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## State Water Resources Control Board

March 27, 2018

VIA ELECTRONIC MAIL

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### **CALIFORNIA WATERFIX HEARING – RULING ON OBJECTIONS TO DEPARTMENT OF WATER RESOURCES’ EXHIBITS AND ORAL TESTIMONY AND PATRICK PORGANS’ MOTION TO STRIKE**

This ruling addresses objections to several Department of Water Resources (DWR) exhibits as well as DWR’s responses to cross-examination that we allowed Patrick Porgans to conduct in writing. We are excluding DWR-1143 subject to the direction provided below, overruling Deirdre Des Jardins’ objections to DWR modeling testimony and exhibits, and granting Mr. Porgans’ motion to strike DWR’s responses to his written cross-examination, subject to the direction provided below. The disposition of Petitioners’ Part 2 case-in-chief exhibits will be addressed in a future ruling.

#### **DWR-1143**

On February 28, 2018, toward the end of Chris Shutes’ cross-examination of Petitioners’ Panel 2 on behalf of California Sportfishing Protection Alliance, California Water Information Network, and AquAlliance (collectively, CSPA), Mr. Shutes requested that Petitioners prepare a single comprehensive document that would show each proposed operating condition for the WaterFix Project and the corresponding requirement or other basis for inclusion of that operating condition. Based on the brief discussion that ensued, we directed DWR to prepare such a document to help all parties.<sup>1</sup> On March 5, 2018, DWR submitted DWR-1143.

On March 9, 2018, protestants represented by Downey Brand LLP (the Downey Brand protestants) lodged an oral objection to entering DWR-1143 into the evidentiary record, followed by a written objection on March 12, 2018. The Downey Brand protestants argue that, as an out-of-court statement offered for the truth of its contents, the exhibit is hearsay; that the exhibit lacks adequate foundation; and that it includes substantive, new testimony that goes beyond merely summarizing or consolidating evidence that already has been introduced, and therefore constitutes impermissible surprise testimony. On March 13, 2018, DWR provided a written response disputing the Downey Brand protestants’ characterization of DWR-1143’s contents and arguing that, in any event, the document is one that we ordered DWR to produce.

Ordinarily, objections such as those raised by the Downey Brand protestants would go to the weight of the evidence and we would view them as insufficient grounds for excluding the exhibit entirely.

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<sup>1</sup> R.T. (Feb. 28, 2018) pp. 4-8.

However, the circumstances surrounding DWR-1143 are fairly unusual compared to how other exhibits are offered into the evidence. DWR prepared this exhibit at our direction and long after the deadline for parties to submit written testimony and exhibits for their Part 2 cases-in-chief. The parties therefore did not have as much time to review DWR-1143 as they had DWR's other case-in-chief exhibits prior to admission. Additionally, our direction for DWR to prepare DWR-1143 came partway through cross-examination of Petitioners' Panel 2 witnesses, meaning several parties that already had conducted their cross-examination would not have an opportunity to cross-examine Panel 2 about the exhibit.<sup>2</sup> In the absence of some of our usual procedural safeguards and because the purpose of the document is to assist the parties and us, we find it appropriate to depart from our usual practice of construing objections as going to the weight of the evidence.

Without ruling or opining on the merits of any of the bases offered for Downey Brand protestants' objection, we will not enter DWR-1143 into the evidentiary record. Rather, we direct DWR to prepare and include an exhibit within their Part 2 rebuttal with the same purpose that motivated DWR-1143: identifying each proposed operating condition for the WaterFix Project and the regulatory requirement or other basis for each one. Further, DWR shall identify and make the persons involved in preparing that exhibit available for cross-examination during Part 2 rebuttal. Other parties will have an appropriate amount of time to review the new exhibit, prepare cross-examination accordingly, and evaluate potentially applicable objections. We also expect the Part 2 rebuttal exhibit just described to reflect the additional time that DWR will have had to prepare it. In particular, we encourage DWR to consider whether, based on some of the questions raised by protestants, there are opportunities to provide greater specificity when tying a particular operating condition to a regulatory requirement or other source. Finally, the exhibit's preparation should anticipate and address the alleged inconsistency raised in the Downey Brand protestants' written objection.

With this ruling, the Downey Brand protestants' objections are hereby overruled as moot.

### **Patrick Porgans' Motion to Strike DWR's Responses to Written Cross-Examination**

On March 1, 2018, we allowed Patrick Porgans to conduct cross-examination of Petitioners' Panel 2 witnesses in writing rather than in person due to his inability to be at the hearing for reasons beyond his control. Mr. Porgans submitted those questions on March 2, 2018, and DWR submitted timely written objections and responses on March 6, 2018. DWR objected to all of Mr. Porgans' questions and, in some cases, provided an alternative question and provided a written response to that question instead.

On March 9, 2018, Mr. Porgans moved to strike DWR's written responses on three bases. First, none of the responses indicated which of Petitioners' witnesses, if any, provided the written response to each question. Second, the alternative questions and answers provided after DWR's objections were not responsive because they related to a different topic or line of inquiry than what was in

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<sup>2</sup> Note that in this instance, DWR introduced DWR-1143 partway through cross-examination because we required it, not as the result of cross-examination by another party. To clarify, cross-examination that elicits new information from a witness does not entitle an earlier cross-examining party to re-cross or other follow-up questioning. A cross-examining party may ask questions about such new information during re-cross if it is within the scope of re-direct, or else may address that information during the rebuttal phase of this hearing. As a reminder, during the rebuttal phase, cross-examination will be limited to the scope of direct testimony.

Mr. Porgans' original question. Third, DWR's responses were evasive. Mr. Porgans' requests that the Hearing Officers require DWR to provide an adequate, non-evasive response from DWR's Panel 2 witnesses, with each answer identified as to witness, and signed by the witnesses that answered the questions.

We concur with all of the proffered bases for Mr. Porgans' motion to strike. As a preliminary matter, it warrants mention that we allowed Mr. Porgans to submit his questions for cross-examination in writing as an *accommodation* for his physical inability to conduct cross-examination in person. The inability to respond to evidentiary objections or ask follow-up questions in real time meant that even this accommodation limited Mr. Porgans' participation somewhat, compared to other cross-examining parties. We acknowledge that conducting cross-examination in writing is procedurally unusual and that, because we did not provide the parties with express instructions as to format and allowable objections, both were somewhat open to interpretation.

However, we find that DWR's responses fell short of a reasonable attempt to discern the substance of Mr. Porgans' questions and provide meaningful responses. Objections that the word "studies" is too vague and ambiguous to provide even a qualified answer, or that the Delta smelt's status as "near extinction" is not in evidence – even though that is what it means for a species to be listed as "endangered" under the California Endangered Species Act<sup>3</sup> – border on dismissive.

Further, we find that DWR's "revised questions" – where even offered – improperly narrowed the scope of Mr. Porgans' original questions. For example, DWR's revised questions in response to Mr. Porgans' Questions 1 through 3 and Question 6 narrowed the focus from existing conditions or existing project operations generally to analyses performed specifically for the WaterFix Project. As our prior rulings have established, testimony and other information regarding existing State Water Project and Central Valley Project operations and existing conditions for fish and wildlife can be relevant to Part 2 key hearing issues even without any specific reference therein to the WaterFix Project. Such conditions can inform the issue of appropriate Delta flow criteria, and they may also inform our evaluation of Petitioners' Part 2 case-in-chief, which judged the reasonableness of the WaterFix Project's projected impacts based on the assumption that existing conditions provide reasonable protection.<sup>4</sup> We also disagree with DWR's objection to Question 4, that Panel 2 witnesses' or their consulting firm's involvement in re-initiation of consultation for the long-term Operations Criteria and Plan is irrelevant to this hearing. Such involvement may inform the weight we give to their testimony pertaining to the impacts of the WaterFix Project relative to existing operations.

We hereby overrule all of DWR's objections to Mr. Porgans' written cross-examination, grant Mr. Porgans' motion to strike, and direct DWR to submit revised written responses to Mr. Porgans' written cross-examination no later than April 2, 2018. Responses to each question shall indicate which Panel 2 witness(es) provided the response, and each of the Panel 2 witnesses providing at least one response shall sign DWR's written response document, affirming the truth of the written responses that they provided. To the extent our expectations regarding DWR's written response are

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<sup>3</sup> DWR's own evidentiary submissions acknowledge the Delta smelt's legal status under the federal Endangered Species Act and California Endangered Species Act. See, e.g., DWR-1012, p. 10 & fn. 7.

<sup>4</sup> See, e.g., DWR-1012, p. 7 ("CWF H3+ will maintain *existing reasonable protection* of Delta Smelt fall rearing habitat") (emphasis added).

unclear, we encourage DWR to ask for clarification rather than risk the need for follow-up procedural motions and rulings.

After DWR has provided adequate responses to Mr. Porgans' written cross-examination, all cross-examination of Petitioners' Part 2 case-in-chief will be complete. At that time, we will issue a ruling regarding the admission of Petitioners' Part 2 case-in-chief exhibits into evidence.

### **Deirdre Des Jardins' Objections to DWR's Modeling Exhibits**

On March 1, 2018, Deirdre Des Jardins made oral objections to several modeling-related exhibits submitted by DWR. Ms. Des Jardins submitted written objections on March 7, 2018, elaborating on her earlier oral objections. In summary, Ms. Des Jardins argues that the DWR exhibits listed therein contain information and analysis presented in a specialized format that is not easily accessible to lay participants in this proceeding. City of Stockton, Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources joined Ms. Des Jardins' objection on March 8, 2018. On March 12, 2018, DWR submitted a written opposition to Ms. Des Jardins' objections. On the same date, Snug Harbor Resorts, LLC, County of San Joaquin, San Joaquin County Flood Control District, The Mokelumne River Water and Power Authority, Local Agencies of the North Delta, Bogle Vineyards, Diablo Vineyards, and Stillwater Orchards joined in Ms. Des Jardins' objections.

Ms. Des Jardins' objections are overruled.

Among the various legal authorities to which Ms. Des Jardins' written objections and its joinders cite, notably absent is any reference to Government Code section 11513, which governs here. The bar for admissibility in this proceeding is whether it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. That legal standard necessarily takes into account the demands of the proceeding in question, including its legal, technical, and policymaking complexity.

This hearing concerns highly complex and technical policy issues. As an administrative agency with specialized expertise in water resources, the State Water Board frequently considers and relies on sophisticated modeling analyses to inform its decisions. In various proceedings, the State Water Board regularly hears evidence and legal argument regarding the proper uses and limitations of particular modeling analyses. By necessity, the technical sophistication of such discussions frequently goes beyond a lay person's understanding.<sup>5</sup>

We find that DWR presented the exhibits to which Ms. Des Jardins objects with sufficient context and indicia of reliability that they meet the applicable Government Code standard for admissibility. DWR provided adequate foundation and an appropriate degree of explanation in the form of written and oral

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<sup>5</sup> A February 19, 2018 Snug Harbor Resorts LLC joinder to a different Des Jardins motion included a request that Petitioners submit certain modeling analysis specific to the vicinity of Snug Harbor in "human readable format." On March 2, 2018, DWR Panel 2 witness Tara Smith provided supplemental oral testimony summarizing the results of Petitioners' modeling as they relate to waterways in the vicinity of Snug Harbor. We will not require Petitioners to further refine, translate, or summarize their modeling at this time. To the extent any Snug Harbor request that we order DWR to produce additional information remains outstanding, that request is hereby denied.

testimony by expert modeling witnesses. Those witnesses were available to further explain their modeling analyses during cross-examination. Though the files themselves and the witnesses' explanations and analyses are not necessarily accessible to a lay person, they are the sort of evidence on which we and other responsible persons are accustomed to rely in proceedings such as this one.<sup>6</sup> In addition, we find that DWR has satisfied the requirement set forth in the Hearing Notice to accompany exhibits based on technical studies or models with sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the models or studies.

We remain committed to conducting this proceeding in a manner that maintains fairness and due process protections for all parties, regardless of what their resources, technical sophistication, or access to outside experts may be. That said, under these circumstances, neither due process nor the applicable legal standard for admissibility of evidence required that DWR submit the contested modeling files in a different format.

Finally, the stated basis for Ms. Des Jardins' objection to the modeling exhibits at issue here was Mr. Erik Reyes's inability to identify one page of DWR's modeling analysis presented out of context during Ms. Des Jardins' cross-examination of Petitioners' Panel 2. Although Mr. Reyes opined that he would be willing and able to answer her questions if she would only lay adequate foundation by confirming the provenance of the page being displayed, Ms. Des Jardins instead proceeded with a prepared oral evidentiary objection to the modeling exhibits at issue here, on the theory that they are so inaccessible that DWR's own modeling expert could not identify them.

In this factual context, we see this evidentiary objection for what it is: a poorly-conceived attempt to catch a witness in a "gotcha" moment, either to make a point concerning the accessibility of modeling files or to undermine the value of Mr. Reyes's testimony. Such tactics are not helpful or appreciated in these proceedings. Going forward, we expect all parties to proceed with cross-examination in a manner intended to illuminate the strengths and weaknesses of a party's case on the merits and to lay adequate foundation for their questioning. Rhetorical grandstanding, unfair treatment of witnesses, and other questioning with no evidentiary value wastes valuable hearing time and will be dealt with accordingly.

### **Deirdre Des Jardins' Objection to Oral Testimony on Modeling**

On March 9, 2018, Ms. Des Jardins followed up her earlier objection to DWR's modeling exhibits with further objections to certain enumerated exhibits and testimony from DWR's Panel 2 witnesses. Ms. Des Jardins asserts that the evidence in question is speculative and on that basis requests that we exclude it from the evidentiary record.

Ms. Des Jardins' objections are overruled.

Like Ms. Des Jardins' earlier objections to DWR's modeling exhibits, these objections fail to reference relevant legal authority such as Government Code section 11513 or our prior ruling letters applying

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<sup>6</sup> That one or more other parties' expert consultants may have chosen to present modeling analysis in a format that Ms. Des Jardins finds more useful or accessible has no bearing on the *admissibility* of DWR evidence that she finds less useful or accessible by comparison. Additionally, we note that Ms. Des Jardins' own Statement of Qualifications states that she has expertise in water supply modeling. (See DDJ-100; see also R.T. (Dec. 13, 2016): p. 133: 23-25; pp. 134-144.)

the Hearing Notice's guidance in the specific context of modeling evidence. Those materials are readily available, and we will not reproduce or summarize them here. As we have repeated on numerous occasions, the appropriate remedy for a party who merely disagrees with a piece of evidence is not to object to its *admissibility*, but rather to reveal that evidence's weaknesses through cross-examination and the introduction of competing evidence during the rebuttal phase.

The orderly and efficient administration of this hearing requires that we refrain from devoting hearing time, as well as hearing participants' limited time outside the hearing, to relitigating the same issues over and over again. Since the start of this proceeding, the hearing team estimates that we already have expended hundreds if not thousands of hours hearing, reviewing, or responding to unnecessary or duplicative procedural requests. In most cases, these requests would never have been made had the requesting party been familiar with and respected our prior rulings. In that context, and out of respect for the time and resources of all hearing participants, it is reasonable and necessary for us to hold the parties to the expectation that they familiarize themselves with our previous procedural rulings, particularly on recurring issues, and refrain from rearguing the same issues.

Going forward, we will not devote additional time during or outside of the hearing to indulging repetitive procedural requests, by Ms. Des Jardins or other parties, that ignore prior rulings. Additionally, parties that continue to waste hearing participants' time with such requests will find us less receptive to discretionary requests, including but not limited to requests for additional time or scheduling accommodations. For parties that fail to heed this ruling's and prior rulings' admonitions and continue to waste all hearing participants' time with duplicative motion practice, we may be forced to consider penalties that could include limitations on further hearing participation.

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](mailto:CWFhearing@waterboards.ca.gov) or (916) 319-0960.

Sincerely,

*ORIGINAL SIGNED BY*

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

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