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## State Water Resources Control Board

November 30, 2023

### **RE: Hearing Officer's Rulings on City of Solvang's Motion in Limine and Other Objections to Rebuttal Testimony in the Matter of City of Solvang's Petition for Change of Water Right Permit 15878**

#### **TO ALL PARTIES:**

On August 15, 2023, the State Water Resources Control Board's (State Water Board or Board) Administrative Hearings Office (AHO) issued an Amended Notice of Public Hearing on the petition for change filed by the City of Solvang (Solvang) for water-right Permit 15878 (Application A022423) which authorizes diversions of water from the Santa Ynez River in Santa Barbara County. The hearing in this proceeding began on November 6, 2023.

Solvang, California Trout (CalTrout), California Department of Fish and Wildlife (CDFW), National Marine Fisheries Service (NMFS), and Cachuma Conservation Release Board (CCRB) submitted rebuttal exhibits to the AHO by the October 16 deadline set in the Amended Notice of Public Hearing. On October 26, Solvang, Santa Ynez Water Conservation District (Parent District), and CDFW filed evidentiary motions objecting to or seeking to exclude rebuttal exhibits or portions of written rebuttal testimony filed by other parties. On October 31, Solvang, CCRB, CalTrout, CDFW, and NMFS filed responses to these motions.

This ruling letter addresses Solvang's Motion in Limine No. 4 and other objections to rebuttal testimony and exhibits as identified by the following document titles:

- 2023-10-26 City of Solvang's Motion in Limine to Rebuttal Testimony of Kit Custis Submitted by California Department of Fish and Wildlife;
- 2023-10-26 City of Solvang's Evidentiary Objections to Case-In-Chief Exhibits Not Referenced In Any Declaration or Direct Testimony Submitted by Opposing Parties (See Hearing Officer's Ruling in Attachment A);
- 2023-10-26 City of Solvang's Evidentiary Objections to Rebuttal Testimonies of K. Evans, K. Custis, H. Sin, and Certain Exhibits Submitted by California Department of Fish and Wildlife (See Hearing Officer's Ruling in Attachment B);
- 2023-10-26 City of Solvang's Evidentiary Objections to Rebuttal Testimony of Richard Bush Submitted by National Marine Fisheries Service (See Hearing Officer's Ruling in Attachment C); and

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

- 2023-10-26 City of Solvang's Evidentiary Objections to Rebuttal Testimony of William (Bill) Trush Submitted by California Trout (See Hearing Officer's Ruling in Attachment D).

## **Legal Background**

This hearing is being conducted in accordance with State Water Board regulations applicable to adjudicative proceedings. (Cal. Code Regs., tit. 23, § 648, subd. (a).) The rules governing the admission of evidence in adjudicative proceedings before the Board are found in 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, subd. (b).)

The State Water Board is not bound in its proceedings by many of the 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).) Hearsay evidence is admissible in State Water Board proceedings to supplement or explain other evidence, but, over timely objection, is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code, § 11513, subd. (d).) In conducting the hearing, "[t]he [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.* at subd. (f).)

## **Solvang's Motion in Limine to Rebuttal Testimony of Kit Custis**

Solvang moves to exclude portions of the rebuttal testimony of Kit Custis (paragraphs 25 through 42) and associated exhibits on the grounds that these portions constitute improper case-in-chief evidence and do not rebut the case-in-chief testimony of any other witness. (2023-10-26 City of Solvang's Motion in Limine to Rebuttal Testimony of Kit Custis Submitted by California Department of Fish and Wildlife.)

"It is the policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits." (Cal. Code Regs., tit. 23, § 648.4, subd. (a).) The August 15, 2023 Amended Notice of Hearing (Hearing Notice) in this proceeding specified that case-in-chief testimony must be submitted in writing by September 8, 2023. The Hearing Notice further specified that "[p]arties must submit rebuttal testimony and exhibits before the hearing by the deadline specified in this notice. Written rebuttal testimony must specify the previously submitted testimony that is being rebutted." (Hearing Notice, pp. 21-22.)

The portions of Mr. Custis's testimony to which Solvang objects purport to respond to the testimony of Solvang's witness Tim Nicely. Solvang objects that the testimony is an attempt to "rectify and replace" CDFW witness Bryan DeMucha's case-in-chief evidence which did not include a Theis drawdown analysis, and an attempt to add a Jenkins stream-depletion analysis even though Mr. Nicely did not perform a Jenkins analysis. (Motion, p. 4.)

I overrule Solvang's objection because Mr. Custis's testimony responds to the testimony of Mr. Nicely. Mr. Custis conducted a Theis analysis that differs in certain respects from that of Mr. Nicely, which is an appropriate response in rebuttal to case-in-chief expert opinion. CDFW was not required to anticipate that Solvang would submit such an analysis and submit its own competing analysis as part of its case-in-chief. And although Mr. Nicely did not conduct a Jenkins analysis, he did testify as to the findings in Stetson Memorandum No. 6 about potential impacts to surface flows from approval of Solvang's petition for change. Therefore, Mr. Custis's testimony about potential impacts to surface flows using a Jenkins analysis is also appropriate rebuttal testimony. I will consider, after cross-examination of Mr. Custis, whether Solvang and other parties should have the opportunity to submit surrebuttal evidence in response to Mr. Custis's testimony.

Mr. Custis also submits in paragraph 41 of his written rebuttal testimony suggested revisions to the permit terms that CDFW, CalTrout, and NMFS submitted with their case-in-chief exhibits. The revisions submitted by Mr. Custis do not appear to respond to any testimony or the permit terms submitted by Solvang, or other opposing parties, but are revisions to Mr. DeMucha's testimony. Although CDFW may submit these revised permit terms with its closing brief, I will exclude the revisions to which Mr. Custis testifies (CDFW-108, ¶ 41) from the evidentiary record for this proceeding as improper rebuttal testimony because the testimony does not respond to the case-in-chief testimony submitted by any other party.

Sincerely,

*/s/ Nicole L. Kuenzi*

Nicole L. Kuenzi  
Presiding Hearing Officer  
Administrative Hearings Office  
State Water Resources Control Board

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8 Attorneys for Petitioner  
 9 CITY OF SOLVANG

10 **STATE WATER RESOURCES CONTROL BOARD**  
 11 **OFFICE OF ADMINISTRATIVE HEARINGS**

12  
 13 In the matter of the Petition for Change of the  
 14 City of Solvang for Water-Right Permit 15878  
 (Application A022423), which authorizes  
 15 diversion of water from the Santa Ynez River  
 16 (underflow) in Santa Barbara County

**CITY OF SOLVANG'S EVIDENTIARY  
 OBJECTIONS TO CASE-IN-CHIEF  
 EXHIBITS NOT REFERENCED IN ANY  
 DECLARATION OR DIRECT TESTIMONY  
 SUBMITTED BY OPPOSING PARTIES**

Hearing Dates and Time:

Dates: November 6, 8-9, 29-30, 2023; and  
 December 6-7, 2023 (subject to change)  
 Time: 9:00 a.m.  
 Hearing Officer: Nicole Kuenzi\_

**RICHARDS WATSON GERSHON**  
 ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION

1 TO THE STATE WATER RESOURCES CONTROL BOARD, OFFICE OF  
 2 ADMINISTRATIVE HEARINGS, AND ADMINISTRATIVE HEARING OFFICER NICOLE  
 3 KUENZI, AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

4 PLEASE TAKE NOTICE that Petitioner City of Solvang (hereinafter “Petitioner”) hereby  
 5 submits the following specific Evidentiary Objections to the Case-In-Chief Exhibits submitted by  
 6 opposing parties but not referenced in any declaration or direct testimony pursuant to the  
 7 Administrative Hearing Officer’s October 18, 2023 Evidentiary Ruling on City of Solvang’s  
 8 Motions in Limine in the Matter of City of Solvang’s Petition for Change of Water Right Permit  
 9 15878:

10  
 11 **CITY’S OBJECTIONS TO CHIEF-IN-CASE EXHIBITS**

12 **NOT REFERENCED IN ANY DECLARATION OR DIRECT TESTIMONY**

<b><u>MATERIAL OBJECTED TO:</u></b>	<b><u>GROUND FOR OBJECTION:</u></b>	<b><u>RULING ON THE OBJECTION</u></b>
<p>13 <b>Objection 1: CalTrout-16</b></p>	<p>14 Lack of Authentication. Evid. Code §                      15 1400, 1401; Relevance Gov. Code §                      16 11513(c); Evid. Code § 350. Exhibit                      17 CalTrout-16 is “Table 2” regarding                      18 “Dissolved oxygen concentration.”                      19 The source of Exhibit CalTrout-16                      20 cannot be ascertained by the exhibit                      21 itself. In addition, the original table                      22 appears modified to include cfs                      23 numbers but it is not evident from                      24 the document alone the source of                      25 those cfs numbers, to what the cfs                      26 numbers refer, and how the cfs                      27 numbers are relevant to the River                      28</p>	<p>14 Sustained: <input checked="" type="checkbox"/> x</p> <p>15</p> <p>16 Overruled: _____</p> <p>17 Although the table is                      18 reproduced and cited in                      19 CalTrout-6, the source and                      20 basis for the additional                      21 annotation is unclear and is                      22 not explained in any                      23 testimony submitted by                      24 CalTrout. Without                      25 explanatory testimony, the                      26 exhibit is not relevant to                      27 the hearing issues and will                      28 not assist the trier of fact.</p>

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	<p>Wells Project. The relevance of the original table numbers and information to the River Wells Project is also not evident by the exhibit itself.</p>	
<p><b>Objection 2:</b> CalTrout-19</p>	<p>Lack of Authentication. Evid. Code § 1400, 1401. Exhibit CalTrout-19 is a table on Santa Barbara County 2016 Water Use. The source of Exhibit CalTrout-19 cannot be ascertained by the exhibit itself. Moreover, water usage of the entire County of Santa Barbara is not relevant to the limited focus of this hearing – Petition for Change of the City of Solvang for Water-Right Permit 15878 (Application A022423).</p>	<p>Sustained: <input checked="" type="checkbox"/> <u>    </u> Overruled: <input type="checkbox"/> <u>    </u> The chart indicates in a footnote that the data is from "each water purveyor's Form DWR #38: Public Water System Statistics for CY 2016," but does not indicate how this underlying data can be obtained, how it was compiled in the chart, or who created the chart. Without additional foundation, the exhibit is not the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, and CalTrout has not shown that the exhibit is relevant to the hearing issues.</p>
<p><b>Objection 3:</b> CDFW-48</p>	<p>Lack of Authentication. Evid. Code § 1400, 1401. Exhibit CDFW-48 is a figure on the typical life histories of <i>oncorhynchus mykiss</i> believed to occur in Southern California. The source of Exhibit CDFW-48 cannot be ascertained by the exhibit itself. Although the apparent author of the figure appears in the bottom right</p>	<p>Sustained: <input type="checkbox"/> <u>    </u> Overruled: <input checked="" type="checkbox"/> <u>    </u> CDFW-48 is a figure included in CDFW-4, National Marine Fisheries Service (NMFS) 2012 Southern California Steelhead Recovery Plan. The figure is relevant and appears sufficiently reliable as part of an official document prepared by a federal agency to</p>



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	<p>corner, Exhibit CDFW-48 does not correspond to any figure in a “Boughton” report offered into evidence by the opposing parties. (See CDFW-9, CDFW-33, and CDFW-50).</p>	<p>meet the standard for admission in administrative proceedings.</p>
<p><b>Objection 4: CDFW-49</b></p>	<p>Lack of Authentication. Evid. Code § 1400, 1401; Relevance Gov. Code § 11513(c); Evid. Code § 350. Exhibit CDFW-49 is a photograph of a fish. Where and when the photograph was taken and who took the photograph cannot be ascertained by the exhibit itself. Further, given the lack of identifying information, it is wholly unclear whether Exhibit CDFW-49 is representative of fish in the Santa Ynez River and relevant to this proceeding.</p>	<p>Sustained: <u>  x  </u></p> <p>Overruled: _____</p> <p>CDFW explains in its responses to Solvang's objection that CDFW-49 was a photograph taken by CDFW staff from the South Coast Region steelhead team during a 2017 CDFW monitoring survey of Ygnacio Creek and that it supports elements of Mr. Evans testimony. In his testimony, Mr. Evans does not, however, reference CDFW-49, authenticate the photograph, or lay any other foundation as to what the photograph depicts. I conclude that</p>

without explanatory testimony, the photograph lacks sufficient reliability and relevance to be admitted into the evidentiary record.

1 DATED: October 26, 2023

RICHARDS, WATSON & GERSHON  
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B. TILDEN KIM  
CHELSEA E. O’SULLIVAN  
JACOB METZ  
TAYLOR FOLAND



7 By: \_\_\_\_\_  
8 Chelsea O’Sullivan  
9 Attorneys for Petitioner  
10 CITY OF SOLVANG

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 14 City of Solvang for Water-Right Permit 15878  
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 16 (underflow) in Santa Barbara County

**CITY OF SOLVANG'S EVIDENTIARY  
 OBJECTIONS TO REBUTTAL  
 TESTIMONIES OF KYLE EVANS, KIT  
 CUSTIS, HANS SIN, AND CERTAIN  
 EXHIBITS SUBMITTED BY CALIFORNIA  
 DEPARTMENT OF FISH AND WILDLIFE**

Hearing Dates and Time:

Dates: November 6, 8-9, 29-30, 2023; and  
 December 6-7, 2023 (subject to change)  
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1 TO THE STATE WATER RESOURCES CONTROL BOARD, OFFICE OF  
 2 ADMINISTRATIVE HEARINGS, AND ADMINISTRATIVE HEARING OFFICER NICOLE  
 3 KUENZI, AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

4 PLEASE TAKE NOTICE that Petitioner City of Solvang (hereinafter “Petitioner”) hereby  
 5 submits the following Evidentiary Objections to the Rebuttal Testimony of Kyle Evans (hereinafter  
 6 “Evans”), the Rebuttal Testimony of Kit Custis (hereinafter “Custis”), and the Rebuttal Testimony  
 7 of Hans Sin (hereinafter “Sin”) filed by the California Department of Fish and Wildlife (hereinafter  
 8 “CDFW”), and certain exhibits submitted by CDFW:

9 **CITY’S OBJECTIONS TO REBUTTAL TESTIMONY OF EVANS**

<b><u>MATERIAL OBJECTED TO:</u></b>	<b><u>GROUND FOR OBJECTION:</u></b>	<b><u>RULING ON THE OBJECTION</u></b>
<p>10 <b>Objection 1:</b> Exhibit CDFW-                      11 103, paragraph 16, lines 2-23 (in                      12 their entirety, including                      13 statements not reproduced here in                      14 the interest of brevity): “In the                      15 2016 Draft BO, NMFS describes                      16 the need to reinitiate consultation                      17 for the Bradbury Dam project                      18 based on new scientific                      19 information and a new                      20 understanding of operations at the                      21 Bradbury Dam...”</p>	<p>Issue Preclusion, Collateral Estoppel                      because previously raised in                      Cachuma proceedings; <i>Lucido v.</i>  <i>Superior Court</i> (1990) 51 Cal.3d                      335, 341: “Collateral estoppel                      precludes relitigation of issues                      argued and decided in prior                      proceedings.” <i>People v. Sims</i> (1982)                      32 Cal.3d 468, 489: “Collateral                      estoppel may be applied to decisions                      made by administrative agencies                      “[w]hen an administrative agency is                      acting in a judicial capacity and                      resolves disputed issues of fact                      properly before it which the parties                      have had an adequate opportunity to</p>	<p>Sustained: _____                      Overruled: _____                      Deferred. The hearing                      officer will                      consider arguments                      about the potential                      application of collateral                      estoppel to any hearing                      issues through the                      submission of written                      briefs but not as a                      threshold matter.</p>

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	<p>litigate.” (emphasis removed). <i>Murray v. Alaska Airlines, Inc.</i> (2010) 50 Cal.4th 860, 868-69 [factual findings and final decisions of an administrative agency can be given preclusive effect in a subsequent action between the same parties]. <i>In the Matter of the Petition For Reconsideration of the Kings River Water Association, Regarding Water Right Fee Determinations For Fiscal Year 2005-2006</i>, 2006 WL 900466, at *5–7 [factual findings on identical issue were binding on same parties in subsequent State Water Board proceeding.]</p>	
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**CITY’S OBJECTION TO REBUTTAL TESTIMONY OF CUSTIS AND CERTAIN EXHIBITS**

<b><u>MATERIAL OBJECTED TO:</u></b>	<b><u>GROUND FOR OBJECTION:</u></b>	<b><u>RULING ON THE OBJECTION</u></b>
<p><b>Objection 1:</b> CDFW-108 (Rebuttal Testimony of Kit Custis)</p>	<p>Improper Rebuttal Testimony Outside Scope of Rebuttal Testimony; Testimony Not Responsive to Evidence Submitted by Another Party (August 15, 2023 Amended Notice of Pre-Hearing</p>	<p>Sustained: _____  Overruled: _____ Sustained in part (excluding paragraph 41) and overruled in remainder. See Hearing Officer's Ruling on Solvang's Motion in Limine to Rebuttal</p>

1		Conference and Notice of Public	
2		Hearing (“Hearing Notice”), pp. 21-	
3		22; Cal. Code Regs., tit. 23, § 648.4);	
4		See also City’s Motion In Limine	
5		seeking to exclude the written	
6		testimony of Kit Custis in its	
7		entirety.	
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9	<b>Objection 2:</b> CDFW-106,	Improper Rebuttal Testimony	Sustained: _____
10	CDFW-107, and CDFW-109	Outside Scope of Rebuttal	Overruled: <u>  x  </u>
11	through CDFW-119.	Testimony; Testimony Not	See Hearing Officer's
12		Responsive to Evidence Submitted	Ruling on Solvang's
13		by Another Party (August 15, 2023	Motion in Limine to
14		Amended Notice of Pre-Hearing	Rebuttal Testimony of Kit
15		Conference and Notice of Public	Custis.
16		Hearing (“Hearing Notice”), pp. 21-	
17		22; Cal. Code Regs., tit. 23, § 648.4);	
18		See also City’s Motion In Limine	
19		seeking to exclude the written	
20		testimony of Kit Custis in its	
21		entirety.	
22	<b>Objection 3:</b> CDFW-108,	Lack of Foundation Evid. Code §	Sustained: _____
23	paragraph 2, lines 23-26: “This	403; Improper Basis for Opinion on	Overruled: <u>  x  </u>
24	conclusion of no significant	unexplained calculations and	Solvang's objection goes
25	impact to the river environs from	inappropriate application of 1:1	to the weight to be
26	pumping underflow at these	relationship. Evid. Code §§ 802, 803.	afforded Mr. Custis's
27	proposed Site B wells is contrary	<i>Bader v. Johnson &amp; Johnson</i> (2022)	testimony.
28		86 Cal.App.5th 1094, 1105: “[T]he	
		matter relied on must provide a	

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<p>to the previous impact analyses, which concluded that river flows will be depleted at a 1:1 ratio when the proposed Site B wells are pumped, and groundwater levels beneath the river at Site B will decline with pumping.”</p>	<p>reasonable basis for the particular opinion offered, and ... an expert opinion based on speculation or conjecture is inadmissible.”; <i>Smith v. Workmens Comp. App. Bd. v. County of Los Angeles</i> (1969) 71 Cal.2d 588, 593: “an expert’s opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence.” Relevance, Gov. Code § 11513(c); Evid. Code § 350. See Exhibit Solvang-5, paragraph 53; Exhibit Solvang-171, paragraphs 34-35.</p>	<p>Solvang will have the opportunity on cross-examination to explore the bases for Mr. Custis's testimony about Mr. Nicely's conclusions and Solvang's "previous impact analyses." (CDFW-108, para. 2, line 24.)</p>
<p><b>Objection 4:</b> CDFW-108, paragraph 11, line 25: “Perhaps this grading was part of a channel modification/restoration project.”</p>	<p>Lack of Foundation Evid. Code § 403; Improper Expert Opinion, Calls for Speculation. Evid. Code §§ 801(b), 802; <i>Sargon Enterprises, Inc. v. University of Southern California</i> (2012) 55 Cal.4th 747, 770: “...the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.”; <i>California Law Revision Commission Comments</i> on Evidence Code Section 801: “...under existing law,</p>	<p>Sustained: <u>  x  </u>  Overruled: _____ Mr. Custis does not provide additional information about the bases for this opinion. Although I could defer ruling on the objection until the bases for the opinion could be explored on cross-examination, I conclude that because the testimony appears to be of marginal relevance to the hearing issues, the probative value of the testimony is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Gov. Code, § 11513, subd. (f).)</p>

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	<p>irrelevant or speculative matters are not a proper basis for an expert’s opinion.”</p>	
<p><b>Objection 5:</b> CDFW-108, paragraph 12, lines 15-25: “Is this evidence that before the 1980s, the river was gaining reach but has since become a losing reach? What changes in the physical conditions in the vicinity of Site B could have caused this decline in underflow water elevation, underflow storage volume, and river regime? Did the flows in the Santa Ynez River change such that there was less “natural” seepage into the subsurface after the early- to mid-1970s? Did the reduction in underflow elevation occur with the pumping of wells at Site B because the volume of underflow storage removed by pumping wasn’t replaced by an increase in “natural” seepage? Did pumping upstream from Site B cause an upstream reduction in the volume of underflow entering</p>	<p>Lack of Foundation Evid. Code § 403; Improper Expert Opinion, Calls for Speculation. Evid. Code §§ 801(b), 802; <i>Sargon Enterprises, Inc. v. University of Southern California</i> (2012) 55 Cal.4th 747, 770: “...the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.”; <i>California Law Revision Commission Comments</i> on Evidence Code Section 801: “...under existing law, irrelevant or speculative matters are not a proper basis for an expert’s opinion.”</p>	<p>Sustained: <u>  x  </u>  Overruled: _____  Mr. Custis lists the questions to which his testimony is intended to respond. The questions do not express any expert opinion by Mr. Custis and therefore have limited probative value. Although I could defer ruling on the objection until the bases for the Mr. Custis' questions can be examined on cross-examination, I conclude that the probative value of the testimony is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Gov. Code, § 11513, subd. (f).)</p>



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<p>the shallow alluvium at Site B? Did the riverbed channel elevation or cross-section change in a way that resulted in less “natural” seepage into the subsurface? Did the change in the density of riverbed vegetation and its evapotranspiration affect the underflow water elevations?”</p>		
<p><b>Objection 6:</b> CDFW-108, paragraph 14, lines 23-4: “This seasonal decline in underflow water elevation may have been caused by pumping in well SYWATER 1111, other wells nearby at Site B (including known existing wells shown in Exhibit Solvang-18; and a Buellflat mine well, Exhibit CDFW-88, PDF p. 23, Plate 8). Unfortunately, since the well pumping records for the wells at or near Site B are not readily available, it is challenging to directly assess impacts of the pumping of these wells on underflow water elevations.”</p>	<p>Lack of Foundation Evid. Code § 403; Improper Expert Opinion, Calls for Speculation. Evid. Code §§ 801(b), 802; <i>Sargon Enterprises, Inc. v. University of Southern California</i> (2012) 55 Cal.4th 747, 770: “...the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.”; <i>California Law Revision Commission Comments</i> on Evidence Code Section 801: “...under existing law, irrelevant or speculative matters are not a proper basis for an expert’s opinion.”</p>	<p>Sustained: _____  Overruled: <u>  x  </u> Mr. Custis expresses his opinion here as to possible causes of a seasonal decline in underflow water elevations based on his expertise. Although expert opinion must be supported by some evidence, experts are permitted to testify as to possible causes of an observed effect even if the expert does not have sufficient evidence to reach a conclusion. (See <i>Kline v. Zimmer, Inc.</i> (2022) 79 Cal.App.5th 123, 134.) Solvang's objection to the foundation for these opinions goes to the weight to be afforded Mr. Custis' testimony. Solvang will have the opportunity to cross examine Mr. Custis about the bases for his opinions and I will consider Solvang's objections when evaluating the weight to be afforded his testimony in light of the whole evidentiary record.</p>

<p>1 <b>Objection 7:</b> CDFW-108,          2 paragraph 16, lines 22-24: “Was          3 this the result of a natural          4 reduction in river flows and          5 seepage, a change in riverbed          6 elevation, pumping of underflow,          7 increase in riverbed vegetation          8 density and ET, or a combination          9 of causes?”          10          11          12          13          14          15          16          17</p>	<p>Lack of Foundation Evid. Code §          403; Improper Expert Opinion, Calls          for Speculation. Evid. Code §§          801(b), 802; <i>Sargon Enterprises, Inc.</i>  <i>v. University of Southern California</i>          (2012) 55 Cal.4th 747, 770: “...the          matter relied on must provide a          reasonable basis for the particular          opinion offered, and that an expert          opinion based on speculation or          conjecture is inadmissible.”;  <i>California Law Revision Commission</i>  <i>Comments on Evidence Code Section</i>          801: “...under existing law,          irrelevant or speculative matters are          not a proper basis for an expert’s          opinion.”</p>	<p>Sustained.           See ruling on Objection          5.</p>
<p>18          19 <b>Objection 8:</b> CDFW-108,          20 paragraph 21, lines 4-12: “In          21 2004 through 2009, the riverbed          22 adjacent to Site B appears to have          23 undergone grading work,          24 possibly to restore the channel          25 after instream mining (Exhibit          26 CDFW-111, pp. 4-9). This in-          27 channel mining and grading          28 coincides with the decrease in the</p>	<p>Lack of Foundation Evid. Code §          403; Improper Expert Opinion, Calls          for Speculation. Evid. Code §§          801(b), 802; <i>Sargon Enterprises, Inc.</i>  <i>v. University of Southern California</i>          (2012) 55 Cal.4th 747, 770: “...the          matter relied on must provide a          reasonable basis for the particular          opinion offered, and that an expert          opinion based on speculation or</p>	<p>Sustained: <u>  x  </u>           Overruled: _____          Sustained in part and          overruled in part. The          testimony "possibly to          restore the channel after          instream mining" and "in-          channel mining and" shall          not be admitted into the          record as speculative and          lacking support in the          evidentiary record.</p>

<p>1 amplitude of the seasonal 2 oscillations. After 2015, the 3 amplitude of the seasonal 4 oscillation increased (Exhibit 5 CDFW-111, pp. 10-24). Perhaps 6 the difference in the 2-to-4-foot 7 amplitudes of the seasonal 8 oscillations during the period of 9 in-channel grading versus the 6- 10 to-8-foot amplitudes after 2015 is 11 due to vegetation ET. 12 Unfortunately, detailed historical 13 data quantifying underflow 14 pumping at Site B is not available 15 to allow for a comparison with 16 vegetation ET consumption.”</p>	<p>conjecture is inadmissible.”; <i>California Law Revision Commission Comments on Evidence Code Section 801: “...under existing law, irrelevant or speculative matters are not a proper basis for an expert’s opinion.”</i></p>	
<p>17 18 <b>Objection 9:</b> CDFW-108, 19 paragraph 22 (in its entirety, 20 including statements not 21 reproduced here in the interest of 22 brevity): “If we assume that the 23 recent increase in seasonal water 24 level oscillations is due to growth 25 of channel vegetation, that would 26 lead to a conclusion that the 275 27 AFY of ET measured from 2018 28 to 2023 caused a 4-to-6-feet of</p>	<p>Lack of Foundation Evid. Code § 403; Improper Expert Opinion, Calls for Speculation. Evid. Code §§ 801(b), 802; <i>Sargon Enterprises, Inc. v. University of Southern California</i> (2012) 55 Cal.4th 747, 770: “...the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.”;</p>	<p>Sustained: _____  Overruled: _____  Deferred. The hearing officer will address this objection after cross-examination of Mr. Custis.</p>

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<p>added seasonal decline in underflow water level at the well SYWATER 1111...”</p>	<p><i>California Law Revision Commission Comments on Evidence Code Section 801: “...under existing law, irrelevant or speculative matters are not a proper basis for an expert’s opinion.”</i></p>	
<p><b>Objection 10:</b> CDFW-108, paragraphs 25-38 (in their entirety, including statements not reproduced here in the interest of brevity): “To evaluate Mr. Nicely’s refined Theis drawdown analysis, I prepared a Theis drawdown analysis without using image wells. My Theis analysis assumes the aquifer is laterally infinite, and therefore, the drawdown will not be influenced by the boundaries of the Santa Ynez River Alluvium underflow...”</p>	<p>Improper Rebuttal Testimony Outside Scope of Rebuttal Testimony; Testimony Not Responsive to Evidence Submitted by Another Party (August 15, 2023 Amended Notice of Pre-Hearing Conference and Notice of Public Hearing (“Hearing Notice”), pp. 21-22; Cal. Code Regs., tit. 23, § 648.4); See also City’s Motion In Limine seeking to exclude the written testimony of Kit Custis in its entirety.</p>	<p>Sustained: _____  Overruled: <u>  x  </u> See Hearing Officer's Ruling on Solvang's Motion in Limine to Rebuttal Testimony of Kit Custis.</p>
<p><b>Objection 11:</b> CDFW-108, paragraphs 33-38 (in their entirety, including statements not reproduced here in the interest of brevity): “I performed the Jenkins</p>	<p>Improper Rebuttal Testimony Outside Scope of Rebuttal Testimony; Testimony Not Responsive to Evidence Submitted by Another Party (August 15, 2023</p>	<p>Sustained: _____  Overruled: <u>  x  </u> See Hearing Officer's Ruling on Solvang's Motion in Limine to Rebuttal Testimony of Kit Custis.</p>

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<p>stream depletion calculations for various pumping times, including 183 days (i.e., the 6 months of pumping modeled by Mr. Nicely). The calculations show that the rate of stream depletion as a percentage of the pumping rate (column F) after 6 months of pumping ranges...”</p>	<p>Amended Notice of Pre-Hearing Conference and Notice of Public Hearing (“Hearing Notice”), pp. 21-22; Cal. Code Regs., tit. 23, § 648.4); See also City’s Motion In Limine seeking to exclude the written testimony of Kit Custis in its entirety.</p>	
<p><b>Objection 12:</b> CDFW-108, paragraph 40, lines 2-13 (in their entirety, including statements not reproduced here in the interest of brevity): “If the Santa Ynez River underflow is being recharged by the adjacent older alluvium formations at a rate that is comparable to the Santa Ynez River, then what physical and hydrogeologic condition(s) define the underflow boundary? If there are no features to create a reasonably well-defined underflow boundary at Site B, then perhaps Solvang’s proposed Site B wells would be pumping from percolating groundwater,</p>	<p>Lack of Foundation Evid. Code § 403; Improper Expert Opinion, Calls for Speculation. Evid. Code §§ 801(b), 802; <i>Sargon Enterprises, Inc. v. University of Southern California</i> (2012) 55 Cal.4th 747, 770: “...the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.”; <i>California Law Revision Commission Comments</i> on Evidence Code Section 801: “...under existing law, irrelevant or speculative matters are not a proper basis for an expert’s opinion.”</p>	<p>Sustained: _____  Overruled: _____  Deferred. Solvang's objection appears to go to the weight to be afforded Mr. Custis' testimony. However, the hearing officer will address this objection after cross-examination of Mr. Custis.</p>

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<p>which would also cause depletion of the adjacent Santa Ynez River due to interconnection of surface water and groundwater in this area...”</p>		
<p><b>Objection 13:</b> CDFW-108, paragraph 41 (in its entirety, including statements not reproduced here in the interest of brevity): “Mr. DeMucha’s testimony recommended 5 permit conditions (Exhibit CDFW-101, p. 14, lines 15-17; p. 15, lines 13). Based on my analysis above regarding impacts from the proposed wells, I concur with Mr. DeMucha’s recommended permit conditions, with the following minor additions...”</p>	<p>Improper Rebuttal Testimony Outside Scope of Rebuttal Testimony; Testimony Not Responsive to Evidence Submitted by Another Party (August 15, 2023 Amended Notice of Pre-Hearing Conference and Notice of Public Hearing (“Hearing Notice”), pp. 21-22; Cal. Code Regs., tit. 23, § 648.4); Lack of Foundation Evid. Code § 403; To the extent relied on DeMucha testimony, Improper Basis for Opinion, Evid. Code §§ 802, 803. See City of Solvang Motion in Limine No. 2.</p>	<p>Sustained: <u>  x  </u></p> <p>Overruled: _____</p> <p>See Hearing Officer's Ruling on Solvang's Motion in Limine to Rebuttal Testimony of Kit Custis.</p>
<p><b>Objection 14:</b> CDFW-108, paragraph 41, p. 24, lines 4-13 (in their entirety, including statements not reproduced here in the interest of brevity): “Periodic biological surveys shall be</p>	<p>Improper Expert Testimony Outside Subject on which Witness has Special Knowledge, Skill, Experience, Training, or Education, Evid. Code §§ 720, 800-803.</p>	<p>Sustained: _____</p> <p>Overruled: _____</p> <p>Objection mooted because paragraph 41 is excluded, see Hearing Officer's Ruling on Solvang's Motion in Limine to Rebuttal Testimony of Kit Custis.</p>

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<p>conducted at intervals to be determined in consultation with CDFW to assess the biological condition of the river’s riparian vegetation. The biological survey results shall be made available to the public within 60 days of the survey’s completion...”</p>		
<p><b>Objection 15:</b> CDFW-108, paragraph 41.D, p. 25, lines 5-11 (in their entirety, including statements not reproduced here in the interest of brevity): “Production Well Construction and Water Level Monitoring Devices: The design of the proposed wells shall incorporate dedicated sounding pipes and port to measure <u>underflow water depths and elevations</u> groundwater levels. The sounding pipe shall be of sufficient size to house dedicated pressure transducers...”</p>	<p>Improper Rebuttal Testimony Outside Scope of Rebuttal Testimony; Testimony Not Responsive to Evidence Submitted by Another Party (August 15, 2023 Amended Notice of Pre-Hearing Conference and Notice of Public Hearing (“Hearing Notice”), pp. 21-22; Cal. Code Regs., tit. 23, § 648.4); See also City’s Motion In Limine seeking to exclude the written testimony of Kit Custis in its entirety.</p>	<p>Sustained: _____  Overruled: _____ Objection mooted because paragraph 41 is excluded, see Hearing Officer's Ruling on Solvang's Motion in Limine to Rebuttal Testimony of Kit Custis.</p>

**CITY’S OBJECTIONS TO REBUTTAL TESTIMONY OF SIN.**

<b><u>MATERIAL OBJECTED TO:</u></b>	<b><u>GROUND FOR OBJECTION:</u></b>	<b><u>RULING ON THE OBJECTION</u></b>
<p><b>Objection 1:</b> Exhibit CDFW-121, paragraph 8, lines 25-28: “Exhibit CDF-122 also shows the location of the previously submitted photos taken between Well Sites A and B (Exhibit CDFW-67) that clearly depict good quality SFWL/LBVI habitat; the map also shows the presence of yellow-breasted chat, which are a good indicator species for LBVI, below Well Site B in the riparian corridor.”</p>	<p>Unsubstantiated for Purpose Being Offered. Evid. Code § 803 to the extent relying on Exhibit CDFW-67; <i>Bader v. Johnson &amp; Johnson</i> (2022) 86 Cal.App.5th 1094, 1105: “[T]he matter relied on must provide a reasonable basis for the particular opinion offered, and ... an expert opinion based on speculation or conjecture is inadmissible.” The City previously objected to CDFW-67 on the basis of Relevance Gov. Code § 11513(c); Evid. Code § 350; Lack of Foundation Evid. Code § 403. Lack of Personal Knowledge. Evid. Code § 702(a). Lack of Authentication Evid. Code § 1400, 1401 The area shown in Exhibit CDFW-67 is located outside of the River Wells Project Site. Moreover, these photos were taken in a location outside of the area where the river wells are proposed to be located.</p>	<p>Sustained: _____  Overruled: <u>  x  </u> Mr. Sin testified in his case-in-chief testimony about the location, date, and other circumstances under which the photographs submitted as CDFW-67 were taken. Mr. Sin's expert opinion based on these photographs is based on evidence in the record. Even though the location of the photographs is not within Well Site B, the photographs are relevant insofar as CDFW asserts that the proposed wells could impact riparian vegetation outside of Well Site B.</p>

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ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION



1	<b>Objection 2:</b> Exhibit CDFW-	Lack of Foundation Evid. Code §	Sustained: _____
2	121, paragraphs 11: “The PAX	403. Contrary to assertion made,	Overruled: <u>  x  </u>
3	Report describes the results of a	Gibson testimony did not state that	Solvang's objection goes
4	one-day survey on April 2, 2021,	the survey found SWFL/LBVI	to the weight to be
5	conducted along the north bank	habitat 1.3 miles downstream of Well	afforded Mr. Sin's
6	of the Santa Ynez River from	Site B or that there was no habitat for	testimony rather than its
7	Alisal Bridge, westward for	these species before this point;	admissibility. The hearing
8	approximately 1.5 miles (Exhibit	rather, testimony states these species	officer will consider
9	CDFW-55, p. 1092) This survey	were detected in the project area but	Solvang's objection when
10	only went 0.2 miles past Well	“not expected to nest” in the project	considering the
11	Site B and it did not survey 1.3	site and that “Suitable habitat for	testimony's probative
12	miles downstream of Well Site B	these species was present 1.3 miles	value.
13	(Exhibit CDFW-122) to	downstream” of the proposed well	
14	determine if SWFL/LBVI	location. (Exhibit Solvang-4, p. 31,	
15	suitable habitat started at that	lines 8-9). This is consistent with the	
16	point as stated by Mr. Gibson.”	PAX Report, which states that	
17		“[m]ore extensive riparian habitat	
18		which is more suitable for these	
19		species does occur approximately 1.3	
20		miles downstream from Well Site	
21		B...” (Exhibit Solvang-22, p. 7).	
22			
23	<b>Objection 3:</b> Exhibit CDFW-	Relevance Gov. Code § 11513(c);	Sustained: _____
24	121, paragraph 13, lines 16-18 (in	Evid. Code § 350; Lack of	Overruled: <u>  x  </u>
25	their entirety, including	Foundation Evid. Code § 403. Lack	Solvang's objection seems
26	statements not reproduced here in	of Personal Knowledge. Evid. Code	to be based on Mr. Sin's
27	the interest of brevity): “C) “On	§ 702(a). Lack of Authentication	alleged lack of personal
28	May 18th, 2023, CDFW staff	Evid. Code § 1400, 1401. See	knowledge about the
			circumstances under
			which the photographs
			were taken.

Mr. Sin testified on cross-examination and redirect about the identity of the

<p>1 2 3 4 5 6</p>	<p>took photos (CDFW-67) between Well Sites A and B, immediately below the rock quarry, looking downstream...”</p>	<p>Evidentiary Objections to CDFW Direct Testimony and Certain Exhibits, City’s Objection to Testimony of Sin and Certain Exhibits Objection 2 (Sept. 22, 2023)</p>	<p>photographer and his knowledge of the circumstances. (2023-11-09 Hearing Transcript (afternoon session).) To the extent that the testimony objected to is based on out of court statements by other CDFW staff, the hearing officer may consider this testimony to be</p>
<p>7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p>	<p><b>Objection 4:</b> CDFW-121, paragraph 19 (in its entirety, including statements not reproduced here in the interest of brevity): “Maximum drawdown values based on Solvang’s proposed withdrawals are about 13 feet at this distance of 1,312 feet (Exhibit CDFW-91), which would further cause desiccation of the CRLF and WPT habitat at this location. Given the potential indirect impacts to habitat, if the State Water Board approved the proposed project, monitoring of known occurrences of CRLF and WPT and other listed and special status species in and downstream of the proposed project area is warranted to understand the long-term impacts of the proposed project’s water diversions on</p>	<p>Improper Expert Testimony Outside Subject on which Witness has Special Knowledge, Skill, Experience, Training, or Education, Evid. Code §§ 720, 800-803.</p>	<p>hearsay, which is still admissible.</p> <p>Sustained: _____</p> <p>Overruled: _____</p> <p>Mr. Sin's testimony is based on a since-corrected version of CDFW-91. Therefore, the hearing officer will exclude paragraph 19 because it lacks evidentiary support. The hearing officer may, however, ask Mr. Sin questions about his opinions as to the potential impact of drawdown based on the revised CDFW-91.</p> <p>The remainder of Solvang's objections to paragraph 19 are therefore mooted.</p>

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<p>these species and habitat...”</p>		
<p><b>Objection 5:</b> CDFW-121, paragraphs 23-26 (in their entirety, including statements not reproduced here in the interest of brevity and inclusive of figures): “As part of his case-in-chief testimony, CDFW expert witness Bryan DeMucha reviewed the historical water levels of the Santa Ynez River based on the data from monitoring well SY1111 at Well Site B (Exhibit CDFW-89)...”</p>	<p>Improper Expert Testimony Outside Subject on which Witness has Special Knowledge, Skill, Experience, Training, or Education, Evid. Code §§ 720, 800-803; Relevance Gov. Code § 11513(c); Evid. Code § 350. To the extent relied on DeMucha testimony, Improper Basis for Opinion, Evid. Code §§ 802, 803. See City of Solvang Motion in Limine No. 2.</p>	<p>Sustained: <u>  x  </u> Overruled: _____ Overruled in part and sustained in part. Paragraphs 24-26 are excluded. Mr. Sin's testimony extends beyond the testimony and opinions offered by Mr. DeMucha and Mr. Sin appears to have modified CDFW-89 in his testimony to include data for 1935. Mr. Sin's testimony and modifications interpreting the hydrologic data are outside of the subject matter in which Mr. Sin has special knowledge, skill, experience training, or education. (Evid. Code § 801.) In addition, the hearing officer will exclude paragraph 26 and associated figure because it is based on the since-revised CDFW-91 and lacks evidentiary support. See Ruling on Objection 4.</p>
<p><b>Objection 6:</b> CDFW-121, paragraph 24, lines 16-17 (in their entirety, including statements not reproduced here in the interest of brevity): “In 1935, the water level was right at ground level, 23 feet above the river bottom at 342 feet of elevation.”</p>	<p>Lack of Foundation Evid. Code § 403.</p>	<p>Sustained: <u>  x  </u> Overruled: _____ See ruling on Objection 5.</p>

1	<b>Objection 7:</b> CDFW-121,	Improper Expert Testimony Outside	Sustained: <u>  x  </u>
2	paragraph 32, lines 12-14: “The	Subject on which Witness has	Overruled: _____
3	Santa Ynez River has changed	Special Knowledge, Skill,	See ruling on Objection 5.
4	over time. The SY1111	Experience, Training, or Education,	
5	hydrograph shows that water	Evid. Code §§ 720, 800-803;	
6	levels were historically higher	Relevance Gov. Code § 11513(c);	
7	than the riverbed until the 1970s,	Evid. Code § 350. Lack of	
8	while they are now consistently	Foundation Evid. Code § 403.	
9	below the riverbed.”		
10			
11	<b>Objection 8:</b> CDFW-121,	Improper Expert Testimony Outside	—
12	paragraph 34, lines 11-14 (in	Subject on which Witness has	Sustained in part and
13	their entirety, including	Special Knowledge, Skill,	overruled in part. The
14	statements not reproduced here in	Experience, Training, or Education,	sentence that begins
15	the interest of brevity): “Current	Evid. Code §§ 720, 800-803;	"Current water
16	water levels from 2000 to 2022	Relevance Gov. Code § 11513(c);	levels..." is excluded
17	have shown the water level to be	Evid. Code § 350.	as
18	1.1 feet to 14.5 feet below the		outside of Mr. Sin's area of
19	riverbed...”		expertise, see ruling on
20			Objection 5.
21	<b>Objection 9:</b> CDFW-121,	Improper Rebuttal Testimony	Sustained: <u>  x  </u>
22	paragraph 35, lines 15-18: “In	Outside Scope of Rebuttal	Overruled: _____
23	addition to the monitoring wells	Testimony; Testimony Not	The testimony does not
24	that I recommended in my	Responsive to Evidence Submitted	appear to respond to any
25	previous testimony (Exhibit	by Another Party (August 15, 2023	testimony or the permit
26	CDFW-53, pp. 30-32), I would	Amended Notice of Pre-Hearing	terms submitted by any other
27	recommend comprehensive	Conference and Notice of Public	party. Therefore it is
28	vegetation monitoring at	Hearing (“Hearing Notice”), pp. 21-	improper rebuttal testimony
			and is excluded. (See also,
			Hearing Officer's Ruling on
			Solvang's Motion in Limine
			to Rebuttal Testimony of Kit
			Custis.)

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<p>permanent plots in areas that support special status species to document any resulting change in vegetation composition, structure, and cover to assess the effects of water diversions.”</p>	<p>22; Cal. Code Regs., tit. 23, § 648.4). Relevance, Outside Scope of Proceedings Gov. Code § 11513(c); Evid. Code § 350; Probative value is substantially outweighed by the probability that admission will necessitate undue consumption of time Gov Code § 11513(f).</p>	<p>CDFW (and any other party) may submit revised permit terms with its closing brief.</p>
<p><b>Objection 10:</b> CDFW-121, paragraph 35, lines 18-21: “If water diversions are negatively affecting herbaceous species within the riparian vegetative communities, I would recommend requiring actions as described in the written rebuttal testimony of Kit Custis (Exhibit CDFW-108, ¶ 40).”</p>	<p>Improper Expert Testimony Outside Subject on which Witness has Special Knowledge, Skill, Experience, Training, or Education, Evid. Code §§ 720, 800-803; Relevance, Outside Scope of Proceedings Gov. Code § 11513(c); Evid. Code § 350; Probative value is substantially outweighed by the probability that admission will necessitate undue consumption of time Gov Code § 11513(f).</p>	<p>Sustained: _____  Overruled: <u>  x  </u> Mr. Sin testified that his area of knowledge and expertise as a biologist included knowledge about water needs of riparian vegetation. ((2023-11-09 Hearing Transcript (afternoon session), p. 29.)  Solvang's objection based on relevance is unclear. The testimony may be relevant to hearing issues l.c., l.d., and l.e.</p>

1 DATED: October 26, 2023

RICHARDS, WATSON & GERSHON  
A Professional Corporation  
B. TILDEN KIM  
CHELSEA E. O’SULLIVAN  
JACOB METZ  
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7 By: \_\_\_\_\_

Chelsea O’Sullivan  
Attorneys for Petitioner  
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8 Attorneys for Petitioner  
 9 CITY OF SOLVANG

10 **STATE WATER RESOURCES CONTROL BOARD**  
 11 **OFFICE OF ADMINISTRATIVE HEARINGS**

12  
 13 In the matter of the Petition for Change of the  
 14 City of Solvang for Water-Right Permit 15878  
 (Application A022423), which authorizes  
 15 diversion of water from the Santa Ynez River  
 16 (underflow) in Santa Barbara County

**CITY OF SOLVANG'S EVIDENTIARY  
 OBJECTIONS TO REBUTTAL  
 TESTIMONY OF RICHARD BUSH**

Hearing Dates and Time:

Dates: November 6, 8-9, 29-30, 2023; and  
 December 6-7, 2023 (subject to change)  
 Time: 9:00 a.m.  
 Hearing Officer: Nicole Kuenzi\_

1 TO THE STATE WATER RESOURCES CONTROL BOARD, OFFICE OF  
 2 ADMINISTRATIVE HEARINGS, AND ADMINISTRATIVE HEARING OFFICER NICOLE  
 3 KUENZI, AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

4 PLEASE TAKE NOTICE that Petitioner City of Solvang (hereinafter “Petitioner”) hereby  
 5 submits the following Evidentiary Objections to the Rebuttal Testimony of Richard Bush  
 6 (hereinafter “Bush”) filed by National Marine Fisheries Service (hereinafter “NMFS”).

7  
 8 **CITY’S OBJECTIONS TO REBUTTAL TESTIMONY OF RICHARD BUSH**

<b><u>MATERIAL OBJECTED TO:</u></b>	<b><u>GROUND FOR OBJECTION:</u></b>	<b><u>RULING ON THE OBJECTION</u></b>
<p>9                      10                      11                      12 <b>Objection 1:</b> NMFS-23,                      13 paragraph 3: “First, I expect a                      14 reduction in the amount and                      15 extent of surface flow, because                      16 the Project would allow pumping                      17 at a rate that exceeds river flow                      18 during periods of low surface                      19 flow (e.g., pumping 2.8 cfs when                      20 river discharge is &gt; 1.5 cfs).                      21 Based on the GSI Water                      22 Solutions Technical                      23 Memorandum (NMFS-11;                      24 Solvang-21), Solvang’s analysis                      25 assumes a 1:1 relationship                      26 between Santa Ynez River                      27 surface and subsurface                      28 underflow, resulting in increased</p>	<p>Improper Expert Testimony Outside                      Subject on which Witness has                      Special Knowledge, Skill,                      Experience, Training, or Education,                      Evid. Code §§ 720, 800-803; Lack of                      Foundation Evid. Code § 403;                      Improper Basis for Opinion on                      unexplained calculations and                      inappropriate application of 1:1                      relationship. Evid. Code §§ 802, 803.  <i>Bader v. Johnson &amp; Johnson</i> (2022)                      86 Cal.App.5th 1094, 1105: “[T]he                      matter relied on must provide a                      reasonable basis for the particular                      opinion offered, and ... an expert                      opinion based on speculation or                      conjecture is inadmissible.”; <i>Smith v.</i>  <i>Workmens Comp. App. Bd. v. County</i>  <i>of Los Angeles</i> (1969) 71 Cal.2d 588,                      593: “an expert’s opinion which does</p>	<p>Sustained: _____                      Overruled: <u>  x  </u>                      I understand Mr. Bush’s                      testimony to be an                      explanation of his                      understanding of flow                      impacts from the project                      and the bases on which his                      expert opinions about                      potential impacts to                      steelhead rest. To the                      extent that Solvang seeks                      to challenge these                      assumptions, Solvang has                      had (and will have) the                      opportunity to cross                      examine Mr. Bush. I will                      also consider Solvang’s                      objections when                      considering the weight to                      be afforded Mr. Bush’s                      testimony.</p>

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<p>underflow withdrawal of 1.2 cfs under the City’s current operations and 2.8 cfs under the proposed Project, meaning that the Project would increase withdrawals by 1.6 cfs on a monthly basis.”</p>	<p>not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence.” Relevance, Gov. Code § 11513(c); Evid. Code § 350. See Exhibit Solvang-5, paragraph 53; Exhibit Solvang-171, paragraphs 34-35.</p>	
<p><b>Objection 2:</b> NMFS-23, paragraph 5: “Based on information contained in the November 5, 2021 GSI Technical Memorandum (NMFS-11, at 8), it is assumed that the proposed Solvang well pumping will remove surface flow from the river at a 1:1 ratio. Removing 2.73 cfs [<i>sic</i>] of flow from the Santa Ynez River during times of low flows, without a meaningful monitoring protocol in place to verify that steelhead or their designated critical habitat are not being adversely affected is expected to result in a significant and avoidable impact to the species.”</p>	<p>Improper Expert Testimony Outside Subject on which Witness has Special Knowledge, Skill, Experience, Training, or Education, Evid. Code §§ 720, 800-803; Lack of Foundation Evid. Code § 403; Improper Basis for Opinion on unexplained calculations and inappropriate application of 1:1 relationship. Evid. Code §§ 802, 803. <i>Bader v. Johnson &amp; Johnson</i> (2022) 86 Cal.App.5th 1094, 1105: “[T]he matter relied on must provide a reasonable basis for the particular opinion offered, and ... an expert opinion based on speculation or conjecture is inadmissible.”; <i>Smith v. Workmens Comp. App. Bd. v. County of Los Angeles</i> (1969) 71 Cal.2d 588, 593: “an expert’s opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial</p>	<p>Sustained: _____ Overruled: <u>  x  </u> See ruling on Objection 1, above.</p>

1		evidence.” Relevance, Gov. Code §	
2		11513(c); Evid. Code § 350. See	
3		Exhibit Solvang-5, paragraph 53;	
4		Exhibit Solvang-171, paragraphs 34-	
5		35.	
6	<b>Objection 3:</b> NMFS-23,	Improper Expert Testimony Outside	Sustained: <u>  x  </u>
7	paragraph 6: “In reality, the	Subject on which Witness has	Overruled: <u>          </u>
8	available information indicates	Special Knowledge, Skill,	The testimony is
9	that the Solvang’s proposal, when	Experience, Training, or Education,	outside of the subject
10	implemented, would reduce the	Evid. Code §§ 720, 800-803; Lack of	matter in which Mr. Bush
11	amount and extent of surface	Foundation Evid. Code § 403.	has special knowledge,
12	flow through a portion of the	Reliance on “available information”	skill, experience, training,
13	main stem Santa Ynez River.”	as basis for assertion is vague and	or education. (Evid.
14		not accompanied by citation to any	Code § 801.)
15		evidence or exhibits.	
16	<b>Objection 4:</b> NMFS-23,	Issue Preclusion, Collateral Estoppel	Sustained: <u>          </u>
17	paragraphs 8-9 (starting with	because previously raised in	Overruled: <u>          </u>
18	“Generally . . .” and through the	Cachuma proceedings; <i>Lucido v.</i>	Deferred. The hearing
19	end of paragraph 9, including	<i>Superior Court</i> (1990) 51 Cal.3d	officer will
20	statements not reproduced here in	335, 341: “Collateral estoppel	consider arguments
21	the interest of brevity):	precludes relitigation of issues	about the potential
22	“Generally, the 2000 Opinion for	argued and decided in prior	application of collateral
23	the Cachuma project should not	proceedings.” <i>People v. Sims</i> (1982)	estoppel to any hearing
24	be relied upon to inform an	32 Cal.3d 468, 489: “Collateral	issues through the
25	understanding of the potential	estoppel may be applied to decisions	submission of written
26	effects of the [ <i>sic</i> ] Solvang’s	made by administrative agencies	briefs but not as a
27	Project on endangered steelhead	“[w]hen an administrative agency is	threshold matter.
28	or designated critical habitat for	acting in a judicial capacity and	

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<p>this species, owing in part to key differences between the consultations underlying the 2000 Opinion and NMFS’s updated 2016 Draft Biological Opinion (2016 Draft Opinion), as explained more fully on page 8 of the Draft Opinion (NMFS-15, at 8)...”</p>	<p>resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.” (emphasis removed). <i>Murray v. Alaska Airlines, Inc.</i> (2010) 50 Cal.4th 860, 868-69 [factual findings and final decisions of an administrative agency can be given preclusive effect in a subsequent action between the same parties]. <i>In the Matter of the Petition For Reconsideration of the Kings River Water Association, Regarding Water Right Fee Determinations For Fiscal Year 2005-2006</i>, 2006 WL 900466, at *5–7 [factual findings on identical issue were binding on same parties in subsequent State Water Board proceeding.]</p>	
<p><b>Objection 5:</b> NMFS-23, paragraph 10: “The fact that the analysis referenced by Mr. Gibson does not included “pumping by others” is of concern, because pumping by others has the potential to amplify or worsen the true effects of the pumping due to the proposal on</p>	<p>Improper Expert Testimony Outside Subject on which Witness has Special Knowledge, Skill, Experience, Training, or Education, Evid. Code §§ 720, 800-803.</p>	<p>Sustained: _____ Overruled: <u>  x  </u> Sustained in part and overruled in part. Mr. Bush initially observes only that pumping by other parties could have a cumulative effect in impacting steelhead habitat. Mr. Bush does not offer any opinion as to whether there would be such an effect based on the evidence here.</p>

<p>1 2 3 4 5 6 7 8 9 10 11 12</p>	<p>the amount and extent of designated critical habitat for endangered steelhead and individual steelhead in the affected area. Therefore, the findings from Solvang’s analysis are more likely than not to lead to spurious conclusions regarding the potential effects of the pumping proposal on this highly imperiled species and its designated critical habitat.”</p>		<p>The statement beginning "Therefore, the findings ..." is excluded as outside of the subject matter in which Mr. Bush has special knowledge, skill, experience, training, or education. (Evid. Code § 801.)</p>
<p>13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p>	<p><b>Objection 6:</b> NMFS-23, paragraph 11: “This is important because subsequent to NMFS’s 2000 Opinion we have published a series of technical memoranda (e.g., Boughton et al. 2005, 2006, and 2007; Boughton and Goslin 2006) and a final recovery plan for endangered steelhead (NMFS-7). Additionally, NMFS scientific staff have conducted studies and produced a number of peer-reviewed publications on steelhead ecology and genetics (e.g., Hayes et al. 2008, 2011; Clemento et al. 2009; Boughton et al. 2015).”</p>	<p>Issue Preclusion, Collateral Estoppel because previously raised in Cachuma proceedings; <i>Lucido v. Superior Court</i> (1990) 51 Cal.3d 335, 341: “Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.” <i>People v. Sims</i> (1982) 32 Cal.3d 468, 489: “Collateral estoppel may be applied to decisions made by administrative agencies “[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to</p>	<p>Sustained: _____ Overruled: _____ Deferred. The hearing officer will consider arguments about the potential application of collateral estoppel to any hearing issues through the submission of written briefs but not as a threshold matter.</p>

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	<p>litigate.” (emphasis removed). <i>Murray v. Alaska Airlines, Inc.</i> (2010) 50 Cal.4th 860, 868-69 [factual findings and final decisions of an administrative agency can be given preclusive effect in a subsequent action between the same parties]. <i>In the Matter of the Petition For Reconsideration of the Kings River Water Association, Regarding Water Right Fee Determinations For Fiscal Year 2005-2006</i>, 2006 WL 900466, at *5-7 [factual findings on identical issue were binding on same parties in subsequent State Water Board proceeding.]</p>	
<p><b>Objection 7:</b> NMFS-23, paragraph 13: “Again, the available information indicates the proposed pumping would reduce the amount and extent of surface flow and, by extension, designated critical habitat for endangered steelhead.”</p>	<p>Lack of Foundation Evid. Code § 403. Reliance on “available information” as basis for assertion is vague and not accompanied by citation to any evidence or exhibits. Improper Expert Testimony Outside Subject on which Witness has Special Knowledge, Skill, Experience, Training, or Education, Evid. Code §§ 720, 800-803.</p>	<p>Sustained: <input checked="" type="checkbox"/> x _____ Overruled: _____ The testimony is outside of the subject matter in which Mr. Bush has special knowledge, skill, experience, training, or education. (Evid. Code § 801.)</p>

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<p><b>Objection 8:</b> NMFS-23, paragraphs 14-16 (starting with “Second, the claim . . .” and continuing until the end of paragraph 16, including statements not reproduced here in the interest of brevity): “Second, the claim rests on meeting conditions or criteria under the 2000 Biological Opinion. However, that biological opinion involves one or more assumptions regarding surface flow in the main stem Santa Ynez River that appear to have been rendered invalid over time, as explained more fully above and in the 2016 Draft Opinion (NMFS-15)...”</p>	<p>Issue Preclusion, Collateral Estoppel because previously raised in Cachuma proceedings; <i>Lucido v. Superior Court</i> (1990) 51 Cal.3d 335, 341: “Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.” <i>People v. Sims</i> (1982) 32 Cal.3d 468, 489: “Collateral estoppel may be applied to decisions made by administrative agencies “[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.” (emphasis removed). <i>Murray v. Alaska Airlines, Inc.</i> (2010) 50 Cal.4th 860, 868-69 [factual findings and final decisions of an administrative agency can be given preclusive effect in a subsequent action between the same parties]. <i>In the Matter of the Petition For Reconsideration of the Kings River Water Association, Regarding Water Right Fee Determinations For Fiscal Year 2005-2006</i>, 2006 WL</p>	<p>Sustained: _____ Overruled: _____ Deferred. The hearing officer will consider arguments about the potential application of collateral estoppel to any hearing issues through the submission of written briefs but not as a threshold matter.</p>
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	900466, at *5-7 [factual findings on identical issue were binding on same parties in subsequent State Water Board proceeding.]	
<p><b>Objection 9:</b> NMFS-23, paragraph 18: “Third, NMFS is aware of one or more recent events that resulted in disconnected flows and unexpected streamflow loss in a portion of the main stem Santa Ynez River where coordination between the City, other pumpers, and Reclamation was insufficient to prevent a dewatering event (e.g., NMFS-39, NMFS-43).”</p>	<p>Lack of Foundation Evid. Code § 403; Unsubstantiated for Purpose Bieng Offered Evid. Code § 803; <i>Bader v. Johnson &amp; Johnson</i> (2022) 86 Cal.App.5th 1094, 1105: “[T]he matter relied on must provide a reasonable basis for the particular opinion offered, and ... an expert opinion based on speculative or conjecture is inadmissible.” Neither NMFS-39 nor NMFS-43 discuss coordination between the City and other pumpers.</p>	<p>Sustained: _____ Overruled: <u>  x  </u> The testimony seems to be based on personal knowledge, not opinion. Solvang will have the opportunity to cross-examine Mr. Bush about the bases for the testimony and I will consider Solvang's objection when considering the weight to be afforded Mr. Bush's testimony.</p>
<p><b>Objection 10:</b> NMFS-23, paragraph 20: “As described in the effects analysis of NMFS’ 2016 Draft Opinion, operation of the Cachuma project appreciably reduces or precludes development and maintenance of physical or biological features of critical habitat designated for the Southern California steelhead</p>	<p>Issue Preclusion, Collateral Estoppel because previously raised in Cachuma proceedings; <i>Lucido v. Superior Court</i> (1990) 51 Cal.3d 335, 341: “Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.” <i>People v. Sims</i> (1982) 32 Cal.3d 468, 489: “Collateral estoppel may be applied to decisions</p>	<p>Sustained: _____ Overruled: _____ Deferred. The hearing officer will consider arguments about the potential application of collateral estoppel to any hearing issues through the submission of written briefs but not as a threshold matter.</p>

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<p>DPS in the Santa Ynez River downstream of Bradbury Dam and is expected to continue reducing the likelihood of both species survival and recovery.”</p>	<p>made by administrative agencies “[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.” (emphasis removed). <i>Murray v. Alaska Airlines, Inc.</i> (2010) 50 Cal.4th 860, 868-69 [factual findings and final decisions of an administrative agency can be given preclusive effect in a subsequent action between the same parties]. <i>In the Matter of the Petition For Reconsideration of the Kings River Water Association, Regarding Water Right Fee Determinations For Fiscal Year 2005-2006</i>, 2006 WL 900466, at *5–7 [factual findings on identical issue were binding on same parties in subsequent State Water Board proceeding.]</p>	
<p><b>Objection 11:</b> NMFS-23, paragraph 20: “ Solvang proposal is expected to artificially reduce the amount and extent of surface flows in the main stem river”</p>	<p>Lack of Foundation Evid. Code § 403; Improper Expert Testimony Outside Subject on which Witness has Special Knowledge, Skill, Experience, Training, or Education, Evid. Code §§ 720, 800-803.</p>	<p>Sustained: <u>  x  </u> Overruled: _____ The testimony is outside of the subject matter in which Mr. Bush has special knowledge, skill, experience, training, or education. (Evid. Code § 801.)</p>



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	<p>Statement is not based on any relevant expert testimony or evidence and Mr. Bush does not have the special knowledge, skill, experience, training or education in hydology/hydrogeology to make such a claim.</p>	
<p><b>Objection 12:</b> NMFS-23, paragraph 21: “ With regard to FIS-6, continuing to coordinate with the other well pumpers in the area (i.e., Alisal Ranch, ID No. 1, and Santa Ynez River Water Conservation District) is not a new mitigation measure developed to mitigate an effect of the River Wells Project, but rather an on-going activity that has not been effective at avoiding adverse effects to steelhead, as explained above (see also NMFS-39).”</p>	<p>Lack of Foundation Evid. Code § 403; Unsubstantiated for Purpose Bieng Offered Evid. Code § 803; <i>Bader v. Johnson &amp; Johnson</i> (2022) 86 Cal.App.5th 1094, 1105: “[T]he matter relied on must provide a reasonable basis for the particular opinion offered, and ... an expert opinion based on speculative or conjecture is inadmissible.” Statement referenced with “explained above” lacks foundation, see Objection 9; Exhibit NMFS-39 does not support assertion made as it does not mention or refer to coordination with other well pumpers.</p>	<p>Sustained: _____ Overruled: <u>  x  </u> Solvang's objection goes to the weight to be afforded Mr. Bush's testimony, not its admissibility. Solvang will have the opportunity to cross-examine Mr. Bush and I will consider Solvang's objection when determining the relative weight of his testimony.</p>
<p><b>Objection 13:</b> NMFS-23, paragraph 22: “The available information indicates that the Project, when implemented,</p>	<p>Lack of Foundation Evid. Code § 403; Improper Expert Testimony Outside Subject on which Witness has Special Knowledge, Skill,</p>	<p>Sustained: <u>  x  </u> Overruled: _____</p>

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<p>would reduce the amount and extent of surface flow through a portion of the main stem Santa Ynez River.”</p>	<p>Experience, Training, or Education, Evid. Code §§ 720, 800-803. Reliance on “available information” as basis for assertion is vague and not accompanied by citation to any evidence or exhibits.</p>	<p>The testimony is outside of the subject matter in which Mr. Bush has special knowledge, skill, experience, training, or education. (Evid. Code § 801.)</p>
<p><b>Objection 14:</b> NMFS-23, paragraph 23: “First, NMFS the 2016 Draft Opinion [<i>sic</i>] concludes the operation and maintenance of the Cachuma Project is likely to jeopardize the continued existence of endangered steelhead and destroy or adversely modify its designated critical habitat (NMFS-15). The 2016 Draft Opinion stipulates a reasonable and prudent alternative to Reclamation’s proposed action that would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.”</p>	<p>Issue Preclusion, Collateral Estoppel because previously raised in Cachuma proceedings; <i>Lucido v. Superior Court</i> (1990) 51 Cal.3d 335, 341: “Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.” <i>People v. Sims</i> (1982) 32 Cal.3d 468, 489: “Collateral estoppel may be applied to decisions made by administrative agencies “[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.” (emphasis removed). <i>Murray v. Alaska Airlines, Inc.</i> (2010) 50 Cal.4th 860, 868-69 [factual findings and final decisions of an administrative agency can be given preclusive effect in a</p>	<p>Sustained: _____ Overruled: _____ Deferred. The hearing officer will consider arguments about the potential application of collateral estoppel to any hearing issues through the submission of written briefs but not as a threshold matter.</p>

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	<p>subsequent action between the same parties]. <i>In the Matter of the Petition For Reconsideration of the Kings River Water Association, Regarding Water Right Fee Determinations For Fiscal Year 2005-2006, 2006 WL 900466, at *5-7 [factual findings on identical issue were binding on same parties in subsequent State Water Board proceeding.]</i></p>	
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ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION

DATED: October 26, 2023

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JACOB METZ  
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10 **STATE WATER RESOURCES CONTROL BOARD**  
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 13 In the matter of the Petition for Change of the  
 14 City of Solvang for Water-Right Permit 15878  
 (Application A022423), which authorizes  
 15 diversion of water from the Santa Ynez River  
 (underflow) in Santa Barbara County

**CITY OF SOLVANG'S EVIDENTIARY  
 OBJECTIONS TO REBUTTAL  
 TESTIMONY OF WILLIAM (BILL) TRUSH**

Hearing Dates and Time:

Dates: November 6, 8-9, 29-30, 2023; and  
 December 6-7, 2023  
 Time: 9:00 a.m.  
 Hearing Officer: Nicole Kuenzi

**RICHARDS WATSON GERSHON**  
 ATTORNEYS AT LAW - A PROFESSIONAL CORPORATION

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1 TO THE BOARD AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that Petitioner City of Solvang (hereinafter “Petitioner”) hereby  
3 submits the following Evidentiary Objections to the Rebuttal Testimony of William (Bill) Trush  
4 (hereinafter “Dr. Trush”) filed by California Trout (hereinafter “CalTrout”).

5 **CITY’S OBJECTIONS TO REBUTTAL TESTIMONY OF WILLIAM (BILL) TRUSH**

<b><u>MATERIAL OBJECTED TO:</u></b>	<b><u>GROUND FOR OBJECTION:</u></b>	<b><u>RULING ON THE OBJECTION</u></b>
<p>6 7 8 9 10 11 12 13 14 15 16 17 18</p> <p><b>Objection 1:</b> CalTrout-37, ¶1, p. 1, lines 3-4: The future of the Southern California steelhead population entirely relies on restoring the health of the Santa Ynez River ecosystem.”</p>	<p>Lacks Foundation. There is no basis or supporting evidence to support the broad claim that the Southern California steelhead’s future “entirely relies” on restoring the health of the Santa Ynez River ecosystem (Evid. Code § 403.)</p> <p>Improper Basis for Opinion. No reasonable basis is established. (Evid. Code §§ 802, 803. <i>Bader v. Johnson &amp; Johnson</i> (2022) 86 Cal.App.5th 1094, 1105 [“the matter relied on must provide a reasonable basis for the particular opinion offered, and ... an expert opinion based on speculation or conjecture is inadmissible.”].)</p>	<p>Sustained: _____</p> <p>Overruled: <u> x </u></p> <p>The opinion expressed by Dr. Trush appears to be based on the whole of his experience and knowledge as an expert in the subject matter. I will consider Solvang’s objection when determining the weight to be afforded Dr. Trush’s testimony.</p>
<p>19 20 21 22 23 24 25 26 27 28</p> <p><b>Objection 2:</b> CalTrout-37, ¶1, p. 1, lines 4-5: “The health of the Santa Ynez River ecosystem is its capacity for self-renewal.”</p>	<p>Lacks Foundation. There is no basis for the claim that the “health” of the Santa Ynez River ecosystem is related to the vague concept of “self-renewal” referenced in the essay by Aldo Leopold regarding agricultural and land conservation philosophy and policy. (Evid. Code § 403.)</p> <p>Improper Basis for Opinion. No reasonable basis is established. (Evid. Code §§ 802, 803. <i>Bader v. Johnson &amp; Johnson</i> (2022) 86 Cal.App.5th 1094, 1105 [“the matter relied on must provide a reasonable basis for the particular opinion offered, and ... an expert opinion based on speculation or conjecture is inadmissible.”].)</p>	<p>Sustained: _____</p> <p>Overruled: <u> x </u></p> <p>See Ruling on Objection 1, supra.</p>

<p>1 <b>Objection 3:</b> CalTrout-37, ¶1, p.          2 1, lines 5-9: “As stated by Luna          3 Leopold at UC Berkeley in his          4 Essay, <i>Conservation: In Whole or</i>          5 <i>In Part</i>, a true and correct copy of          6 which is submitted as CalTrout          7 Exhibit 62, Leopold wrote, ‘The          8 land consists of soil, water,          9 plants, and animals, but health is          10 more than a sufficiency of these          11 components. It is a state of          12 vigorous self-renewal in each of          13 them, and in all collectively.’”</p>	<p>Lacks Foundation, there is no          CalTrout-62. To the extent CalTrout-          55 was meant to be referenced this          statement lacks relevance and is          improper expert testimony. (Evid.          Code § 403.)<sup>1</sup></p> <p>Relevance. The essay by Aldo          Leopold, <i>Conservation: In Whole or</i>  <i>In Part</i> (CalTrout-55), concerns          agricultural and land conservation          philosophy and policy, which is          irrelevant to Mr. Gibson’s testimony          and this proceeding. The concept of          “self-renewal” in this context is          irrelevant to this proceeding. (Gov.          Code § 11513, subd. (c); Evid. Code          § 350.)</p> <p>Improper Expert Testimony. Mr.          Trush’s testimony states that the          essay is written by Luna Leopold (a          hydrologist). In reality, the essay was          written by Aldo Leopold whose          expertise is environmental ethics and          philosophy. It is therefore          unsubstantiated for the purpose being          offered (Evid. Code §§ 720, 800-          803; <i>Smith v. Workmens Comp. App.</i>  <i>Bd. v. County of Los Angeles</i> (1969)          71 Cal.2d 588, 593 [“an expert’s          opinion which does not rest upon          relevant facts or which assumes an          incorrect legal theory cannot          constitute substantial evidence.”].)</p>	<p>Sustained: <u>  x  </u></p> <p>Overruled: _____</p> <p>The statement will be          excluded from the          evidentiary record based          on the lack of proper          attribution and lack of          sufficient information to          ascertain the appropriate          weight to which it          should be afforded as          evidence relevant to the          hearing issues. (See          Gov. Code § 11513,          subd. (f) [“The [hearing]          officer has discretion to          exclude evidence if its          probative value is          substantially outweighed          by the probability that          its admission will          necessitate undue          consumption of time.”].)          I will, however, consider          the statement in a non-          evidentiary manner as a          statement of policy.</p>
<p>19 <b>Objection 4:</b> CalTrout-37, ¶2, p.          20 1, lines 13-19: “[M]oving the          21 diversion downstream does not          22 avoid important steelhead habitat,          23 it merely relocates the impact.          24 For example, if we place an ‘X’          25 on a map of the Santa Ynez River          26 watershed anywhere an alevin          27 hatches, the entire mainstem          28 channel network downstream is          critical to that alevin’s ability to          return as a spawning adult          steelhead—regardless of whether          that ‘X’ is located within or</p>	<p>Lacks Foundation. There is no          evidentiary support for the          conclusory assertion that “it makes          no difference” to the impact to          steelhead regardless of where the          diversion occurs. (Evid. Code §          403.)</p> <p>Improper Basis for Opinion. (Evid.          Code §§ 802, 803. <i>Bader v. Johnson</i>          &amp; <i>Johnson</i> (2022) 86 Cal.App.5th          1094, 1105 [“the matter relied on          must provide a reasonable basis for          the particular opinion offered, and ...</p>	<p>Sustained: _____</p> <p>Overruled: <u>  x  </u></p> <p>See Ruling on Objection          1, supra.</p>

<sup>1</sup> The testimony references “CalTrout Exhibit 62” but no such exhibit exists. This appears to be a typographical error and the intended reference is to Exhibit CalTrout-55. Additionally, the testimony cites to CalTrout-60 (¶5, p. 3:12) and CalTrout-61 (¶ 7, p. 3:26; ¶ 7, p .4:2; ¶ 11, p. 5:16), but these exhibits do not exist.



1		(Evid. Code § 403.)	
2		Improper Basis for Opinion. (Evid. Code §§ 802, 803. <i>Bader v. Johnson &amp; Johnson</i> (2022) 86 Cal.App.5th 1094, 1105 [“the matter relied on must provide a reasonable basis for the particular opinion offered, and ... an expert opinion based on speculation or conjecture is inadmissible.”].)	
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7	<b>Objection 8:</b> CalTrout-37, ¶9, p. 4, lines 25-26: “Intentionally dewatering rearing habitat (i.e., by prescribing a higher diversion rate) below Alisal is counterproductive to recovering the steelhead population’s capacity for self-renewal.”	Lacks Foundation. Mr. Trush’s testimony, again, cites to the vague concept of “self-renewal” cited in the essay by Aldo Leopold, which is not a reasonable basis for the opinion offered because Leopold’s philosophical principles on agricultural and land conservation are irrelevant to the rearing habitat of steelhead. Further, Mr. Trush applies the concept of “self-renewal” to the steelhead population, whereas in ¶¶ 1 and 2, Mr. Trush applies the concept to the Santa Ynez River’s capacity for “self-renewal.” There is no explanation for the broad application of the concept of “self-renewal” to various topics. There is no evidentiary support for the claim that dewatering is counterproductive to steelhead’s capacity for self-renewal. (Evid. Code § 403.)	Sustained: _____ Overruled: <u>  x  </u> See Ruling on Objection 1, supra.
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19		Improper Basis for Opinion. (Evid. Code §§ 802, 803. <i>Bader v. Johnson &amp; Johnson</i> (2022) 86 Cal.App.5th 1094, 1105 [“the matter relied on must provide a reasonable basis for the particular opinion offered, and ... an expert opinion based on speculation or conjecture is inadmissible.”].)	
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24	<b>Objection 9:</b> CalTrout-37, ¶11, p. 5, lines 7-10: “A recently hatched alevin above Alisal Bridge, will require the best rearing/out-migration mainstem habitat possible along its entire route, including downstream from Alisal, to the Pacific Ocean as a healthy smolt. NOAA recognizes this imperative for	Lacks Foundation. NMFS-6 does not support the assertion that it is NOAA’s position that the best possible rearing/out-migration mainstem habitat is imperative to steelhead’s “self-renewal.” In fact, nowhere in 141 pages of the NOAA’s 50 CFR Part 226 (NMFS-6) does it mention the concept of	Sustained: _____ Overruled: <u>  x  </u> See Response to Objection 1, supra.
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1	recovering Southern steelhead population self-renewal by formally designating all the mainstem from just below Bradbury Dam downstream to the Pacific Ocean as “critical” Southern California steelhead habitat. NMFS-6.”	“self-renewal.” (Evid. Code § 403.)  Improper Basis for Opinion. (Evid. Code §§ 802, 803. <i>Bader v. Johnson &amp; Johnson</i> (2022) 86 Cal.App.5th 1094, 1105 [“the matter relied on must provide a reasonable basis for the particular opinion offered, and ... an expert opinion based on speculation or conjecture is inadmissible.”]; <i>Smith v. Workmens Comp. App. Bd. v. County of Los Angeles</i> (1969) 71 Cal.2d 588, 593 [“an expert’s opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence.”].)	
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11	<b>Objection 10:</b> CalTrout-37, ¶14, p. 6, lines 11-13: “Mr. Gibson failed to acknowledge the 2000 BiOp’s collective failure the last 20 years at measurably improving the Southern California steelhead population’s capacity for self-renewal.”	Lacks Foundation. (Evid. Code § 403.)  Improper Basis for Opinion. (Evid. Code §§ 802, 803. <i>Bader v. Johnson &amp; Johnson</i> (2022) 86 Cal.App.5th 1094, 1105 [“the matter relied on must provide a reasonable basis for the particular opinion offered, and ... an expert opinion based on speculation or conjecture is inadmissible.”].)	Sustained: _____  Overruled: _____  Deferred. Solvang will have the opportunity to cross-examine Dr. Trush about the bases for this opinion.
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17	<b>Objection 11:</b> CalTrout-37, ¶14, p. 6, lines 14-17: “The City of Solvang’s proposed additional ‘small’ diversions will not protect steelhead. The diversions will adversely impact critical mainstem habitat downstream from Alisal where steelhead migrate, spawn, and rear and thus further hasten the threat of steelhead extinction.”	Lacks Foundation. There is no support for this conclusory assertion. (Evid. Code § 403.)  Improper Basis for Opinion. (Evid. Code §§ 802, 803. <i>Bader v. Johnson &amp; Johnson</i> (2022) 86 Cal.App.5th 1094, 1105 [“the matter relied on must provide a reasonable basis for the particular opinion offered, and ... an expert opinion based on speculation or conjecture is inadmissible.”].)	Sustained: _____  Overruled: _____  Deferred. Solvang will have the opportunity to cross-examine Dr. Trush about the bases for this opinion.
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24	<b>Objection 12:</b> CalTrout-55	Relevance. The essay by Aldo Leopold, <i>Conservation: In Whole or In Part</i> , concerns agricultural and land conservation philosophy and policy, which is irrelevant to Mr. Gibson’s testimony and this proceeding (Gov. Code § 11513(c); Evid. Code § 350.)	Sustained: <u>  x  </u>  Overruled: _____  See Ruling on Objection 3, supra.
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1 DATED: October 26, 2023

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