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BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the matter of Hearing re California
WaterFix Petition for Change

**OBJECTIONS TO EXHIBITS OFFERED
ON CROSS-EXAMINATION**

During the course of its Part 2 cross-examination in this Hearing, counsel for the Natural Resources Defense Council ("NRDC") presented expert witnesses with documents not authored by those witnesses, and asked those witnesses either to read directly from the documents, or else to interpret the documents contemporaneously. Cross-examination, however, may not be used as a pretext to offer otherwise unexamined statements into the record for their truth. To the extent that these documents are offered for the truth of the matters asserted within them, each are subject to limitation on the use of hearsay evidence to support a finding under Government Code section 11513.

On these grounds, Protestants respectfully request that the Hearing Officers decline to admit Exhibit NRDC-104 as lacking in foundation, and recognize Exhibits SWRCB-25, SWRCB-103, NRDC-29, NRDC-40, and NRDC-104 as comprised of hearsay statements

1 insufficient in themselves to support a finding by the Board, pursuant to Government Code
2 section 11513(d).

3 LEGAL STANDARD

4 Exhibits and evidence in a hearing on a petition for change are admitted in accordance
5 with Government Code section 11513. (Cal. Code Regs., tit. 23, § 648.5.1.) Pursuant to that
6 standard, technical rules of evidence do not apply; instead, relevant evidence may be admitted if
7 “it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of
8 serious affairs.” (Gov. Code, § 11513(c).) Notwithstanding the flexibility of that rule, “[c]ertain
9 basic requirements must be met to constitute substantial evidence upon which the State Water
10 Board can rely.” (Feb. 21, 2017 Ruling, p. 16.) In particular, while relevant and reliable hearsay
11 evidence may be used for the purpose of supplementing or explaining other evidence, it is not
12 sufficient in itself to support a finding by the Board. (Gov. Code, § 11513(d); *see Aengst v. Bd. of*
13 *Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283.) As to all evidence, the Hearing
14 Officer has “discretion to exclude evidence if its probative value is substantially outweighed by
15 the probability that its admission would necessitate undue consumption of time.” (Gov. Code, §
16 11513(f).)

17 ARGUMENT

18 Certain exhibits offered by NRDC in the course of its cross-examination contain hearsay,
19 or are lacking in foundation. These objectionable exhibits include:

- 20 1. SWRCB-25 (Development of Flow Criteria for the Sacramento-San
21 Joaquin Delta Ecosystem, August 2010) is an out-of-court statement presented to Witness
22 Greenwood to explore the efficacy of existing regulatory requirements. As hearsay
23 evidence, the statements contained in SWRCB-25 cannot be relied upon alone to support a
24 finding by the Board. (*See* Gov. Code, § 11513(d).)
- 25 2. SWRCB-103 (Scientific Basis Report) is an out-of-court statement
26 admitted pursuant to the Hearing Officers’ oral ruling on April 24, 2018. As hearsay
27 evidence, however, the contents of SWRCB-103 cannot be relied upon alone to support a
28 finding by the Board. (*See* Gov. Code, § 11513(d).)

1 3. NRDC-29 (correspondence regarding Proposed Amendment to the
2 Reasonable and Prudent Alternative of the 2009 Biological Opinion, January 2017) is a
3 hearsay statement that neither supplements nor explains other evidence, and has very little
4 probative value as to the key Hearing issues. Indeed, oral testimony regarding this exhibit
5 has already been struck from the record, and upon cross examination this document was
6 revealed to be a draft, subject to future change. NRDC-29 was admitted pursuant to the
7 Hearing Officers' oral ruling on April 24, 2018. As hearsay evidence, however, the
8 contents of NRDC-29 cannot be relied upon alone to support a finding by the Board. (*See*
9 *Gov. Code, § 11513(d).*)

10 4. NRDC-40 (a draft thesis paper proposed to the Canadian Journal of
11 Fisheries and Aquatic Sciences) is an out-of-court statement by an author not subject to
12 cross-examination. NRDC-40 was admitted pursuant to the Hearing Officers' oral ruling
13 on April 24, 2018. As hearsay evidence, however, the contents of NRDC-40 cannot be
14 relied upon alone to support a finding by the Board. (*See Gov. Code, § 11513(d).*)

15 5. NRDC-104 (unattributed draft graphs, purporting to depict doubling
16 objectives for salmon) is inadmissible hearsay, lacking in foundation, and not the sort of
17 document upon which responsible persons would rely. This exhibit contains no
18 explanatory information regarding its origin or authorship, is explicitly marked as a draft,
19 and was offered without foundation or an opportunity to cross-examine its unidentified
20 authors regarding its contents. (H.T. p. 108:3-7 (“WITNESS GREENWOOD: I'm not
21 sure which of the -- I can't see the header. Are you asking me to read it off the screen or --
22 ; MR. OBEGI: Yeah, it's the right-hand column, sorry.”).) Because it lacks foundation
23 and authenticity, admission of NRDC-104 at this juncture is procedurally improper, and
24 may result in the undue consumption of time, as other parties will be forced to avail
25 themselves of rebuttal in order to refute the statements contained in that document, before
26 its relevance or validity can be tested in the ordinary course of Hearing procedures. To
27 the extent it is admitted, the contents of NRDC-104 are hearsay and cannot be relied upon
28 alone to support a finding by the Board. (*See Gov. Code § 11513(d).*)

1 Finally, Protestants note that the fact that certain of these exhibits were referred to by NRDC's
2 experts does not cure the hearsay nature of the statements contained within them. (*See People v.*
3 *Sanchez* (2016) 63 Cal.4th 665, 696 ("When any expert relates to the jury case-specific out-of-
4 court statements, and treats the content of those statements as true and accurate to support the
5 expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements
6 are not being admitted for their truth.")) To the extent that these documents are offered for the
7 truth of their contents, the Board's reliance on the hearsay statements contained within them is
8 constrained by Government Code section 11513, subdivision (d).

9 CONCLUSION

10 For all of the forgoing reasons, Protestants object to Exhibits SWRCB-25, SWRCB-103,
11 NRDC-29, NRDC-40 and NRDC-104 as hearsay evidence insufficient in itself to support a
12 finding by the Board. Protestants further object to the introduction of NRDC-104 as lacking in
13 foundation, and respectfully request that the Hearing Officers decline to admit that exhibit.
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1 DATED: May 1, 2018

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STATEMENT OF SERVICE

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

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

OBJECTIONS TO EXHIBITS OFFERED ON CROSS-EXAMINATION

to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated March 26, 2018, posted by the State of Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

	I caused a true and correct hard copy of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818: Method of Service: _____
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I certify that the foregoing is true and correct and that this document was executed on May 1, 2018.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

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