

1 KATHERINE POOLE (SBN 195010)
DOUGLAS ANDREW OBEGI (SBN 246127)
2 NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter Street, 21st Floor
3 San Francisco, CA 94104
Telephone: (415) 875-6100
4 Facsimile: (415) 875-6161
kpoole@nrdc.org; dobegi@nrdc.org

5
6 Attorneys for Natural Resources Defense Council,
The Bay Institute, and Defenders of Wildlife

7
8
9 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

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

**OPPOSITION TO SVWU'S OBJECTIONS
TO EXHIBITS OFFERED ON CROSS-
EXAMINATION**

1 The Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute
2 (“NRDC et al”) oppose the objections to exhibits offered on cross-examination served by the
3 Sacramento Valley Water Users et al (SVWU). SVWU object to one exhibit (NRDC-104) as
4 lacking in foundation, and claim that other exhibits constitute hearsay. However, SVWU’s
5 objections are not timely with respect to exhibits that were moved into evidence at the close of
6 NRDC et al’s case in chief, which includes all of the exhibits objected to by SVWU with the
7 exception of NRDC-104. Even if SVWU’s objections were timely, they lack a reasonable basis
8 and should be denied because all but one of the challenged exhibits, including NRDC-104, do
9 not constitute hearsay under the exception for official records.

10 First, SVWU’s objections are untimely with respect to exhibits moved into evidence
11 following the case in chief presented by NRDC et al. or other parties. SWRCB-103,¹ NRDC-29,²
12 and NRDC-40³ were all moved into evidence at the close of NRDC’s case in chief. WaterFix
13 hearing video archive, 4/24/18, at 6:26:15-6:67:12. The hearing officers offered the opportunity
14 for any party to object to exhibits moved into evidence at the close of NRDC’s case in chief, and
15 no party objected. *Id.* Therefore, SVWU have waived any objections to the exhibits moved into
16 evidence at the close of NRDC et al’s case in chief. In addition, SWRCB-25 had already been
17 admitted into evidence in 2017, and any objection now is plainly untimely. *See* Feb. 21, 2017
18 ruling; Nov. 8, 2017 ruling. The Hearing Officers should therefore deny SVWU’s objections
19 with respect to SWRCB-25, SWRCB-103, NRDC-29, and NRDC-40 on the grounds that the
20 objections were untimely.

21 Second, SWRCB-25, SWRCB-103, NRDC-29, and NRDC-104 do not constitute hearsay
22 under exceptions to the hearsay rule and would be admissible in a civil trial, and are thus
23 admissible under section 11513 of the Government Code.

25 ¹ Dr. Rosenfield’s written testimony repeatedly refers to and discusses the conclusions in this
26 document, and he included it in his list of literature cited. NRDC-58 Errata at 8, 19, 20, 25, 26,
27 27, 28, 47.

27 ² Dr. Rosenfield’s written testimony refers to this document as part of his proposed terms and
conditions. NRDC-58 Errata at 43.

28 ³ Dr. Rosenfield’s written testimony refers to and summarizes the conclusions in this study, and
he included it in his list of literature cited. NRDC-58 Errata at 10, 20, 46.

1 SWRCB-25 is the State Water Resources Control Board’s 2010 Flow Criteria Report.
2 The preparation of this report was mandated by the Legislature through an informational process
3 that SVWU participated in, and the State Water Resources Control Board is required as a matter
4 of law to consider SWRCB-25 in this water rights hearing. Cal. Water Code § 85086(c)(2). The
5 Legislature mandated that this water rights proceeding “shall be informed by the analysis
6 conducted pursuant to this section.” *Id.* Moreover, SWRCB-25 constitutes an official record
7 that is admissible under an exception to the hearsay rule. Cal. Evid. Code § 1280. SWRCB-25
8 was prepared by a government official, pursuant to official duties, at the time of the conclusion
9 of the 2010 public trust proceeding, and the full State Water Resources Control Board concluded
10 that the report was based on the best available science, indicating its trustworthiness. Courts and
11 the Board have previously admitted similar documents. For instance, in *People v. ConAgra*
12 *Grocery Products Company*, the court of appeal concluded that a monograph prepared by an
13 employee of the National Institutes of Health regarding the health effects of exposure to lead, a
14 report published by the Department of the Interior on the production of white lead in 2015, and
15 weekly reports of the Centers for Disease Control constitute official records exempt from
16 hearsay under section 1280. 17 Cal.App.5th 51, 138-139 (2017). Similarly, the State Water
17 Resources Control Board previously held that a regional board’s reports on the spread and level
18 of pollutants in groundwater are public records and are not inadmissible hearsay under section
19 1280. *In the Matter of the Petition of Harold and Joyce Logsdon*, State Water Resources Control
20 Board Order No. WQ-84-6, July 19, 1984, 1984 WL 946885. The Board has also held that
21 biological monitoring reports prepared by an agency subcontractor to satisfy compliance
22 obligations under a NMFS permit meet the official records exception to the hearsay rule. *In the*
23 *Matter of the Petitions of California Dept. of Transportation and MCM Construction, Inc.*,
24 SWRCB Order WQ 2014-2015, Feb. 4, 2014, 2014 WL 784908, *7. Because SWRCB-25
25 satisfies the requirements of section 1280, even assuming for the sake of argument that SVWU’s
26 objection was timely and ignoring the requirements of section 85086 of the Water Code, this
27 exhibit does not constitute hearsay and the objection should be overruled.

1 SWRCB-103 is the State Water Resources Control Board's 2017 Final Scientific Basis
2 Report for the Phase 2 update of the Bay-Delta Water Quality Control Plan. It was prepared by
3 employees of the State Water Resources Control Board pursuant to and within the scope of their
4 official duties, and it reports on the state of the science at the time of its writing in 2017.

5 Furthermore, the Hearing Officers have already ruled that:

6 Other reports authored by the Board could, however, be offered by parties and
7 admitted without sponsoring testimony because there is no requirement under
8 State Water Board regulations or Chapter 4.5 of the Administrative Procedure Act
9 that every exhibit be supported by testimony. We addressed this issue previously
10 in our February 21, 2017 ruling. In assessing the reliability of the reports and
their relevance to the hearing issues, we will consider the extent of any supporting
testimony and whether there was an opportunity for cross-examination on the
information and conclusions in the reports.”

11 Nov. 8, 2017 ruling at 3. SVWU had an opportunity to cross-examine Dr. Rosenfield and other
12 witnesses regarding the information and conclusions in this exhibit, and several parties did so.
13 Like SWRCB-25, SWRCB-103 constitutes an official record that is not inadmissible under the
14 hearsay rule, *see* Evid. Code § 1280, and even assuming that SVWU's objection was timely, the
15 objection should be overruled.

16 NRDC-29 is the National Marine Fisheries Service's January 21, 2017 draft amendment
17 to the Reasonable and Prudent Alternative for Shasta Dam operations in the 2009 biological
18 opinion. It was prepared by employees of the National Marine Fisheries Service, a federal
19 government agency, pursuant to and within the scope of their official duties under the federal
20 Endangered Species Act. It identifies changes to the existing reasonable and prudent alternative
21 in order to comply with the ESA and reports on the effects of operations in 2014 and 2015, and
22 its official writing indicates its trustworthiness. SVWU and other water users had an opportunity
23 to cross-examine Dr. Rosenfield and other witnesses regarding this exhibit. Like SWRCB-25,
24 NRDC-29 constitutes an official record that is not inadmissible under the hearsay rule, and even
25 assuming that SVWU's objection was timely, the objection should be overruled.

26 Finally, NRDC-104 constitutes an official record of the U.S. Fish and Wildlife Service,
27 made in the scope of and pursuant to official duties by employees of the U.S. Fish and Wildlife
28 Service, providing the most recent report of the production of salmon as compared to the salmon


1 doubling objective of the Central Valley Project Improvement Act of 1992. At the time it was
2 proffered for cross-examination, counsel for NRDC explained that this exhibit was downloaded
3 from the website of the U.S. Fish and Wildlife Service. Rough Transcript, April 28, 2018 at 112:
4 15-16. This document is available from the website of the U.S. Fish and Wildlife Service at the
5 web address:

6 https://www.fws.gov/lodi/anadromous_fish_restoration/documents/Doubling_goal_graphs_0630
7 [16.pdf](#). This exhibit identifies the sources of its data, including data from the California
8 Department of Fish and Wildlife's Grand Tab report, and its preparation by the U.S. Fish and
9 Wildlife Service indicates its trustworthiness. Like SWRCB-25, NRDC-104 constitutes an
10 official record that is not inadmissible under the hearsay rule. Moreover, counsel provided the
11 foundation for this exhibit during cross examination, *see* RT April 28, 2018 at 112:15-16, and the
12 document provides explanatory information regarding its data sources. The objection to NRDC-
13 104 should be overruled.

14 Because SVWU's objections were untimely with respect to exhibits that NRDC moved
15 into evidence as part of its case in chief, and because several of the exhibits do not constitute
16 hearsay under the official records exception, SVWU's objections should be overruled.

17
18 Dated: May 4, 2018

Natural Resources Defense Council

19 

20 _____
Doug Obegi

21 On behalf of the Natural Resources Defense
22 Council, Defenders of Wildlife, and the Bay
23 Institute