesses to testify during Part 1B. We granted DWR's motion for a protective order, and SJRECWA's petition for reconsideration of our ruling on DWR's motion remains pending. SJRECWA submitted two exhibits, SJRECWA-1 and SJRECWA-2, before Part 1B of the hearing, but has not offered those exhibits into evidence. DWR objected to SJRECWA's exhibits as lacking foundation or any demonstrated relevance because they were not used in any direct testimony or on cross-examination. Because SJRECWA has not offered these exhibits into evidence, we need not rule on DWR's objections.

Disposition: SJRECWA-1 and SJRECWA-2 are not admitted into the evidentiary record.

Group 18

San Joaquin Tributaries Authority (SJTA), Merced Irrigation District, Modesto Irrigation District, Oakdale Irrigation District, South San Joaquin Irrigation District, Turlock Irrigation District, and City and County of San Francisco

No party objected to the exhibits introduced by the SJTA during cross-examination and offered into evidence.

Disposition: The exhibits listed on SJTA's Exhibit Identification Index submitted on December 19, 2016, are admitted into the evidentiary record.

Groups 19 and 20

Local Agencies of North Delta, Bogle Vineyards/DWLC, Diablo Vineyards/DWLC, Stillwater Orchards/DWLC, Islands, Inc., San Joaquin County, San Joaquin County Flood Control and Water Conservation District, Mokelumne River Water and Power Authority, and Daniel Wilson

SLDMWA's objections to the testimony presented by LAND and SLDMWA and Westlands' hearsay objections to LAND's exhibits are addressed in the general discussion. Most of DWR's objections to the testimony presented by LAND also are addressed in the general discussion. One of DWR's objections to the testimony of Mr. Van Loben Sels and DWR's objections to LAND's exhibits are discussed below.

DWR objected to testimony from Russell Van Loben Sels and asked that it be excluded in its entirety because the specific topic of impacts to Amistad Ranch was not identified on LAND's original NOI and the hearing officers did not grant permission to add a new witness or topic. We find that Mr. Van Loben Sels' testimony is consistent with the general description of proposed testimony contained in LAND's original NOI, and therefore there is no basis for excluding his testimony.

DWR objected to LAND-3, LAND-4, LAND-5, LAND-6, LAND-7, LAND-57, LAND-58, and LAND-60, a series of figures based on underlying maps from an unidentified source created by the firm BSK Associates. DWR also objected to LAND-59, which consists of maps that appear to have been excerpted from the DEIR/DEIS for the WaterFix Project, on which well locations have been depicted by hand. DWR argued that while cited and relied on by various witnesses, none of the witnesses could testify concerning the preparation of these exhibits. In response to DWR's objections, the attorney for LAND attempted to provide foundation for these exhibits through a declaration and oral, direct testimony from a witness; however, we sustained DWR's objection to the declaration and testimony because they constituted surprise testimony submitted after the due date for the parties' case-in-chief. (See R.T. (Nov. 4, 2016) 4:8-25.) LAND was given various options for these exhibits moving forward, including submitting them over DWR's objection, or resubmitting them with proper authentication on rebuttal. LAND-3 through LAND-7, and LAND-57 through LAND-60 will not be admitted into the record at this time. These exhibits do not identify the source of information depicted, and neither the exhibits themselves nor any of LAND's witnesses explained how the exhibits were prepared or by whom.

In contrast, LAND-1, LAND-2, LAND-8, LAND-65, LAND-66, and LAND-69 are all identifiable on their face and are admissible. DWR objected to LAND-69, which is a draft document titled "DCE CM1 Property Management Plan" that is marked "Confidential draft – Prepared for internal discussion purposes only and not intended for public distribution." DWR argued that no witness provides any information about how the document was acquired or whether this draft is reliable. This exhibit contains sufficient information concerning its origin and purpose to meet the standard for admissibility. The fact that it is an internal draft goes to the weight to be afforded this exhibit.

LAND-50 is described in LAND's exhibit identification index as "Russell Van Loben Sels Water Rights associated with S021406." LAND-51 through LAND-55 are described as the water rights of three individuals, Diablo Vineyards, and unidentified LAND member property owners "as described in the protest filed on January 5, 2016." LAND offered these "exhibits" into evidence as exhibits by reference pursuant to California Code of Regulations, title 23, section 648.3. Under that that section, otherwise admissible evidence may be received without the

necessity of supplying copies, provided that the original or a copy is in the possession of the State Water Board and the specific file folder or other exact location where it can be found is identified. Here, LAND does not point to a specific exhibit or file; rather, LAND's exhibit identification index refers to a water right as described in LAND's protest. The protest (which was not submitted as an exhibit) does not identify the water right permits or licenses held by the protestants, or any statements of diversion and use filed by any protestants who may claim to hold riparian or pre-1914 appropriative rights. Instead, the protest contains Exhibit B "Description of LAND water rights" which generally describes a geographic area, and references Exhibit C for points of diversion. Exhibit C appears to be a screen shot from the eWRIMs database with numerous arrows, presumably referencing points of diversion in the area displayed.

There are several problems with this approach. First, it is not appropriate to offer as an exhibit by reference a vague description of a water right, as opposed to a discrete exhibit, that is located somewhere in a secondary document. LAND could have submitted its protest as an exhibit, but the protest, itself, does not contain any reference to a specific water right. Second, the protest only contains a general narrative describing a geographic area, without any specific permit, license or statement numbers. Attaching a screenshot of the eWRIMs database with hundreds of highlighted points of diversion does not suffice as evidence of any particular water right that may be held by LAND protestants.

While phrased somewhat ambiguously, the description of LAND-50 contained in LAND's exhibit identification index at least contains a statement number. A statement of diversion and use does not constitute a water right, but a statement can be used to help substantiate a claim of a water right. We will interpret LAND-50 to be the statement of diversion and use that is on file with the State Water Board and may be offered into evidence as an exhibit by reference. LAND-51 through 55 cannot be admitted into the record at this time, by reference or otherwise. We will allow the protest to be admitted as an exhibit and will label it as LAND-62.

LAND withdrew the remaining exhibits to which DWR objected.

Disposition: Subject to the ruling above, the testimony and exhibits listed on LAND's Exhibit Identification Index dated November, 28, 2016 (including revised LAND-62 [protest]), are admitted into the evidentiary record, with the following exceptions: LAND-3 through LAND-7, LAND-57 through LAND-60, and LAND-51 through 55.

Islands, Inc.

DWR's and SLDMWA's objections to the testimony presented by Islands, Inc. are addressed in the general discussion, above. DWR's objections to Islands, Inc.'s exhibits are discussed below.

DWR objected to exhibits II-4, II-5, II-6, II-7, II-8, II-11, II-17, II-18, II-20, II-31, II-33, II-34, II-35, II-36, II-37, II-38, and II-39 as lacking foundation and relevance because they were not referenced in any of the testimony of Islands, Inc. witnesses. These objections lack merit. DWR's objections to the following exhibits are no longer an issue because they have been withdrawn: II-6, Exhibits II-11, II-31, II-34, II-35, and II-36. Exhibit II-8 was cited in Stanley Grant's testimony. (II-2-Revised, p. 4.) II-17 and II-18 were discussed in Michelle Leinfelder-Miles' testimony, although she did not refer to those specific exhibit numbers. (See II-14 [Dr. Leinfelder-Miles' PowerPoint presentation].) Exhibits II-37, II-38 and II-39 are all cited and explained in the written testimony of Thomas Hester. (II-40, pp. 1-2.) The other exhibits contain enough identifying criteria on the face of the documents to be admitted into the record.

DWR also objected to the admission of II-26 and II-27 into the record. These are reports by CCWD dated 2009 and 2010, respectively. During the hearing, DWR and the State Water Contractors argued that because CCWD has withdrawn from the hearing, the documents lack adequate authentication as to whether they are true and correct copies, or represent the current opinions of CCWD. In most instances, the State Water Board does not need the formality of a witness or attorney affirming that a document is true and correct copy. We are capable of determining from the face of an exhibit certain indicia of reliability such as whether a document is a published paper, when it was written, who authored it, and for what purpose. Additional foundational information may be required for exhibits that are not official records, published reports, or formal letters, such as photographs and sound recordings, or unexplained hand-crafted exhibits. This is not the case for II-26 and II-27. These exhibits contain enough identifying information on their face to be admitted into the record. Whether they represent the current position of CCWD is an issue that DWR and the State Water Contractors may address on rebuttal.

Disposition: The testimony and exhibits listed on Islands Inc.'s Exhibit Identification Index dated November 28, 2016 are admitted into the evidentiary record.

Group 21

Central Delta Water Agency, South Delta Water Agency, Lafayette Ranch, Heritage Lands Inc., Mark Bachetti Farms, and Rudy Mussi Investments L.P.

SLDMWA's objections to the testimony presented by Central Delta Water Agency, SDWA, Lafayette Ranch, Heritage Lands Inc., Mark Bachetti Farms, and Rudy Mussi Investments L.P. (SDWA parties) are addressed in the general discussion, above, with the exception of the testimony of Linda Turkatte, whose testimony on behalf of the SDWA parties was withdrawn. SLDMWA and Westlands' hearsay objections to the SDWA parties' testimony and exhibits are also addressed above. The objections of DWR, the SVG, and TCCA to the testimony and associated exhibits of Jeffrey Michael and Dante Nomellini also have been addressed, with the exception of one exhibit discussed below.

DWR objected to exhibits SDWA-1, SDWA-17, SDWA-19, SDWA-20, SDWA-26, SDWA-30, SDWA-32 through SDWA-34, SDWA-187, SDWA-198 and SDWA-199 as lacking foundation and relevance. Upon review, SDWA-1, SDWA-26, SDWA-33, and SDWA-187 do not contain sufficient information to confirm the identity of the documents and, therefore, will not be admitted into the record. Since SDWA-187 is already a part of SDWA-152, it does not need to be submitted as its own exhibit.

DWR requested that the testimony of Linda Turkatte, SDWA-42, and the associated exhibits (SDWA-41 and SDWA-43 through SDWA-66) and the testimony of Erik Ringelberg, SDWA-73, and the associated exhibits (SDWA-72, SDWA-74, and SDWA-221 through SDWA-242) be excluded from the record because the attorney for the SDWA parties decided not to call these witnesses for their case-in-chief. (R.T. (Nov. 4, 2016) 7:12-8:19.) We agree. The testimony and exhibits are duplicative of San Joaquin County exhibits SJC-002 (and associated exhibits SJC-001 and SJC-16 through SJC-39) and SJC-4 (and associated exhibits SJC-3 and SJC-45 through SJC-68). There is no need for the SDWA parties to submit duplicate exhibits.

DWR objected to the submittal of SDWA-153, which is no longer referenced in the revised testimony submitted by witness Dante Nomellini in response to the Hearing Officer's rulings on October 7, 2016, and on November 4, 2016, during the hearing. SDWA-153 contains sufficient

identification on the face of the document and does appear to be related solely to Part 2 issues and may, therefore, be admitted into the record.

DWR also requested that pages 20 and 21 be removed from SDWA-152-R. In this PowerPoint, pages 20-21 are clearly marked as "Withdrawn per Nov. 4 ruling." These pages may remain in the exhibit to provide clarity for the record as it appears that some cross-examination may have been conducted on a portion of these pages. (R.T. (Nov. 30, 2016) pp. 164-168.) These slides will not be afforded any evidentiary weight.

Disposition: The testimony and exhibits listed on the SDWA parties' Exhibit Identification Index dated December 15, 2016, are admitted into the evidentiary record, with the following exceptions: SDWA-1, SDWA-26, SDWA-33, SDWA-41 through 66, SDWA-72 through SDWA-74, SDWA-153, SDWA-187, and SDWA-221 through SDWA-242.

Group 22

City of Stockton

DWR's objections to the testimony of Robert L. Granberg on behalf of the City of Stockton are addressed in the general discussion. SLDMWA and Westlands' hearsay objections to some of the City of Stockton's exhibits also are addressed in the general discussion. DWR submitted various evidentiary objections to the City of Stockton's opening statement that are invalid because opening statements are not evidence. DWR's objections to the city's exhibits are addressed below.

DWR objected to exhibits STKN-5, STKN-6, STKN-7, STKN-8, STKN-9 and STKN-21, on the grounds that they lack foundation and relevance because they were not referenced in direct testimony or utilized during cross-examination. Contrary to this assertion, however, these exhibits were specifically identified, labeled, and used on cross-examination (see, e.g., R.T. (Aug. 25, 2016) 86:14-105:9 [STKN-5, STKN-6, STKN-7, STKN-8, and STKN-9]), or directly cited in written, direct testimony (see STKN-10, p. 13 [authenticating STKN-21]). DWR's objections are overruled.

DWR's objections to comment letters on the BDCP NOP (STKN-2), the BDCP DEIR/EIS (STKN-3) and the WaterFix RDEIR/SDEIS (STKN-4) as exhibits are overruled. DWR argued that these comment letters amount to surprise testimony that is irrelevant and misleading without the benefit of corresponding responses. We disagree. Mr. Granberg cited the comment letters in his testimony, but he did not purport to incorporate them by reference into his testimony. In addition, these exhibits were submitted by the deadline for the submittal of the city's case-in-chief. Accordingly, they do not amount to surprise testimony. As explained in Mr. Granberg's testimony, the comment letters are relevant to the potential water quality impacts of the WaterFix Project that concern the city. Mr. Granberg did not cite the comment letters in support of a CEQA challenge. Finally, DWR may offer the final EIR/EIS, including responses to comments, into evidence at a later stage in this proceeding.

Disposition: The testimony and exhibits listed on City of Stockton's Exhibit Identification Index dated November 16, 2016 are admitted into the evidentiary record.

Group 23

Stockton East Water District

Stockton East Water District submitted a NOI indicating the district's intent to participate through cross-examination and rebuttal only. The district has not submitted any testimony or exhibits.

Group 24

County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, Mokelumne River Water and Power Authority

SLDMWA objected to the testimony of Linda Turkatte (SJC-002) that discusses present conditions in the Delta and the occurrence of algal blooms. SLDMWA argued that this is irrelevant to the issues of the potential effects of the WaterFix Project on legal uses and users of water, and consideration of this extensive testimony on current conditions would result in undue consumption of time in this proceeding and should be stricken in its entirety. DWR also objected to Ms. Turkatte's testimony and the exhibits she relied on (SJC-16 through SJC-39), as solely concerning current conditions in the Delta regarding algal blooms and microcystis. DWR argued that the exhibits provide no information regarding impacts of the WaterFix Project on such conditions. As discussed above, however, a witness may testify on an issue related to a key issue without addressing the key issue directly. In this case, testimony discussing current conditions in the Delta is relevant to understanding any incremental change to current conditions that may be caused by the WaterFix Project. These objections are overruled.

Disposition: The testimony and exhibits listed on San Joaquin County et al.'s Exhibit Identification Index dated November 28, 2016, are admitted into the evidentiary record, except that duplicate copies of SWRCB-1 through SWRCB-5 (also submitted by DWR), DWR-3, DWR-5, DWR-515, SDWA-133, SDWA-134-R, SDWA-135-R, LAND-35-Errata, and LAND-36 through LAND-39) are not admitted on behalf of San Joaquin County et al.

Group 25

County of Solano, Contra Costa County and Contra Costa County Water Agency

The County of Solano, Contra Costa County, and Contra Costa County Water Agency participated in this part of the hearing through cross-examination. They did not present any testimony or offer any exhibits into evidence.

Group 26

Contra Costa Water District

By letter dated March 29, 2016, CCWD withdrew its protest against the change petition for the WaterFix Project. CCWD has not offered any testimony or exhibits into evidence.

Group 27

City of Antioch

DWR's and SLDMWA's objections to the testimony presented by the City of Antioch are addressed in the general discussion. SLDMWA and Westlands' hearsay objections to the city's

exhibits are also addressed in the general discussion. DWR's objections to the city's exhibits are addressed below.

DWR's objections to various technical reports and articles marked as exhibits Antioch-216 and Antioch-226 through Antioch-229 on the grounds that they lack foundation are overruled. These exhibits are identifiable on their face and, therefore, do not require formal authentication.

DWR objected to the City of Antioch's exhibits that duplicate DWR's testimony and exhibits and were simply relabeled as City of Antioch exhibits. In its response, the city explained that these exhibits were submitted independently because DWR's exhibits had not been admitted into evidence yet. We appreciate the city's willingness to cite to DWR's exhibits once admitted into the record in lieu of submitting such exhibits separately. To avoid unnecessary duplication and confusion in the record, these documents will not be admitted into the record with alternate exhibit identification numbers. With the exception of one citation to Antioch-206, there do not appear to be any references to the city's exhibit numbers in written or oral testimony that might create confusion if these were eliminated.

It is not necessary to submit Antioch-203, the Notice of Petition and Notice of Public Hearing and Pre-Hearing Conference, because it is already a part of the administrative record.

DWR also objected to Antioch-219, the city's comments on the WaterFix RDEIR/SDEIS, because its relevance was not established through testimony and "challenges to the environmental review process are outside the scope of Part 1 of this proceeding." This comment letter is related to the content of Dr. Paulsen's testimony and was not submitted in support of a CEQA challenge. DWR's objection is overruled.

Disposition: The testimony and exhibits listed on City of Antioch's Exhibit Identification Index dated December 21, 2016, are admitted into the evidentiary record, with the following exceptions: Antioch-203, Antioch-204 (DWR-5), Antioch-206 (DWR-66), Antioch-207 (DWR-513), Antioch-213 (DWR-53), Antioch-214 (DWR-301), Antioch-220 (DWR-51), Antioch-221 (DWR-71), Antioch-223 (DWR-61), Antioch-229 (DWR-509), and Antioch-230 (DWR-512).

Group 28

California Delta Chambers and Visitors Bureau

Although the California Delta Chambers and Visitors Bureau submitted a NOI, it did not present any testimony or offer any exhibits into evidence.

Group 29

Steamboat Resort

Although Steamboat Resort submitted a NOI, it did not present any testimony or offer any exhibits into evidence.

Group 30

Save the California Delta Alliance, Janet and Michael McCleary, Frank Morgan, and Captain Morgan's Delta Adventures, LLC

With one exception, discussed below, the objections of DWR, SLDMWA, the SVG, and TCCA to the testimony presented by SCDA et al. are addressed in the general discussion, or have been addressed in earlier rulings concerning testimony outside the scope of Part 1 of the hearing.

DWR argued that Michael Brodsky's testimony goes beyond the scope of SCDA's NOI in violation of our August 24, 2016 ruling. In our ruling, we determined that SCDA could not expand the scope of their participation to present evidence relevant to issues other than impacts to human uses, including in particular evidence to support the claim that members of SCDA hold riparian water rights. Although Mr. Brodsky's testimony includes broad allegations that the proposed changes would result in injury to legal users, his underlying factual assertions concern impacts to human uses. Consistent with our ruling, SCDA has not offered any evidence concerning Discovery Bay riparian rights. Mr. Brodsky's testimony generally falls within the parameters of SCDA's NOI. This objection is overruled.

At the close of Part 1, DWR objected to the admission of SCDA-63 and SCDA-64. SCDA-63 is a letter from DWR to the State Water Board, which SCDA used during cross-examination of Jennifer Pierre, and SCDA-64 is a declaration authenticating three other exhibits used during cross-examination. DWR also objected to exhibits SCDA-3 and SCDA-5, two handmade figures drawn by Mr. Brodsky and used in the cross-examination of John Leahigh on August 18, 2016. We find nothing unnecessary or improper about these submittals and these objections are overruled.

DWR also objected to SCDA-20, SCDA-63, and SCDA-64 on the grounds that they lack foundation or relevance because they were not mentioned in direct testimony or used during cross-examination. With respect to SCDA-63 and SCDA-64, this assertion is incorrect. As stated above, SCDA used SCDA-63 and SCDA-64 during cross-examination. (R.T. (July 29, 2016) 228:18-234:4, 248:9-254:14, 260:13-261:2.) SCDA-20 is a copy of a minute order in the *Delta Stewardship Council Cases* (Super. Ct. Sacramento County, 2016, JCCP 4758). This exhibit is self-authenticating, but does not appear to be relevant. The *Delta Stewardship Council Cases* involved challenges to the Delta Plan developed by the Delta Stewardship Council pursuant to the Delta Reform Act of 2009. SCDA has not shown how this exhibit has any bearing on the key hearing issues for Part 1 of this hearing. Accordingly, DWR's objection to this exhibit is sustained.

DWR also objected to the appearance of several footnotes in Mr. Brodsky's testimony that were stricken as untimely additions of testimony on November 16, 2016. In addition, the written testimony of Mr. Brodsky and Frank Morgan, which was revised in response to our October 7, 2016 ruling, does not reflect the additional text that was stricken pursuant to our November 16, 2016 ruling. State Water Board staff will make these changes so that the text and footnotes are shown in strikeout type.

DWR objected to the submittal of SCDA-40 and SCDA-41, comments on the BDCP DEIR/EIS and the WaterFix RDEIR/EIS as being outside the scope of Part 1 of this proceeding. These comment letters are related to the testimony of Mr. Brodsky and do not appear to have been submitted in support of a CEQA challenge. DWR's objection is overruled.

DWR objected to the fact that SCDA marked its opening statement as an exhibit, SCDA-38. SCDA has acknowledged that this was a mistake, and SCDA did not intend to offer its opening statement into evidence.

Disposition: The testimony and exhibits listed on SCDA's Exhibit Identification Index dated December 7, 2016, are admitted into the evidentiary record, with the following exceptions: SCDA-20, SCDA-22 (original testimony of Janet McCleery), SCDA-25 (original testimony of Frank Morgan), SCDA-38, and SCDA-48 (original testimony of Michael Brodsky). In addition, duplicate copies of Antioch-216, DWR-117, and SWRCB-21 (also submitted by DWR) are not admitted on behalf of SCDA.

Group 31

AquAlliance

With the exception of the issues discussed below, DWR's and SLDMWA's objections to the testimony presented by AquAlliance are addressed in the general discussion, or they were addressed in previous rulings regarding testimony outside the scope of Part 1 of the hearing. SLDMWA and Westlands' hearsay objections to AquAlliance's exhibits also are addressed in the general discussion.

SLDWA and DWR objected to portions of testimony addressing the effect of groundwater substitution transfers on stream flow and water tables (see, e.g., AQUA-1 [testimony of Barbara Vlamis]; AQUA-3 [testimony of Jim Brobeck]; AQUA-5 [testimony of Kit H. Custis]), as irrelevant to the issue of the change petition's potential effects on legal users of water. DWR argued that while the WaterFix Project might increase system capacity to implement water transfers, this is not a direct impact or injury caused by the proposed changes on a municipal, industrial, or agricultural use of water. Thus, this would best be addressed in the environmental review process pursuant to CEQA. Similarly, SLDMWA argued that the impacts from transfers are irrelevant because the State Water Board will not be approving any water transfers as part of the change petition proceeding. These objections go to the merits of the witnesses' claims concerning the potential impacts of the WaterFix Project on groundwater resources, not the admissibility of their testimony. Accordingly, these objections are overruled.

DWR objected to the testimony of Kit Custis (AQUA-5, p. 5) that purports to incorporate previously-written letters into his testimony for this hearing. DWR argued that the letters (Exhibits AQUA-29 through 33) are comprised of thousands of pages and constitute impermissible surprise testimony because it is impossible to determine exactly which parts of the incorporated testimony Mr. Custis actually intends to use as his direct testimony, and what additional conclusions he intends to make. We agree. While Mr. Custis may rely on these as exhibits to support his testimony, he may not convert existing documents wholesale into his testimony by simply incorporating them by reference. AQUA-29 through AQUA-33 may be submitted as exhibits, but will not be considered part of Mr. Custis' testimony. This is different from technical reports prepared by an expert witness concurrently and specifically for the hearing, as discussed above in the context of hearsay objections.

DWR objected to exhibits AQUA-34 through AQUA-36, AQUA-45 through AQUA-61, AQUA-63 through AQUA-68, and AQUA-70 through AQUA-72 for lack of sponsoring testimony providing foundation and demonstrating relevance. As discussed above, "sponsoring" testimony is not required for exhibits that are self-authenticating and relevant on their face. Upon review, AQUA-53, AQUA-70 and AQUA-71 appear to be relevant to Part 2 issues and will not be admitted into

the record at this time. In addition, AQUA-62 and AQUA-63 do not contain sufficient information to confirm the identity of the documents, and therefore will not be admitted into the record.

DWR also objected on the grounds of relevance to AQUA-29 through AQUA-33, which were cited in Mr. Custis' testimony, and AQUA-37 through AQUA-40, AQUA-42, and AQUA-44, which were cited in Ms. Vlamis' testimony. These exhibits are comment letters concerning water transfers. Although they do not address the WaterFix Project directly, their relevance is explained in the witnesses' testimony. Accordingly, DWR's objection to these exhibits is overruled.

Disposition: The testimony and exhibits listed on AquAlliance's Exhibit Identification Index dated December 7, 2016 are admitted into the evidentiary record, with the following exceptions: AQUA-53, AQUA-62, AQUA-63, AQUA-70, and AQUA-71.

California Sportfishing Protection Alliance

With the exception of the issues discussed below, the objections of DWR, SLDMWA, the SVG, and TCCA to the testimony presented by CSPA are addressed in the general discussion, or they were addressed in previous rulings regarding testimony outside the scope of Part 1 of the hearing. SLDMWA and Westlands' hearsay objections to CSPA's exhibits also are addressed in the general discussion.

DWR objected to portions of Chris Shutes' testimony concerning whether petitioners should be required to apply for a new water right for the WaterFix Project because the water right permits for the SWP and CVP have expired. DWR argued that this issue is distinct from and not relevant to the key hearing issue of whether the proposed change in point of diversion constitutes the initiation of a new right. Because these two issues are related, DWR's objection is overruled. DWR's argument goes to the merits of Mr. Shutes' testimony, not its admissibility.

DWR objected to the testimony of Bill Jennings (CSPA-2, p. 10) that purports to incorporate CSPA-18 and CSPA-19, comments on the EIR/EIS and RDEIR/SDEIS, into his testimony for this hearing. Similarly, DWR objected to the testimony of G. Fred Lee (CSPA-6) that purports to incorporate CSPA-58, CSPA-60, CSPA-62, CSPA-63, CSPA-66, CSPA-67, CSPA73, CSPA-75, CSPA-76, CSPA-77, CSPA-80, and CSPA-82 into his testimony. As stated above, a witness may not wholesale convert already existing documents into direct testimony by simple incorporation by reference. Such a practice could lead to excessive submittals that are not tailored to the hearing. This would not incentivize succinct testimony, and could burden both decision-makers and other parties unnecessarily. Mr. Jennings and Dr. Lee may rely on the documents listed above in support of their testimony, and they may submit the documents as exhibits, but we will not consider the documents to be part of their testimony.

DWR argued that the third version of written testimony submitted by Mr. Jennings (CSPA-2-Revised2) fails to conform to the Hearing Officers' November 23, 2016 ruling. In that ruling, several portions of Mr. Jennings' testimony were stricken, including section VII (beginning on page 19), except the first three paragraphs and the last two paragraphs. Parties were directed to submit updated exhibits to reflect the corrections in strikeout/underline format when submitting requests to enter their exhibits into the evidentiary record. CSPA-2-Revised2 does not show in strikeout format all of the text that was stricken by the November 23, 2016 ruling. Rather than inviting CSPA to correct its exhibit a third time, the State Water Board staff will make the necessary redactions to the CSPA-2 Revised exhibit before including it in the evidentiary record. This will be reflected in CSPA-2 Revised. CSPA-2 Revised2 will not be admitted into the record.

Disposition: The testimony and exhibits listed on CSPA's Exhibit Identification Index dated December 7, 2016, including CSPA-2 Revised (subject to November 23, 2016 ruling), are admitted into the evidentiary record, except CSPA-2 Revised2 is not admitted into evidence, and duplicative copies of SWRCB-3 and SWRCB-4 (also submitted by DWR) and SWRCB-49 (also submitted by SCDA) are not admitted on behalf of CSPA.

California Water Impact Network

With the exception of the issues discussed below, DWR's and SLDMWA's objections to the testimony presented by C-WIN are addressed in the general discussion, or they were addressed in previous rulings regarding testimony outside the scope of Part 1 of the hearing. SLDMWA and Westlands' hearsay objections to C-WIN's exhibits also are addressed in the general discussion.

DWR argued that CWIN-3-Revised2 and CWIN-6-Revised constitute improper surprise testimony and should be excluded from the record because they contain revisions not specifically directed by our rulings on scope. CWIN-3-Revised2, the written testimony of Arve R. Sjovold, contains a minor correction made during oral testimony and not objected to at the time. (R.T. (Dec. 1, 2016) 35:9-12.) CWIN-6-Revised, the report of Ed Whitelaw, reflects a change to the first paragraph on page nine, which was read into the record by the witness with no objections at the time. (R.T. (Dec. 1, 2016) 105:2-107:3.) DWR's objections are overruled. However, we note that submittal of both CWIN-3-Revised and CWIN-3-Revised2 is duplicative and unnecessary.

Disposition: The testimony and exhibits listed on C-WIN's Exhibit Identification Index dated December 7, 2016, are admitted into the evidentiary record, except for CWIN-3 Revised.

Group 32

Restore the Delta

The objections of DWR, SLDMWA, the SVG, and TCCA to the testimony presented by RTD are addressed in the general discussion, or they were addressed in previous rulings regarding testimony outside the scope of Part 1 of the hearing. SLDMWA and Westlands' hearsay objections to RTD's exhibits also are addressed in the general discussion. DWR's first set of objections to RTD's testimony and exhibits included an attachment with a long list of various categorical objections to all of RTD's exhibits. The categories of objections included relevance, lack of foundation, and speculative and misleading evidence. Many of the objections lacked specificity. RTD has amended its testimony and exhibits in response to our October 7, 2016 ruling on scope, and withdrawn a number of exhibits. None of DWR's remaining objections warrant the wholesale exclusion of evidence. The State Water Board will determine the weight to assign evidence and testimony upon the conclusion of the hearing and in light of all the evidence presented. DWR's more specific set of objections to RTD's exhibits, submitted after the presentation of cases-in-chief in Part 1B, are addressed below.

DWR objected to the submittal of exhibits RTD-105, RTD-106, RTD-107, RTD-108, RTD-110, RTD-111, RTD-112, RTD-113, RTD-233, and RTD-234 as lacking foundation or demonstrated relevance because they were not referenced either in direct written testimony or used during cross-examination. These exhibits include historical summaries about the SWP and CVP that relate to RTD's case-in-chief and are identifiable on the face of documents. DWR's objections are overruled.

DWR objected to the submittal of RTD-142 through RTD-144, RTD-153, RTD-154, RTD-221, RTD- 222, and RTD-223 for lack of foundation because RTD “provided no witness able to establish the foundation of such documents including who prepared them, the sources of information relied on in the preparation of the documents or the analyses conducted in support of the documents.” (DWR’s Objections to Exhibits Submitted in Support of Protestants’ Cases-in-Chief, pp. 18-19.) These exhibits are comments on environmental review documents made by other entities, including EBMUD, CCWD, and the City of Stockton. RTD-144 and RTD-233 are protests filed by two other parties to this proceeding. DWR’s main argument appears to be that RTD’s expert witness, Tim Stroshane, reiterates “without independent analysis or corroboration, the opinions of MBK Engineers,” which were prepared on behalf of these other parties. DWR argued further that there is no evidence that these comments reflect the other parties’ current analysis or opinion, and the comments are hearsay to the extent relied on by RTD’s witnesses for the truth of the matters asserted. (*Id.*, p. 19.) DWR’s objection to these exhibits goes to their weight, not their admissibility. These exhibits are identifiable on their face, and do not require formal authentication. We find nothing improper with these exhibits and DWR’s objection to the admission of these exhibits is overruled.

DWR also objected for lack of foundation to admission of the following exhibits labeled as declarations: RTD-401, RTD-402, RTD-403, RTD-404, and RTD-405. DWR argued that because no witness was presented in support of this testimony, these exhibits should be excluded from the record. We do not consider these exhibits to be witness testimony. Witnesses presenting testimony must appear at the hearing to swear or affirm that the written or oral testimony they present is true and correct, and to be subject to cross-examination. Accordingly, the statements contained in these declarations are subject to the hearsay rules discussed above and go to the weight to be accorded them.

Disposition: The testimony and exhibits listed on RTD’s Exhibit Identification Index dated December 12, 2016, are admitted into the evidentiary record.

Group 33

Planning and Conservation League

The Planning and Conservation League (PCL) participated in cross-examination and offered exhibits into evidence. During the hearing, parties objected to the submittal of PCL-1, which is a one-page excerpt from the Biological Assessment for the WaterFix Project, which is marked for identification as SWRCB-104. Hearing Officer Doduc noted the objection, but admitted the exhibit into the evidentiary record. (See R.T. (Aug. 4, 2016) p.19.) No party objected to the remaining exhibits identified by PCL during cross-examination and offered into evidence.

Disposition: The exhibits listed on PCL’s Exhibit Identification Index dated December 21, 2016, are admitted into the evidentiary record.

Friends of the River and Sierra Club California

Friends of the River and Sierra Club California did not present any testimony or submit any exhibits.

Group 34

Environmental Justice Coalition for Water

The Environmental Justice Coalition for Water did not present any testimony or submit any exhibits.

Group 35

Natural Resources Defense Council, The Bay Institute, and Defenders of Wildlife

The Natural Resources Defense Council et al. did not present any testimony or submit any exhibits.

Group 36

Earthjustice

By email dated July 19, 2016, Earthjustice clarified that it will be representing RTD during the hearing, and is not a party in its own right.

Group 37

Deirdre Des Jardins

With the exception of the objections discussed below, DWR's, SLDMWA's and Westlands' objections to the testimony and exhibits submitted by Deirdre Des Jardins are addressed in the general discussion, above.

DWR objected to Ms. Des Jardins' testimony because it consists of argument concerning the admissibility of petitioners' modeling data and criticism of Armin Munévar's testimony and does not directly address injury to legal users or impacts to human uses. Although protestants ultimately must substantiate their protests, evidence presented as part of a case-in-chief in Part 1B was not limited to evidence intended to support a claim of injury or impacts to human uses. Instead, Ms. Des Jardins' testimony criticizing petitioners' case-in-chief was permissible. Ordinarily, it might have been more appropriate for Ms. Des Jardins to present her testimony on rebuttal, but in the interest of efficiency we have encouraged the parties to present relevant evidence in their case-in-chief, rather than waiting for rebuttal.

At the close of the presentation of cases-in-chief in Part 1, DWR listed and objected to a series of exhibits that it claims were not utilized and, therefore, should be excluded for lack of foundation and relevance, including DDJ-7, DDJ-11, DDJ-13, DDJ-20, DDJ-21, DDJ-30 through DDJ-36, DDJ-44, DDJ-46 through DDJ-50, DDJ-55, DDJ-57, DDJ-59 through DDJ-64, DDJ-89, DDJ-121, DDJ-122, DDJ-125 and DDJ-138. Upon review, the following exhibits do not contain sufficient information to identify what the document is, and therefore will not be admitted into the record: DDJ-7, DDJ-13, DDJ-20, DDJ-55, DDJ-121, DDJ-125, and DDJ-138. DWR's objection to the admission of the remaining documents is overruled.

DWR also objected to DDJ-58, which is a document by the BDCP Steering Committee dated August 12, 2010 marked as a "Preliminary Draft- Not for Distribution." DWR argued that Ms. Des Jardins has not established that the document and the information it contains remain an accurate reflection of the steering committee's analysis or whether a final version of the document was later released. This objection falls into the general category of argumentative

objections discussed above. The State Water Board will determine the weight to afford exhibits upon completion of the hearing and in light of all the evidence.

Disposition: The testimony and exhibits listed on Deirdre Des Jardins' Exhibit Identification Index dated December 20, 2016 are admitted into evidence, with the following exceptions: DDJ-7, DDJ-13, DDJ-20, DDJ-55, DDJ-121, DDJ-125, and DDJ-138.

Group 38

Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources

Both DWR and SLDMWA objected to the testimony of Ms. Des Jardins presented on behalf of PCFFA. Most of their arguments in support of their objections to Ms. Des Jardins' testimony are addressed in the general discussion, above. SLDMWA and Westlands' hearsay objections to Ms. Des Jardins' testimony and many of PCFFA's exhibits also are addressed in the general discussion.

DWR's argument that Ms. Des Jardins' testimony is irrelevant because it is not tied directly to any alleged injury or water right is similar to DWR's objection to Ms. Des Jardins' testimony presented on her own behalf. This objection is addressed under the discussion of Ms. Des Jardins' case-in-chief, above. DWR also objected to Ms. Des Jardins' incorporation of written testimony submitted in her own case-in-chief "[t]o the extent such testimony is outside the scope of her [n]oticed testimony for PCFFA," but does not cite any specific offending testimony. Accordingly, this objection is overruled.

SLDMWA objected to the testimony of Patricia Schifferle (PCFFA-82), which exists solely to authenticate exhibits PCFFA-23 through PCFFA-61, because her testimony provides no facts or explanation of how and from where Ms. Schifferle obtained each of these exhibits or how she has acquired her claimed knowledge in the authenticity and source of each of these exhibits. Both SLDMWA and DWR also objected to exhibits PCFFA-23 through PCFFA-61 on the grounds that they lack foundation, are irrelevant, are hearsay, and that their probative value, if any, would be substantially outweighed by the undue and unnecessary consumption of time in this proceeding.

Upon review, the majority of these exhibits contain enough information to ascertain what each document is, who wrote it, and for what purpose. (The exceptions are exhibits PCFFA-58 and PCFFA-59, which contain scribbled notes of unknown authorship, and were withdrawn by PCFFA's attorney on December 13, 2016. (R.T. (Dec. 13, 2016) 51:11-14.) Most of these exhibits, however, are internal documents between fisheries agencies reviewing various aspects of the BDCP that do not appear relevant to Part 1. Some documents relate to funding issues for the project, and others focus on various species of concern. To the extent that these exhibits are relevant, it appears that they focus on issues more appropriately addressed in Part 2 of the hearing.

PCFFA argued that on cross-examination, Ms. Schifferle explained that PCFFA-23 through PCFFA-61 show concerns of federal fisheries agencies about the environmental impacts of the WaterFix Project, and that project revisions have removed the few mitigation measures designed to address them. (R.T. (Dec. 13, 2016) 106:9-107:25.) PCFFA argued that PCFFA57 relates to a land acquisition plan associated with another party's exhibit, LAND-69. PCFFA also argued that it may use these exhibits during its rebuttal presentation. While some of these documents may contain passing references to modeling or construction impacts that could

possibly pertain to key issues in Part 1, most of the content centers on species and other environmental concerns. With no witness specifying which portions of these documents pertain to Part 1, their utility is further diminished.

With the exception of PCFFA-57, the relevance objections to PCFFA-23 through PCFFA-61 are sustained. To the extent PCFFA intends to use an exhibit for rebuttal, it may resubmit the exhibit by the deadline for rebuttal exhibits; however, we advise PCFFA to refrain from presenting material outside the scope of Part 1. Ms. Schifferle's testimony (PCFFA-82) is no longer relevant as the exhibits Ms. Schifferle attempts to authenticate in this document are excluded from the record.

At the close of the presentation of cases-in-chief in Part 1B, DWR also objected to PCFFA-7, PCFFA-13, PCFFA-15, and PCFFA-19 for lack of foundation and relevance because they were not used by PCFFA during direct or cross-examination. PCFFA-7 and PCFFA-15 are highlighted portions of DWR exhibits. PCFFA 13 contains information on SWP contract deliveries, and PCFFA 19 is a panel presentation on the use of modeling data. These exhibits are not so lacking in foundation and relevance to be excluded from the record, and DWR's objection is overruled.

DWR also objected to the relevancy and authenticity of PCFFA-21, which is a multi-tabbed Excel spreadsheet obtained from a DWR website and used during cross-examination. PCFFA stated that the purpose of this exhibit is to demonstrate the impenetrable nature of petitioners' underlying modeling data. This exhibit is not identifiable on its face, and its identity was not further illuminated during cross-examination. DWR's objection is sustained.

Similarly, DWR objected on relevance grounds to exhibits PCFFA-12 and PCFFA-18, which were used for cross-examination, arguing that the cross-examination did not establish a proper foundation to include the exhibits into the record. These objections are overruled. PCFFA-12 is a screen shot of the State Water Board's TUCP index highlighting application requests by the U.S. Bureau of Reclamation and DWR for the time period from 2003 to 2016. PCFFA-18 is a copy of the Ninth Circuit's unpublished decision in *Pacific Coast Federation of Fishermen's Associations v. United States Department of the Interior* (9th Cir. July 25, 2016) No. 14-15514 concerning CVP interim renewal contracts and NEPA review. As discussed previously, an exhibit may be admitted without testimony from a witness if it contains sufficient information to understand what it is, who prepared it, and for what purpose. The State Water Board will decide what weight should be afforded to various exhibits if necessary, based on the complete record.

DWR objected to the admissibility of PCFFA-83, which is labeled Part 1 Opening Statement (and embedded requests for official notice) of Protestants. Opening statements are not evidence and should not be marked as exhibits and offered into evidence. (See letter from Hearing Officers to Service List (June 10, 2016) p. 5.) In its response, PCFFA stated that PCFFA-83 is a policy statement, not an opening statement. Either way, this document may not be labeled and submitted as an exhibit. DWR's objection is sustained.

PCFFA-84 contains a declaration by PCFFA's attorney, Stephan Volker, authenticating exhibits PCFFA 1 through PCFFA-22. None of these exhibits need a witness to authenticate them. Moreover, Mr. Volker's declaration will not be treated as testimony.

Disposition: The testimony and exhibits listed on PCFFA's Exhibit Identification Index dated December 20, 2016, are admitted into the evidentiary record, with the following exceptions: PCFFA-21, PCFFA-23 through PCFFA-56; PCFFA-58 through PCFFA-61; and PCFFA-82

through PCFFA-84. In addition, duplicate copies of SWRCB-3, SWRCB-4, and SWRCB-87 (also submitted by DWR) will not be admitted on behalf of PCFFA.

Group 39

North Delta C.A.R.E.S. and Barbara Daly

Except for the issues discussed below, DWR's objections to the testimony and exhibits of North Delta C.A.R.E.S. (NDC) are addressed in the general discussion, above. SLDMWA and Westlands' hearsay objections to several of NDC's exhibits also are addressed in the general discussion.

DWR objected to testimony of Barbara Daly that introduces each person on the NDC witness panel and their testimony as hearsay evidence of statements by someone other than the witness being offered to prove the truth of the allegations asserted. We do not find Ms. Daly's introduction to panel witnesses and overview of their testimony as problematic or hearsay. Ms. Daly has been an organizer and representative of NDC in this hearing, and this portion of her testimony is intended to introduce witnesses, not to prove the truth of a matter asserted. This objection is overruled.

At the close of presentation of cases-in-chief in Part 1, DWR objected to the admission of NDC-12, NDC-13, NDC-14, NDC-25 and NDC-29, as lacking foundation and relevance because they were not referenced in either oral or written testimony. With the exception of NDC-25, these exhibits are identifiable on their face and therefore sufficiently authenticated. NDC-25 contains no identifying information or sponsoring testimony, and the objection is sustained.

DWR also objected to the submittal of NDC-30 through NDC-37. These exhibits are excerpts from SWRCB-3, the RDEIR/SDEIS for the WaterFix Project. They were not previously cited in NDC's written testimony or marked for identification as NDC exhibits during the hearing. NDC's witnesses referred to portions of SWRCB-3 during the hearing. (R.T. (Dec. 13, 2016) 177:9-190:22.) It would be unnecessary and duplicative, and would create confusion to label these portions of SWRCB-3 with new exhibit numbers. These objections are sustained.

Disposition: The testimony and exhibits listed on NDC's Exhibit Identification Index dated December 20, 2016, are admitted into the evidentiary record, except for NDC-25 and NDC-30 through NDC-37.

Group 40

Patrick Porgans

Patrick Porgans participated in cross-examination and offered into evidence a number of exhibits, some of which he did not use during cross-examination. In addition, the list of exhibits that Mr. Porgans submitted on December 21, 2016, does not match the exhibits uploaded to the Board's exhibit page. DWR objected to the admission of any exhibit other than those used during cross-examination, and to the admission of documents that were not uploaded to the web site and available for review.

We agree. Because Mr. Porgans did not present a case-in-chief in Part 1, it is inappropriate to introduce exhibits into the record that were not introduced and used during cross-examination. In addition, it would be unfair to admit exhibits that were not posted on the web site and made available to the other parties on a timely basis. To avoid confusion, we will disregard Mr. Porgans' December 21, 2016 list of exhibits, and rely instead on the record kept by State

Water Board staff of exhibits introduced during cross-examination. These exhibits were posted on the website for review by the other parties. Accordingly, only the following exhibits that were introduced during cross-examination are potentially admissible: PORGANS-1, PORGANS-2, PORGANS-3, PORGANS-4, PORGANS-5, PORGANS-6, PORGANS-7, PORGANS-100M, PORGANS-102, PORGANS-104, PORGANS-105, PORGANS-121, and PORGANS-122. Of these exhibits, the following exhibits were not properly authenticated during cross-examination and lack sufficient identification to be admitted into the record: PORGANS-4, PORGANS-5, PORGANS-7, and PORGANS-104.

Disposition: The following exhibits are admitted into the evidentiary record: PORGANS-1, PORGANS-2, PORGANS-3, PORGANS-6, PORGANS-100M, PORGANS-102, PORGANS-105, PORGANS-121, and PORGANS-122.

Group 41

Snug Harbor Resorts, LLC

Except to the extent discussed below, DWR's objections to the testimony of Nicole S. Suard presented on behalf of Snug Harbor Resorts, LLC (Snug Harbor) are addressed in the general discussion, above. DWR also objected to the majority of exhibits submitted by Snug Harbor for lack of foundation and demonstrated relevance to the proceeding. DWR stated that Ms. Suard did not specifically cite to any of the submitted exhibits in her direct written testimony, "and only twelve were even referenced on cross-examination of other parties' witnesses or by Ms. Suard in her oral, but not written, direct testimony." (DWR's Objections to Exhibits Submitted in Support of Protestants' Cases-in-Chief, p. 26.) DWR's objections have merit as many of Snug Harbor's exhibits are not sufficiently identified or explained and cannot be admitted into the record at this time.

When questioned by DWR on cross-examination about why her written testimony did not cite to exhibits, Ms. Suard explained that she was not familiar with State Water Board procedures. (R.T. (Dec. 8, 2016) 202:6-203:1.) Consistent with State Water Board practice, we have afforded some latitude to parties that appear *in propria persona* (on behalf of one's self, and not represented by legal counsel). In general, parties have been diligent, including Snug Harbor, in trying to understand and conform to established procedures, and this effort is appreciated. Although some parties used PowerPoint slide presentations to orally summarize their testimony, we expect written testimony to provide more detail. Not every exhibit needs to be cited in witness testimony in order to be admitted into evidence; however, written, direct testimony should cite to and explain underlying exhibits as necessary. This procedure is different from trial court practice, and we recognize that not all parties are familiar with it.

DWR objected to Ms. Suard's oral, direct testimony concerning arsenic levels in groundwater and surface water on the grounds that it exceeded the scope of her written direct. This objection is overruled. We allowed more detailed testimony from Ms. Suard in oral examination as it was clear she intended this to be part of the case-in-chief. Her written testimony contains a general discussion regarding the potential impacts of the WaterFix Project on arsenic levels in drinking water wells in and around the proposed project. (SHR-108, pp. 2-3.) Her direct oral testimony was accompanied by the presentation of a twelve-slide PowerPoint exhibit, SHR-21 (R.T. (Dec. 8, 2016) pp. 188-193), and a six-slide PowerPoint exhibit SHR-77. (*Id.*, p. 193.) We will allow these shorter slide presentations into the record to accompany the oral direct testimony that was provided. Similar allowances may not be made in Part 2.

Snug Harbor's exhibits include several other PowerPoint presentations that are more problematic. Lengthy PowerPoint presentations without the benefit of explanatory written testimony do not constitute evidence upon which the State Water Board may reasonably rely. For example, Ms. Suard referenced just one slide from SHR-102 in direct examination, yet requests to admit all 64 slides into the record. While some underlying data is identified, most of the slides are highly modified and difficult to decipher. Admitting unreferenced and voluminous documents wholesale into the record would be unfair to the other parties and not useful to the State Water Board. DWR's objections to exhibits in this regard are sustained. Unless a page of a PowerPoint is clearly identified and referenced in oral testimony that is within the scope of written direct (or used with proper foundation in cross-examination), we will not admit it into the record.

The same applies to all other exhibits submitted by Snug Harbor. Many of the exhibits are not clearly identified on their face or in testimony, and therefore may not be admitted into the record. While some exhibits appear identifiable, many include modifications, and it is impossible to tell whether the exhibit is what it purports to be, or contains additional information of unknown origin imbedded into the document. To the extent possible, we have identified and will admit into evidence unadulterated exhibits that are identifiable on the face of the document. These include SHR-5, SHR-6, SHR-6f, SHR-9, SHR-26, SHR-27, SHR-28, SHR-29, SHR-34f, SHR-35f, SHR-205, SHR-209, SHR-211, and SHR-215. In addition, SHR-350 is admissible because it was discussed in direct testimony. (R.T. (Dec. 8, 2016) 181:23-183:13 [SHR-350].)

SHR-66 appears related to Part 2 and will not be admitted into the record at this time. SHR-107 and SHR-204 are opening statements and will not be admitted as evidentiary exhibits.

Disposition: The following exhibits (or portions thereof) from Snug Harbor's Exhibit Identification Index dated December 20, 2016, are admitted into the evidentiary record: SHR-5, SHR-6, SHR-6f, SHR-9, SHR-17 (slide 1), SHR-21, SHR-24, SHR-26, SHR-27, SHR-28, SHR-29, SHR-34f, SHR-35f, SHR-39wf, SHR-77, SHR-102 (slide 27), SHR-103 (slides 3, 4, 8, 16, 22, 24, 38 and 40), SHR-104 (slides 4, 5, 26, and 27), SHR-108, SHR-205, SHR-209 through SHR-211, SHR-215, SHR-350, and SHR-389-errata (Slides 1-3).

Group 42

SolAgra Corp.

SolAgra Corp. did not present any testimony or submit any exhibits.

Group 43

Clifton Court, L.P.

DWR objected to testimony and exhibits that show claims of past impacts to the agricultural property owned by Clifton Court, LP. DWR argued that these are not relevant to this hearing and should be excluded. In addition, DWR argued that testimony concerning condemnation of Clifton Court's land is irrelevant because that issue will be addressed through other regulatory processes.

Objections to the relevance of testimony related to economic and construction impacts were previously addressed in our October 7, 2016 ruling on the scope of Part 1. Although past construction and economic impacts are not directly related to the WaterFix Project, they may be relevant to the extent that they demonstrate similar impacts that could be expected. Finally, we

recognize that the purpose of this proceeding is not to determine the fair market value of Clifton Court's land, but the fact that Clifton Court's land may be condemned, and Clifton Court's ability to exercise its water rights may be limited as a result, is relevant to the issue of injury.

Disposition: The testimony and exhibits listed on CCLP's Exhibit Identification Index are admitted into the evidentiary record.

Conclusion on Evidentiary Motions

We have, and will continue to diligently respond to meritorious evidentiary objections as necessary and to the extent possible. It bears repeating that the bar for the admission of evidence is low in administrative proceedings, and evidence may be admissible even though its probative value is limited. The parties are responsible, however, for submitting their testimony and exhibits on time, and for providing adequate foundation to demonstrate that their exhibits are relevant and reliable. We will defer any final decisions on the weight to afford testimony and exhibits until such time when the entire record is before us and we have the opportunity to carefully consider all of the evidence.

If you have any non-controversial, procedural questions about this ruling or other matters related to the California WaterFix Hearing, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.

Sincerely,

ORIGINAL SIGNED BY

Felicia Marcus, State Water Board Chair
WaterFix Project Co-Hearing Officer

ORIGINAL SIGNED BY

Tam M. Doduc, State Water Board Member
WaterFix Project Co-Hearing Officer

Attachment A (February 21, 2017):

Hearing Dates and Room Schedule for the Continuation of Part 1
of the California WaterFix Water Right Change Petition Hearing

PART 1 of the hearing will resume at **9 a.m. on April 25, 2017** and continue, as necessary, at **9 a.m. on each of the following dates** and at the locations shown in the tables below. **Start times may be earlier than 9 a.m. on subsequent hearing days if the hearing officers determine it is necessary.** Any change in start times will be announced at the conclusion of the previous hearing day. ***Please note that the hearing rooms are not all at the same street address, as shown below.***

DATE	HEARING ROOM*
April 25, 2017	Byron Sher Auditorium
April 26, 2017	RWQCB-5
April 27, 2017	RWQCB-5
April 28, 2017	Coastal Hearing Room
May 04, 2017	Sierra Hearing Room
May 05, 2017	Coastal Hearing Room
May 09, 2017	RWQCB-5
May 10, 2017	RWQCB-5
May 11, 2017	RWQCB-5
May 12, 2017	Byron Sher Auditorium
May 18, 2017	Coastal Hearing Room
May 19, 2017	Coastal Hearing Room
May 23, 2017	Coastal Hearing Room
May 24, 2017	Coastal Hearing Room
May 25, 2017	City Hall*
May 26, 2017	Sierra Hearing Room
May 30, 2017	Byron Sher Auditorium
May 31, 2017	City Hall*
June 01, 2017	Byron Sher Auditorium
June 02, 2017	Byron Sher Auditorium
June 08, 2017	Byron Sher Auditorium

DATE	HEARING ROOM*
June 09, 2017	Byron Sher Auditorium
June 13, 2017	Sierra Hearing Room
June 14, 2017	Sierra Hearing Room
June 15, 2017	Byron Sher Auditorium
June 16, 2017	Byron Sher Auditorium
June 22, 2017	Coastal Hearing Room
June 23, 2017	Coastal Hearing Room
June 27, 2017	Coastal Hearing Room
June 28, 2017	Coastal Hearing Room
June 29, 2017	Coastal Hearing Room
June 30, 2017	Coastal Hearing Room
July 11, 2017	Byron Sher Auditorium
July 12, 2017	Sierra Hearing Room
July 13, 2017	Sierra Hearing Room
July 14, 2017	Sierra Hearing Room
July 20, 2017	Byron Sher Auditorium
July 21, 2017	Byron Sher Auditorium
July 25, 2017	Coastal Hearing Room
July 26, 2017	Coastal Hearing Room
July 27, 2017	Coastal Hearing Room
July 28, 2017	Coastal Hearing Room
August 03, 2017	Byron Sher Auditorium
August 04, 2017	Byron Sher Auditorium
August 08, 2017	Sierra Hearing Room
August 09, 2017	Sierra Hearing Room
August 10, 2017	Byron Sher Auditorium

* Room is subject to availability.

If the hearing must be moved from one hearing room to another on a particular date, then the parties on the [Current Service List](#) will be notified and a revised schedule will be posted on the State Water Resources Control Board's California WaterFix hearing webpage at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/ruling_notices/ prior to the hearing date.

The addresses of the hearing rooms in the table above are as follows:

HEARING ROOM	LOCATION/ADDRESS
Sierra Hearing Room, Coastal Hearing Room, and Byron Sher Auditorium	Joe Serna Jr.-CalEPA Building 1001 I Street, Second Floor Sacramento, CA 95814 MAP
RWQCB-5	California Regional Water Quality Control Board Central Valley Region (5), Sacramento Main Office 11020 Sun Center Drive, Suite 200 Rancho Cordova, CA 95670 MAP
City Hall	City of Sacramento City Hall Council Chamber 915 I Street, 1st Floor Sacramento, CA 95814 (Across the street from the CalEPA Building)

Broadcasts of the hearing will be available via the internet and can be accessed at:
<https://video.calepa.ca.gov/>.