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9 VALLEY WATER MANAGEMENT COMPANY

10 BEFORE THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
11 FOR THE CENTRAL VALLEY REGION

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14 In the Matter of:

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16 TENTATIVE CEASE AND DESIST  
17 ORDER R5-2015-XXXX FOR VALLEY  
18 WATER MANAGEMENT COMPANY'S  
19 RACE TRACK HILL FACILITY AND  
20 FEE 34 FACILITY, EDISON OIL FIELD,  
21 KERN COUNTY

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**VALLEY WATER MANAGEMENT COMPANY'S  
OBJECTIONS TO PROSECUTION TEAM'S  
REBUTTAL EVIDENCE SUBMITTAL AND  
WITNESSES**

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1 Pursuant to the Advisory Team’s Revised Hearing Procedure, Valley Water Management  
2 Company (“Valley Water”) hereby submits the following response to the objections sent by  
3 Prosecution Team for the Central Valley Regional Water Quality Control Board (“Prosecution Team”)  
4 to the Advisory Team on July 3, 2015, as well as objections to the Prosecution Team’s rebuttal  
5 evidence submitted and witnesses identified in Prosecution Team’s filings on July 6, 2015 in the above-  
6 captioned matter related to the proposed Cease and Desist Order (“CDO”) No. R5-2015-XXXX.

7 **I. RESPONSE TO PROSECUTION TEAM’S OBJECTIONS**

8 **A. JULY 3RD OBJECTIONS**

9 The Prosecution Team sent an email to the Advisory Team on Friday, July 3, 2015, objecting to  
10 Valley Water’s objections 3 and 4, on pages 5-6, to the use of Exhibit 10. These objections by Valley  
11 Water stated as follows:

- 12 3. PT Statement, p. 1: “Information from the California Department of Water Resources  
13 identified 36 groundwater supply wells within about one-mile of the Fee 34 Facility.”

14 **OBJECTION:** Lack of evidence. Citation to an exhibit without adequate support or  
15 information.

16 **REBUTTAL:** The only information supplied in the record is Exhibit 10, which  
17 provides no information as to whether the 36 wells cited are active or not, whether  
18 the wells are currently or were historically used, and for what purpose the wells  
19 were used. Without this information, this statement is incomplete, misleading and  
20 should be stricken.

- 21 4. PT Statements, p. 2: “Although Resolution 58-349 found ‘no freshwater producing wells in  
22 this vicinity,’ more recent information from the California Department of Water Resources  
23 identified six groundwater supply wells within one-mile of the [Race Track Hill] Facility.  
24 The wells [near the Race Track Hill Facility] may have been used for domestic water  
25 supply, agriculture supply, or industrial service supply. The current status of these wells  
26 [near the Race Track Hill Facility] is not clear and some may have been destroyed. Several  
27 residences are within a mile of the [Race Track Hill] facility and appear to depend on wells  
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1 to meet their water needs. There also is a small grape vineyard about three quarters of a mile  
2 southwest of the facility that appears to rely on groundwater to meet its irrigation needs.”

3 **OBJECTION:** Lack of evidence. There are no citations to exhibits, declarations or  
4 other authenticated material to support these allegations.

5 **REBUTTAL:** Assuming that the Prosecution Team is relying on Exhibit 10 (which  
6 is not indicated in the submission), this Exhibit does not support these “facts.”  
7 Exhibit 10 only shows one red dot, indicating a potential well, approximately 8000  
8 feet (over 1.5 miles) west of the Race Track Hill facility, and other wells to the  
9 southwest, none of which are in the potential downstream flow gradient from that  
10 site. (See Exhibit 32.) Exhibit 10 also does not support the allegations set forth in  
11 Exhibit 11, which includes blue circled areas stating “Residence believed to have a  
12 Domestic Well” since those circles are not included on Exhibit 10’s well records.

13 The essence of the Prosecution Team’s objections seem to be that Valley Water had Department  
14 of Water Resources (“DWR”) well logs and that somehow makes Exhibit 10 not objectionable. This is  
15 not the case.

16 Exhibit 10 states that the “source” of the information is “Geotracker,” not DWR well logs. (See  
17 Exhibit 10, stating “Source = Geotracker”.) The Geotracker GAMA (Groundwater Ambient Monitoring  
18 and Assessment Program) system was created by the State Water Board (circa year 2000) to monitor  
19 groundwater quality. If one goes to the website, the well location, well number, and ownership  
20 information can be accessed, however one cannot access not the well completion report information  
21 (depth, date of drilling, drilling log) protected by Water Code section 13752. The Prosecution Team  
22 could and should have supplied the unprotected Geotracker information with its opening submission.

23 Instead, the Prosecution Team provided no additional information as to how this document was  
24 created, or by whom, and the well locations indicated by “dots” were not tagged with a well  
25 identification number of some sort so that Valley Water’s experts could double-check the accuracy. In  
26 addition, the map was of such a large scale that individual wells could not be located by section,  
27 township and range (STR). STR information was not shown on the map. Since the Geotracker source  
28 information was not provided or identified, Valley Water had no convenient way to determine if the  
“dots” were consistent with the wells in the area identified and located by Valley Water’s experts. (See  
Exhibit 32, Figure 8.)

1 Without any identifying information, it was also not clear whether the Prosecution Team had  
2 utilized the same information Valley Water's experts were using. In addition, as stated in Objection 3  
3 above, the Prosecution Team made no effort to determine and provide information on whether the  
4 "dots" represent wells that are active (or not), whether the wells are currently or were historically used,  
5 and for what purpose the wells were used. That information is critical to a determination as to whether  
6 any existing beneficial uses are being impacted or threatened.

7 Some well information could have been submitted by the Prosecution Team without violating  
8 the letter or spirit of Water Code section 13752<sup>1</sup> by redacting owner names, dates of drilling, and other  
9 specific identifying information, or providing the publicly available Geotracker data used.

10 Alternatively, the Prosecution Team could have merely numbered the well dots 1-36 for those near the  
11 Fee 34 facility and A-F for the dots near the Race Track Hill Facility, and then provided the  
12 information in its excel spreadsheet to Valley Water offline so that both Designated Parties could have  
13 been on the same page, but avoiding public disclosure. Either way, this information could and should  
14 have been submitted in its Case in Chief and is objectionable because submitted belatedly on rebuttal.

15 Finally, Valley Water was not stating that it was not given DWR well information, the  
16 objections were to the creation and inclusion of Exhibit 10, which may or may not reflect that DWR  
17 well information. In addition, Valley Water also objected to Exhibit 10 on the grounds that it was  
18 incomplete, misleading, not authenticated, included hearsay, and represented an expert document for  
19 which the Prosecution Team has designated no experts that could rely on the opinions of others. (See  
20 Valley Water's Objections at pages 5-9. Those objections remain valid notwithstanding the Prosecution  
21 Team's recent email.

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25 <sup>1</sup> Valley Water recently discovered the newly chaptered S.B. 83 (approved by the Governor and filed  
26 with the Secretary of State on June 24, 2015), which modifies the requirements of Section 13752 by  
27 amending that statute to read: 13752. (a) Reports made in accordance with paragraph (1) of subdivision  
28 (b) of Section 13751 shall be made available as follows: (1) to government agencies. (2) To the public,  
upon request, in accordance with subdivision (b)...."

1           **B.       RESPONSE TO JULY 6TH PROSECUTION TEAM OBJECTION RESPONSES**

2                   **1.       STANDARDS OF EVIDENCE**

3           The Prosecution Team fails to recognize that this *is* a formal adjudicatory hearing that threatens  
4 to harm many people and businesses, as demonstrated by the numerous interested parties that wrote  
5 into the Regional Board to explain how this action would impact their lives and livelihoods. As such,  
6 any evidence relied upon should be “substantial evidence,” which means that “it must actually be  
7 ‘substantial’ proof of the essentials which the law requires in a particular case.” *People v. Bassett*  
8 (1968) 69 Cal. 2d 122, 139.<sup>2</sup> An “abuse of discretion is established if a court determines that the  
9 findings are not supported by substantial evidence in the light of the whole record.” Cal. Code Civ.  
10 Proc. §1094.5. Thus, Valley Water’s objections to evidence not deemed substantial, or otherwise  
11 worthy of being placed in the record, were proper.

12                   **2.       THE PROSECUTION TEAM’S RESPONSES PROVE VALLEY WATER’S CLAIMS**

13           Valley Water objected to numerous statements in the Prosecution Team’s initial submittal  
14 because of a lack of evidence. The Prosecution Team’s responses prove that Valley Water’s objections  
15 were valid because the response tries to belatedly fix the problems, which should not be allowed. For  
16 example, on page 7 of the Prosecution Team’s response to Valley Water’s objections, filed on July 6th,  
17 the Prosecution Team finally cites to evidence to support its statements. However, the Hearing  
18 Procedures required all arguments and evidence (and necessarily citations to that evidence in support of  
19 the arguments) to be submitted by June 12, 2015. Allowing the late citation to the evidence prejudices  
20 Valley Water and should not be allowed. Further, some of the evidence cited by the Prosecution Team  
21 (e.g., Exhibit 11) has been separately objected to by Valley Water and should not be used as supporting  
22 evidence.

23           Similarly, on page 9 of the Prosecution Team’s response to “5. PT Statement, p. 2,” the  
24 Prosecution Team’s response to a lack of evidence provided in its Case in Chief is to state reliance  
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26 <sup>2</sup> The Prosecution Team cited to *Ofsevit v. Trustees of California State Universities and Colleges*  
27 (1978) 21 Cal. 3d. 768, 773, n. 9, when the proper citation to the case is 21 Cal. 3d 763.

1 upon a document (Exhibit 32) that was not even in existence when the Case in Chief had to be  
2 submitted proving its case. This demonstrates that there was inadequate evidentiary support in the  
3 record for this statement at the time the Prosecution Team submitted its Case in Chief.

4 In addition, on page 9 of the Prosecution Team's response to "6. PT Statement, p. 3," the  
5 Prosecution Team admits that there is no valid basis for these statements because they relied on an  
6 interim report (Exhibit 6) that has been superseded by Exhibit 32, which no longer includes that  
7 language. *See* PT Response at p. 9:18-19 ("It has removed this discussion entirely.") Therefore, this  
8 objection should be sustained.

9 The Prosecution Team also admits that its evidence was not authenticated. PT Response at p.  
10 10:5-10. The Prosecution Team also failed to designate and name witnesses that can authenticate each  
11 document. Simply stating that "Regional Board employees will be present at the hearing to  
12 authenticate documents" is not compliant with evidentiary rules or with the Hearing Procedures.

13 The Prosecution Team also admits that certain documents are hearsay, but tries to still utilize  
14 these documents by stating that they are not submitted for the truth of the matter asserted. *Id.* at p. 10.  
15 However, then they try to say that these same documents "are consistent with the Prosecution Team's  
16 interpretation and analysis," neither of which have been provided. *Ibid.* Since they are attempting to  
17 use these documents as expert documents, they must be excluded because no experts were designated  
18 to discuss that evidence submitted with its Case in Chief. To do otherwise would be highly prejudicial  
19 and unfair to Valley Water.

20 In addition, undisclosed expert opinions about those documents, or the undocumented theories  
21 of the Prosecution Team that they support, must be excluded. In *Jones v. Moore* (2000) 80 Cal.App.4th  
22 557, 95 Cal.Rptr.2d 216 (Jones ), a plaintiff sued her former attorney for legal malpractice after her ex-  
23 husband stopped paying spousal support. At the plaintiff's expert's deposition, the expert testified that  
24 he believed the defendant's conduct fell below the standard of care when he negotiated the underlying  
25 divorce settlement and judgment. When asked whether he believed the defendant's conduct fell below  
26 the standard of care in other areas of his representation, the expert testified "Not that I'm prepared to  
27 testify to at this time." (*Id.* at p. 563, 95 Cal.Rptr.2d 216.) When asked whether he anticipated arriving  
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1 at any other opinions, the expert testified, “No, but if I do, you will be notified well in advance, so as to  
2 be able to properly exercise your discovery rights.” (Id. at p. 563, 95 Cal.Rptr.2d 216.) Thus, he did not  
3 provide any other opinions,

4 At trial, the expert testified that the defendant's conduct fell below the standard of care when he  
5 failed to properly secure the source of the plaintiff's spousal support income, a task *unrelated* to his  
6 negotiation of the underlying settlement and judgment. The trial court excluded this opinion, and the  
7 Court of Appeal affirmed, holding:

8 “Under these circumstances, exclusion of testimony going beyond the opinions he expressed  
9 [previously] was justified ... When an expert deponent testifies as to specific opinions and  
10 affirmatively states those are the only opinions he intends to offer at trial, it would be grossly  
11 unfair and prejudicial to permit the expert to offer additional opinions at trial.” (Id. at pp. 564–  
565, 95 Cal.Rptr.2d 216, emphasis added.)

12 In this case, allowing Mr. Rodgers (or any other expert) to provide opinions not disclosed in the Case in  
13 Chief should be disallowed and excluded.

14 Similarly, in *Bonds v. Roy* (1999) 20 Cal.4th 140, a medical malpractice case, the defendant  
15 stated in his expert witness declaration that his expert would testify only on the issue of damages. At  
16 the expert's deposition, the expert “specifically confirmed he did not expect ‘to be giving any testimony  
17 or any opinion concerning the standard of care issues that might be involved in this case.’ ” (Id. at p.  
18 143.) At trial, during the afternoon recess of the last day of testimony, defense counsel sought to  
19 expand the scope of the expert's testimony to include the applicable standard of care. The trial court  
20 denied the request on two grounds: first, the plaintiff had expected the expert to testify only as to  
21 damages; and second, expanding the “scope of [the expert's] testimony at that point would be unfair,  
22 prejudicial, and a surprise to [the plaintiff].” (*Ibid*, emphasis added.) The Supreme Court affirmed,  
23 explaining: “**the very purpose of the expert witness discovery statute is to give fair notice of what  
24 an expert will say at trial. This allows the parties to assess whether to take the expert's deposition,  
25 to fully explore the relevant subject area at any such deposition, and to select an expert who can  
26 respond with a competing opinion on that subject area.**” (Id. at pp. 146–147, emphasis added.) The  
27 Court continued, “[w]hen an expert is permitted to testify at trial on a wholly undisclosed subject area,  
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1 opposing parties similarly lack a fair opportunity to prepare for cross-examination or rebuttal.” (*Id.* at p.  
2 147.) This same theory applies here. No experts were designated in the Case in Chief and none should  
3 be allowed to opine on the Prosecution Team’s initially submitted evidence.

4 **II. THE PROSECUTION TEAM DID EXACTLY WHAT VALLEY WATER PREDICTED AND**  
5 **INTRODUCED NEW ARGUMENTS AND EXPERT WITNESSES IN REBUTTAL.**

6 As pointed out in Valley Water’s previously filed objections, the Prosecution Team’s Opening  
7 Submission consisted of less than five (5) pages of information nearly mirroring the allegations  
8 contained in the proposed CDO, included 30 unauthenticated exhibits, and designated only three  
9 potential percipient fact witnesses and no expert witnesses. Valley Water requested that the Advisory  
10 Team *prohibit* the Prosecution Team from providing any legal or technical arguments beyond those  
11 made in the Opening Submission itself, and from designating any expert witnesses since none were  
12 initially presented in the Prosecution Team’s Case in Chief. The Advisory Team did not issue such a  
13 ruling in time to prevent the Prosecution Team from doing exactly what Valley Water had feared –  
14 designating two experts on rebuttal that clearly could and should have been designated in its Case in  
15 Chief, and making new alleged facts and arguments not included previously (e.g., now arguing that  
16 Valley Water created a “pollution” under the Waste Discharge Requirements (WDR) for Race Track  
17 Hill (PT rebuttal at pp.5-6, 8-9), when the opening submission focused entirely on the exceeding of  
18 limits (*see* PT Opening Submission at p. 4); adding “facts” and opinions about site geology, shallow  
19 and deep groundwater impacts and movement, and water supply wells not provided previously and  
20 were not rebuttal.

21 The Hearing Procedure expressly required that that the Prosecution Team must submit by June  
22 12, 2015, among other things, “All legal and technical arguments or analysis” and the “qualifications of  
23 each expert witness, if any.” (Revised Hearing Procedures, p. 3; 23 C.C.R. §648.4(b) (emphasis  
24 added).) The Prosecution Team failed to comply with this clear and fair rule. For these reasons as well  
25 as those contained in Valley Water’s initial objections, the Advisory Team should exclude any new  
26 arguments or evidence that could have been made in its Case in Chief, and any experts that could have  
27 been initially designated. The fact that Mr. Rodgers’ credentials should have been known by Valley  
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1 Water, and were available online,<sup>3</sup> does not cure the Prosecution Team’s failure to designate him as an  
2 expert initially as required. Allowing Mr. Rodgers to be belatedly designated as an expert severely  
3 prejudices Valley Water as it had no way of knowing the extent and substance of his expert opinions  
4 prior to the due date for its submission, and now has no ability to provide adequate rebuttal at this late  
5 date. “Only by such a [timely] disclosure will the opposing party have reasonable notice of the specific  
6 areas of investigation by the expert, the opinions he has reached and the reasons supporting the  
7 opinions, to the end the opposing party can prepare for cross-examination and rebuttal of the expert’s  
8 testimony.” *Easterby v. Clark* (2009) 171 Cal. App. 4th 772, 779.

9 The California Administrative Procedure Act requires that an “agency’s notification must be  
10 complete and specific enough to give an effective opportunity for rebuttal. It must also help build a  
11 record adequate for judicial review.” *Franz v. Board of Medical Quality Assurance*, 31 Cal.3d 124,  
12 140, 642 P.2d 792, 799-800 (en banc) (1982) (applying adequate notification requirement to action for  
13 official notice according to Gov. Code, § 11515); *see also Burrell v. City of Los Angeles*, 209 Cal. 3d  
14 568, 581 (1989) (finding that due process under California administrative law requires “notice of the  
15 proposed action; the reasons therefor; a copy of the charges and materials on which the action is based;  
16 and the right to respond”)(emphasis added).

17 **III. OBJECTIONS TO UNSUPPORTED REBUTTAL “FACT” STATEMENTS AND EXPERT OPINIONS**

18 1. Valley Water takes issue with the Prosecution Team’s statement on pages 1-2 of its  
19 Rebuttal Brief that its preliminary review of the Phase 2 report (Exhibit 32) “supplements analysis that  
20 was submitted with the Prosecution Team’s initial evidence, including laboratory data and review of  
21 Valley Water consultant information that had been provided prior to that time.” (Emphasis added.) One  
22 of Valley Water’s primary objections to the Prosecution Team’s initial submission was that it contained  
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25 <sup>3</sup> The Prosecution Team’s Responses to Objections at p.3:19-20 admitted that: “This information was  
26 publicly available, although omitted from the Prosecution Team’s initial submission.” The Prosecution  
27 Team also thinks its failure should be excused because “Valley Water’s counsel and consultants have  
28 met with Mr. Rodgers extensively prior to this matter and aware of his background and qualifications.”  
*Id.* at p.4:7-8.

1 no “analysis.” While the Prosecution Team’s initial evidence did include exhibits that contained lab  
2 data, and previous consultant information, there was no real analysis of this information.

3 2. Again, as with its initial brief, the Prosecution Team includes facts with no supporting  
4 evidence. (*See e.g.*, PT Brief at page:lines 2:8-12, 14-15, 19-20, 24-28; 3:1-8, 26-28.) All unsupported  
5 allegations must be stricken.

6 3. The Rebuttal Brief provides expert opinions and allegations without proper basis. For  
7 example, page 3, lines 2-6 of the brief includes the opinion that an unidentified groundwater map  
8 “contours the area northwest of the site, but does not contour the remainder of the site indicating they  
9 were not comfortable indicating the direction of the groundwater flow across most of the area.” First,  
10 this sentence leaves Valley Water to guess which map the Prosecution Team is referring to, and second,  
11 there is no way that the Prosecution Team can opine on the reasons why the map was not contoured in  
12 other areas. Valley Water’s experts used the groundwater level data available to conclude that a mound  
13 exists in the shallow groundwater. Plotting contours was not required for this result. The dataset was  
14 not contoured because it is technically inappropriate given the small number of monitoring locations  
15 and the large number of percolation ponds and irrigated areas distributed around the site that affect  
16 groundwater elevations. Because the Prosecution Team’s statements are inaccurate, these statements  
17 should be stricken.

18 4. An additional opinion at page 3, lines 6-8 states that unidentified water quality data  
19 indicates “the primary direction of impacted groundwater flow may not be to the northeast.” (Emphasis  
20 added.) This is an unsupported theory, not proper rebuttal, since it does not cite to any evidence to  
21 disprove the allegations made by Valley Water. This statement should be stricken.

22 5. Similarly, at page 3, lines 14-15, the PT Brief states without support that the  
23 groundwater elevation data in Figure 6 of Exhibit 32, which identifies some gradients, but does not  
24 provide evidence of “highly permeable sediment at the site,” “will result in high groundwater flow  
25 velocities.” This unsupported statement should be stricken, particularly when the evidence  
26 demonstrates this to not be the case given the fact that the RTH#5, which is downgradient, is not  
27 impacted by groundwater flow (Exhibit 32 at p. 9). In addition, wells containing 100% produced water  
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1 have not been seen, so this theory has not been demonstrated.

2           6.       While Valley Water concedes that there have been localized impacts to groundwater  
3 under the percolation ponds in the form of mixing percolated produced water and other groundwater, an  
4 impact is not equivalent to “pollution” as implied on page 3, lines 19-20 and other places in the PT  
5 Brief (*see e.g.*, PT Brief at p. 5, first 2 bullets near lines 14-15 and last bullet at 19-21, and pp. 5-6,  
6 Section II.) As previously mentioned, Valley Water objects to any discussion of pollution or Valley  
7 Water “polluting” the ground water since the Prosecution Team failed to include those arguments and  
8 meet its burden of proof demonstrating a condition of pollution in its Case in Chief. The Water Code at  
9 section §13050(*l*)(1) defines pollution as “an alteration of the quality of the waters of the state by waste  
10 to a degree which unreasonably affect either of the following: (A) The waters for beneficial uses; (B)  
11 Facilities which serve these beneficial uses.” The Prosecution Team failed to make these arguments in  
12 its Case in Chief or provide evidence to prove that waters for beneficial uses or facilities that serve  
13 these beneficial uses have been “unreasonably” affected.

14           The Prosecution Team states that the shallow and deep groundwater beneath the facility has  
15 been “polluted” by site activity,<sup>4</sup> but offers no evidence that site activity will “unreasonably affect  
16 beneficial uses of the groundwater,” such as drinking water supply from nearby wells. There is no  
17 definition of “reasonable” or “unreasonable” in the Water Code, but as argued in Valley Water’s brief,  
18 Water Code section 13000 states that “activities and factors which may affect the quality of the waters  
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21 <sup>4</sup> The Prosecution Team contends that the 1958 WDR says that the Race Track waste discharge cannot  
22 cause pollution of the underlying groundwater. PT Brief at pp. 5-6. The underlying groundwater  
referenced in the WDR is that of the alluvium, not the groundwater in the Santa Margarita formation.

23       The WDR discusses “the disposal of wastewater to the alluvium in this area constitutes a threat of  
24 pollution to the useable groundwater,” which is found in the alluvium. *See* Exhibit 1 at 4th *Whereas*  
25 clause (emphasis added). The WDR also says that so long as wastewaters from the Race Track Hill area  
26 of the Edison Oil field are disposed of by means of injection into saline water bearing formations below  
27 the base of the fresh water (i.e. the base of alluvium) or by means of percolation into permeable  
Miocene formations (the Santa Margarita), which dip below the usable groundwater levels, that no  
threat of groundwater pollution will exist in this area. *Id.* at p. 1. In other words, the WDR permitted  
percolation into the Santa Margarita formation, but not the alluvium. Since Valley Water is not  
percolating into the alluvium, according to the 1958 WDR, this activity is not polluting.

1 of the state shall be regulated to attain the highest water quality which is reasonable, considering all  
2 demands being made and to be made on those waters and the total values involved, beneficial and  
3 detrimental, economic and social, tangible and intangible.” (Emphasis added.) Thus, reasonableness  
4 requires a weighing of the various factors.

5 In addition, and also as argued in Valley Water’s brief, section 13241 of the California Water  
6 Code states “that it may be possible for the quality of water to be changed to some degree without  
7 unreasonably affecting beneficial uses.” In fact, Regional Water Boards are directed to consider  
8 several factors, including environmental characteristics of the hydrographic unit under consideration,  
9 water quality conditions that could reasonably be achieved, and economic considerations, when setting  
10 Water Quality Objectives to ensure “reasonable protection of beneficial uses.” Wat. Code §13241.

11 The State Water Board also considered similar factors - including the distance of drinking water  
12 wells from the contaminated site and the hydrogeological conditions limiting migration of groundwater  
13 from the shallow to the deeper aquifers - in determining that a localized volume of water with  
14 petroleum contamination would not unreasonably affect existing or probable beneficial uses in  
15 surrounding wells. *In the Matter of the Petition of Matthew Walker*, Order No. WQ 98-04 UST at pp.7-  
16 8 (August 26, 1998)(included for the Regional Board’s convenience as **Attachment J**). In this Order,  
17 the State Board found that “facts in the record indicate that with no further regulatory action, residual  
18 detectable concentrations of TPH-g, TPH-d, TPH-mo. and xylene adsorbed to shallow,  
19 fine-grained soils will remain localized and continue to attenuate naturally over time. The lingering, but  
20 diminishing residual concentrations of petroleum constituents will not affect beneficial uses of  
21 groundwater. According to Department of Water Resources well records and 1990 Census data, there  
22 are no drinking water wells within 2.500 feet of petitioner’s site.... Considering the absence of existing  
23 wells in close proximity to petitioner’s site, the local hydrogeologic considerations, and standard well  
24 construction practices, such a limited, isolated scenario will not unreasonably affect existing or  
25 probable future beneficial uses.” *Id.* at p. 10.

26 In that case, the issue was not salt, but total petroleum hydrocarbons (“TPH”). The State Board  
27 considered the fact that localized levels of TPH exceeded the applicable water quality objectives and  
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1 still found no unreasonable affect. “TPH-g in the shallow groundwater in immediate contact with the  
2 limited residual TPHg adsorbed to soils will likely remain above 5 ppb (the commonly accepted odor  
3 threshold for water) and thus violate the basin plan's narrative odor objective in a localized volume of  
4 surrounding groundwater for a significant period of time. This time period could be anywhere from a  
5 couple of decades to hundreds of years. Nonetheless, during this time these residual concentrations  
6 above 5 ppb TPH-g will not pose a threat to current or future beneficial uses. It is highly unlikely that  
7 TPH-g detected in localized areas in the immediate area of the UST's discharge will migrate  
8 substantially beyond current limited spatial extent.” *Id.* at p. 10. In that case, the State Board found no  
9 corrective action or further action related to the release should be required because no local wells being  
10 used for the beneficial use of groundwater<sup>5</sup> were likely to be impacted. The same should be found in  
11 Valley Water’s case. The Regional Board should find that the underlying groundwater is equivalent to  
12 a “mixing zone” where water quality objectives may be exceeded so long as no nearby supply wells are  
13 adversely impacted or unreasonably affected.

14 To support its allegation that Valley Water has “polluted” the groundwater, the Prosecution  
15 Team was required to present evidence in its Case in Chief that Valley Water’s activities have done  
16 more than merely change the quality of the groundwater beneath the Race Track Hill facility, or even  
17 exceed the applicable Basin Plan objectives. Instead, the Prosecution Team had the burden to  
18 demonstrate that the activities have affected the actual beneficial uses of the groundwater and that those  
19 affects are unreasonable, considering all of the relevant factors, including economic considerations.<sup>6</sup>

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22 <sup>5</sup> Unlike surface waters where beneficial uses can occur within the waters themselves, such as  
23 recreation and aquatic life uses, beneficial use of groundwater only occurs when that water is extracted  
24 from the ground for some beneficial use, such as drinking or irrigating crops.

24 <sup>6</sup> State Board policy is to only allow changes or “limited degradation” of water quality “which will not  
25 unreasonably affect beneficial uses, will be consistent with the maximum benefit to the people of the  
26 State of California and with the factors listed in Water Code Section 13241. In the absence of additional  
27 information, we cannot find that the degradation in Region II is in violation of state law. We base this  
28 finding on the fact that ... existing data regarding water quality is well below applicable health criteria,  
[and] the fact that the degradation has already occurred and has not unreasonably affected beneficial uses,  
[and] the fact that we are not dealing with a situation where a change to existing water quality is being

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2 The Prosecution Team failed to do this and, therefore, all references to “pollution” and  
3 “polluted” must be stricken from the Prosecution Team’s submissions.

4 7. Page 3, lines 26-28 and page 4, lines 1-11 contain expert opinions with no certainty (“do  
5 not appear to be” and “may not be”) and with no supporting evidence. One opinion states that a “great  
6 difference in vertical gradients indicates there is probably a layer impeding the vertical migration of  
7 water at locations RTH #7D and RTH#9D that is not present at location RTH #8D,” which “indicates  
8 connection of the shallow and deeper groundwater on the northern edge of the facility” and “clearly  
9 indicates that deeper groundwater in well RTH #8D, on the northern edge of the facility, is polluted.”  
10 None of this contains citations to evidence, and any use of the evidence is being cherry picked. Based  
11 on the evidence of the elevations of groundwater in the monitoring wells, the indicated direction of  
12 shallow groundwater flow is to the northeast. (Exhibit 32 at p. 18.) Depending on the area of the  
13 mound from which the elevations are taken, the direction of flow may differ, but that would only be a  
14 localized impact, such as if you released a golf ball from the side of a round hill. Valley Water’s  
15 experts provided a figure (Exhibit 32, Figure 9) including water level information between an  
16 evaporation/ percolation pond and a soil boring location 220 feet from the pond and passing by a  
17 monitoring well, RTH-1. The figure was judged to be technically appropriate because of the very small  
18 lateral extent – 220 feet. The intent of this figure was to demonstrate the very steep water level decrease  
19 in a short distance indicates that the groundwater mound at Race Track Hill likely has limited extent to  
20 the west at this location. In addition, the Prosecution Team Brief appears to contain a typographical  
21 error in line 10 on page 3, or an error in understanding, since there is no “well RTH-2.”

22 8. Valley Water objects to the characterization of Mr. Waldron’s testimony as stating that  
23 “groundwater is not moving.” PT Brief at p. 4:21. Mr. Waldron’s testimony was addressing the  
24 migration of percolated produced water, not movement of groundwater. Thus, this representation is

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27 asked for but rather to a question of whether a cleanup should be mandated...” Attachment G at pp. 30-  
31.

1 inaccurate and must be stricken. In addition, Valley Water objects to the unsupported conclusion that  
2 “57 years of disposal *could* produce impacts that have traveled a significant distance offsite” (PT Brief,  
3 p. 4, lines 27-28 (italics added)) since there is no evidence to support this statement, and the opposite  
4 *could* also be true.

5 9. Valley Water already objected to Exhibit 11, which was the aerial photograph indicating  
6 potential residences that might have supply wells. Now, in the PT Brief, the Prosecution Team has  
7 stated without supporting evidence that these residences “probably have water supply wells that are not  
8 included in the list of wells summarized by Valley Water.” (PT Brief at p. 5, lines 3-5.) This section  
9 also states that “It is unclear whether Valley Water conducted a well survey to identify all wells in the  
10 area. Also, no construction data for any of the sampled wells are provided preventing identification of  
11 from what level the water samples originated.” (*Id.* at p. 5:5-7.) It seems incredible that the  
12 Prosecution Team is making these statements when Valley Water clearly surveyed local wells and  
13 reviewed drillers logs and completion reports as evidenced in the Prosecution Team’s Exhibit 88, and  
14 provided the survey of wells information in Exhibit 32 at p. 11, and Fig. 8. The well near Cottonwood  
15 Creek, well 24J, is the well that supplies those local residences seen from aerial photos and the data  
16 from those wells is far below applicable water quality objectives and unaffected by produced water.  
17 (*See* Exhibit 32 at p. 16.) Construction data was not provided because that was considered confidential  
18 under Water Code section 13752. However, other identifying information *was* provided by Valley  
19 Water, including the well number, depth, and indicated use of the well. (*See* Exhibit 32 at p. 11.)  
20 Because this section on “Water Supply Wells” is inaccurate and objectionable, this section should be  
21 stricken from the record.

22 10. Valley Water objects to the “Summary of Valley Water’s Impacts” because this section  
23 equates impacts to pollution (*see* PT Brief, p. 5, lines 14-15); contains unsupported conclusions that  
24 “Steep gradients and permeable material indicates that impacts to groundwater quality *have probably*  
25 gone a significant distance offsite” (*Id.* at p.5, lines 16-17); and states that “Impacts to groundwater are  
26 occurring due to unlined ponds and spray fields” without acknowledging that these activities have been  
27 permitted since 1958.

1 11. Valley Water strenuously objects to the fact that the proposed “CDO requires cessation  
2 of Valley Water’s use of the sprayfields by 15 August 2015.” (PT Brief at p. 7, line 4.) This is Valley  
3 Water’s biggest problem with the CDO because the Prosecution Team has produced no evidence that  
4 the spray fields are causing groundwater impacts. Moreover, the results presented in Exhibit 32  
5 provide the evidence that no effects specifically related to irrigation can be identified. The reason for  
6 the spray fields is to evaporate the water and allow for salt-tolerant plants to uptake the water (via  
7 evapotranspiration) so that the water does not percolate deeply into the ground. The Prosecution Team  
8 has provided no legitimate, supported reason why this cessation needs to happen so quickly,  
9 particularly when the PT Brief recognizes that the unlined sumps “will be phased out by December  
10 2016.” (PT Brief at p. 10, lines 3-4.) No reason exists why the spray fields cannot be on a similar  
11 schedule for phase out to allow other alternatives to land application to be explored.

12 Unreasonably short time schedules are not favored. “Due to the nature and history of violations  
13 of requirements in this case, it was not appropriate to direct compliance ‘forthwith.’ [C]ompliance  
14 should be directed in accordance with an appropriate time schedule, as authorized by Water Code  
15 Section 13301. *See In the Matter of the Petition of Crestline Sanitation District*, SWRCB Order No.  
16 WQ 78-12 (emphasis added) (attached hereto as **Attachment K**). The State Board has held that “Cease  
17 and desist orders requiring compliance ‘forthwith’ with requirements should be used sparingly and are  
18 most appropriate to address what are considered emergency situations or violation of requirements  
19 which can be corrected immediately. State Board regulations provide that ‘forthwith’ means “as soon as  
20 is reasonably possible.” (Section 2243(a), Title 23, California Administrative Code.) The determination  
21 of what is a reasonable period of time for compliance becomes a question of fact which may finally be  
22 determined judicially, making an order directing ‘forthwith’ compliance difficult to enforce in the  
23 absence of a clear emergency or ability to correct the problem. Therefore, it is appropriate to substitute  
24 a time schedule for the ‘forthwith’ compliance date contained in the Regional Board’s order.” *Id.* at p.  
25 15. Here, no imminent threat or other emergency situation exists since these activities have been  
26 ongoing since 1958, and no need exists for an essentially “forthwith” requirement to cease use of the  
27 spray fields by August 15, 2015.

1           12.     Although footnote 3 of the PT Brief on page 7 states that “The scope of Mr. Harvey’s  
2 testimony directly rebuts Gary Carlton and Dee Jaspar’s testimony,” the Prosecution Team failed to  
3 provide any indication as to what Mr. Harvey’s testimony will be, thereby violating the Hearing  
4 Procedures’ “Prohibition on Surprise Evidence.” (Hearing Procedures at p. 3.) Since Valley Water has  
5 no idea what Mr. Harvey intends to say, his testimony will be a surprise, unfairly provided to Valley  
6 Water at the hearing, where it has no reasonable ability to cross-examine or provide rebuttal to that  
7 testimony. For this reason, Mr. Harvey must be prevented from testifying since he did not provide any  
8 indication of the issues he will raise.

9           13.     Valley Water objects to the Prosecution Team now stating that it will rely on Exhibit 32  
10 to support its case, when that document did not exist when the CDO was proposed or the Prosecution  
11 Team was obligated to present its Case in Chief. (*See* PT Brief at p. 8, lines 17-18.) In addition, the PT  
12 Brief was supposed to be used to *REBUT* Valley Water’s evidence, not rely upon it. This reliance  
13 proves that the Prosecution Team failed to have adequate evidence to support the CDO at the time it  
14 was proposed. This objection is also supported by the Prosecution Team’s response to Valley Water’s  
15 objection to PT Statement, pg. 3, as addressed in the Prosecution Team’s response document at pg. 9,  
16 lines 15-16. This response demonstrates that the basis for statements in the Prosecution Team’s initial  
17 submission have no evidentiary support since it was based on an “Interim” report without final  
18 conclusions.

19           14.     Valley Water objects to the statement in the PT Brief at Section IV.E. that Exhibit 32  
20 “presents analytical data indicating that waste constituent concentrations in groundwater beneath the  
21 Race Track Hill Facility are high enough to render groundwater unfit for drinking and for irrigation,  
22 thereby unreasonably affecting these beneficial uses and, therefore, polluting the groundwater.” (PT  
23 Brief at p. 8, lines 24-28.) This statement is objectionable about its erroneous conclusions about  
24 “unreasonably affecting” beneficial uses and “polluting” as described in Section III.6. above, but also  
25 because there is no evidence that any used or useable groundwater is “unfit for drinking or for  
26 irrigation.” No offsite wells have any evidence of impacts from produced water and no complaints  
27 have been registered that any local wells are impacting drinking water or agricultural uses. If people  
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1 could not drink their well water or irrigate with it due to high salinity levels, those people would be  
2 complaining and trying to find someone to supply replacement water. Further, all data submitted has  
3 been from monitoring wells, not municipal supply, drinking water, or irrigation supply wells.

4 15. Valley Water objects to the conclusions set forth in PT Brief Section IV.E. related to the  
5 Fee 34 facility. The use of the ponds for storage and treatment of the water prior to shipping and  
6 transfer from that facility do not equate to “discharges.” Even if there *were* discharges that could be  
7 alleged to have occurred, the Prosecution Team has provided no evidence that there have been any  
8 impacts to groundwater from that facility. In fact, the evidence shows the opposite is true. (*See Exhibit*  
9 *32 at p. 17.*) Furthermore, Valley Water previously attempted to make this demonstration at a hearing  
10 before the Regional Board in 1996, but it had no ability to force such a hearing to occur. Valley Water  
11 now will be appearing before the Regional Board in a hearing with more confirmatory data to  
12 demonstrate that the water coming through this facility is acceptable and allowable under the Basin  
13 Plan’s and WDR permit requirements.

14 16. The Prosecution Team admits that the increased enforcement is due at least in part to  
15 “different political influences.” This is an objectionable reason to alter the Regional Board’s decades  
16 of finding that Valley Water was in compliance to now having the complete opposite opinion. The  
17 Regional Boards have a long history of being aware of and sensitive to ever-changing “political  
18 influences,” but steadfastly avoiding basing their permitting and enforcement decisions on these  
19 “influences.” Rather, Regional Boards have adhered to their legislative mandate to base their decisions  
20 on factual considerations related to protection of water quality with due consideration to socioeconomic  
21 issues in the best interest of the People of California. It appears to Valley Water in this case that the  
22 Prosecution Team is yielding to the immense pressure created by “political influences” and is now  
23 looking to “get tough,” using Valley Water as the poster child or sacrificial lamb. The unnecessarily  
24 short compliance schedule requirements for cessation of spray field activities proposed in this CDO  
25 cannot be justified based upon any clear evidence of an imminent threat to existing beneficial use of  
26 groundwater and, therefore, this schedule is presumed to be motivated by “political influences.”  
27  
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1 17. Valley Water objects to the PT Brief's Section V.B. about "irrigation" since that term  
2 was first introduced by the Regional Board and that term has been consistently used by the Regional  
3 Board staff to describe the activities at the spray fields. (See accord Exhibit 21, p. 3 of 6/20/12  
4 Inspection Report ("The Edison Facility (Figure 1) contains 24 unlined surface impoundments (sumps)  
5 and an irrigation sprinkler system." (emphasis added); Exhibit 3 at p. 2 of 3/27/15 Inspection Report  
6 ("The Racetrack Hill facility ... contains 27 unlined ponds and an irrigation sprinkler system."  
7 (emphasis added); Exhibit 43 at p. 1 ("Water is also discharged to one of the canyons through sprinkler  
8 irrigation." (emphasis added). If the Prosecution Team does not like this term, then it should instruct its  
9 inspectors to not utilize that term. However, this is not an issue relevant to this hearing and this section  
10 should be stricken and excluded from consideration by the Regional Board.

11 18. Valley Water objects to PT Brief Section V.C. that spins the burden of proof in this case.  
12 The Prosecution Team has the burden of proof in this case. Nevertheless, Valley Water has met the  
13 burden of demonstrating that the Fee 34 Facility is not substantially affecting groundwater quality or  
14 causing a violation of water quality objectives. (Exhibit 32.) Valley Water is in no way trying to use  
15 this hearing to de-designate beneficial uses. Valley Water has asked that it be allowed to potentially  
16 pursue an exception from applicable water quality objectives and/or create a Salt Management Plan that  
17 would make certain that any impacted groundwater does not travel offsite to unreasonably affect any  
18 offsite supply wells. This would not necessarily require a de-designation of groundwater, although that  
19 would be allowed, contrary to the Prosecution Team's allegations. In a recent action by the Central  
20 Valley Regional Board, approved by the State Water Board in Resolution 2015-0002 (attached for  
21 convenience as **Attachment L**), de-designated "groundwater beneath and immediately downgradient  
22 of several waste management units [which] is not being, nor is it likely to be, utilized for MUN  
23 purposes." *Id.* at para. 4. This de-designation included both "actual and potential MUN uses of  
24 groundwater." *Ibid.* Therefore, the Prosecution Team's inaccurate statements that "There is no  
25 authority for the Central Valley Water Board to de-designate an existing use" (PT Brief at p. 10, lines  
26 21-23) are incorrect and, therefore, objectionable. In addition, there is no state law requirement to  
27 "complete the equivalent of a use attainability analysis (UAA)" (PT Brief at p. 10, line 17) to de-

1 designate uses of groundwater, nor any prohibition in state law on de-designating existing uses (PT  
2 Brief, p. 10, n. 5). Those concepts only exist in federal law for application to waters of the United  
3 States, which does not include groundwaters.<sup>7</sup> See EPA Federal Regulations at 40 C.F.R.  
4 §131.10(g) (“can remove a designated use which is *not* an existing use) and (h) “States may not remove  
5 designated uses if: (1) they are existing uses as defined in §131.3”; 40 C.F.R. §131.10(j) (“A State must  
6 conduct a use attainability analysis as described in §131.3(g) whenever ... (2) The State wishes to  
7 remove a designated use that is specified in section 101(a)(2)...”).<sup>8</sup>

8 19. Valley Water objects to the Prosecution Team’s characterization of Valley Water as a  
9 “point source” discharger. (PT Brief at p. 11, line 6 and 11.) There is no definition of “point source” in  
10 a non-NPDES discharge context. Valley Water’s activities are not at a single location, they are diffuse  
11 through various percolation ponds and spray fields, not a “confined and discrete conveyance” such as a  
12 pipe, ditch, or tunnel. See Clean Water Act, 33 U.S.C. §1362(14). Groundwater is not regulated by the  
13 Clean Water Act. See footnote 7. Thus, this term was inappropriately used when discussing Valley  
14 Water’s activities. In addition, this section makes numerous statements without any evidentiary support,  
15 making each of these statements objectionable. In addition, although Valley Water is not an active  
16 member of CV-SALTS, Valley Water has been coordinating with other CV-SALTS members to keep  
17

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18 <sup>7</sup> *Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.*, 962 F.Supp. 1312 (D.  
19 Ore 1997); see also *Woodward v. Goodwin*, 2000 U.S. Dist. LEXIS 7642, \*43 (N.D. Cal. 2000) (“The  
20 only possible remaining claim is the claim of general seepage of the sewage pipe into the groundwater  
21 to the surrounding streams and rivers. However, as this means of establishing jurisdiction on this  
22 record would necessarily rely on groundwater conveyance of waste . . . it is beyond the purview of the  
23 CWA.”). Congress meant to exclude discharges to all groundwater, even hydrologically connected  
24 groundwater, from the CWA’s permitting requirements. See, e.g., 118 Cong. Rec. 10666-10667, S.  
25 Rep. No. 414, 92d Cong., 1st Sess. 73, U.S. Code Cong. & Admin. News 1972, pp. 3739; see also  
26 Waters of the US Rule, 80 Fed. Reg. 37054, 37074 (June 29, 2015) (“The rule excludes for the first time  
27 certain waters and features over which the agencies have generally not asserted CWA jurisdiction, as  
28 well as groundwater, which the agencies have never interpreted to be a ‘water of the United States’  
under the CWA.”)(emphasis added).

<sup>8</sup> Section 101(a)(2) uses are the so-called “fishable/swimmable” uses, not municipal drinking water  
(MUN) or agricultural (AGR) uses. 33 U.S.C. §1251(a)(2) (“it is the national goal that wherever  
attainable, an interim goal of water quality which provides for the protection and propagation of fish,  
shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.”).

1 track of the Central Valley Salinity organization’s plans to achieve more reasonable regulations related  
2 to salt.

3           20. Valley Water takes issue with the Prosecution Team stating that “Valley Water’s  
4 timelines for its proposed alternatives may be inaccurate.” (PT Brief at p. 11, lines 19-20.) Valley  
5 Water did its best to *estimate* the time needed to pursue each of these alternatives. If the Regional  
6 Board finds that these timelines are not long enough, Valley Water would be happy to have a longer,  
7 more reasonable schedule. However, Valley Water was trying to take into consideration the need to  
8 move quickly. For example, Valley Water’s estimated “251 days” cited by the Prosecution Team (PT  
9 Brief at p. 11, line 22) takes into account that Valley Water has already applied for an underground  
10 injection permit and is currently in the queue for such permits. This Section V.E. also contains  
11 objectionable statements related to de-designation discussed in Section III.18 above, and contains an  
12 unsupported opinion that “[b]lending to provide water to Arvin Edison may require a 20:1 dilution.”  
13 (PT Brief, p. 12, lines 1-2.) The Prosecution Team should have researched this issue as Arvin Edison  
14 has enough water to dilute Valley Water’s produced water by 384:1 or more.<sup>9</sup>

15 **IV. OBJECTION TO INCLUSION OF NEW NOV AS EXHIBIT 87.**

16           This new evidence contained in Exhibit 87 is not rebuttal, is severely prejudicial at this late date,  
17 and must be stricken. Using Valley Water’s own submitted evidence and photographs that the  
18 Prosecution Team had previously taken, the Prosecution Team created a new Notice of Violation  
19 (“NOV”) to attempt to influence the Regional Water Board by showing that the Valley Water facility has  
20 had numerous NOV’s, which in turn would presumably provide additional justification for the issuance of  
21 a CDO. In addition, this document is unauthenticated, contains hearsay, and/or unsupported expert  
22 evidence. For these reasons, Exhibit 87 must be stricken.

23 //

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25 \_\_\_\_\_  
26 <sup>9</sup> See Exhibit 32, Appendix E; see also Vaux, *Innovations in Ground Water Management: The Arvin-Edison Water Storage District of California* (undated) accessible at  
27 <http://ciwr.ucanr.edu/files/187211.pdf> at p. 11 (citing 160,000 acre feet per year of firm water deliveries).

1 **V. OBJECTION TO PROSECUTION TEAM’S RESPONSE TO PUBLIC COMMENTS**

2 The Prosecution Team submitted 8 pages of responses to comments made by interested parties  
3 and members of the public. To the extent that the Prosecution Team made arguments or statements in this  
4 document similar to those objected to in this and earlier objections filed by Valley Water, these  
5 arguments and statements should also be stricken. The Prosecution Team also goes beyond the scope of  
6 its initial Case in Chief in these comment responses. For example, on page 5, the Prosecution Team  
7 incorrectly states that “any discharge off-site could be considered a violation of the Federal Clean Water  
8 Act and California Water Code section 13385.” This goes beyond the scope of the CDO and the  
9 Prosecution Team failed to present any evidence in its Case in Chief that Valley Water’s Race Track Hill  
10 or Fee 34 facilities have had any off-site discharges of produced water, or that any discharges from these  
11 sites reached any waters of the United States regulated under the Clean Water Act. Thus, this and other  
12 similarly incendiary statements should be removed as unsupported and prejudicial.

13  
14 **VI. OBJECTIONS TO NEW REBUTTAL EXPERT WITNESS DESIGNATIONS**

15 For the reasons provided herein and in Valley Water’s previous objections to any proposed  
16 expert testimony by Mr. Clay Rodgers, Mr. Rodgers must not be allowed to provide expert opinions  
17 related to groundwater impacts or any other topics related to the Prosecution Team’s Opening  
18 Submission. Valley Water continues to object to Mr. Rodgers testifying as an expert, since he has not  
19 provided the basis for any opinions. However, if allowed by the Advisory Team, Mr. Rodgers should be  
20 limited to the rebuttal testimony contained in pages 1-5 of the PT Brief, and rebuttal of Exhibits 32 and  
21 80 only since that is the extent of his designation by the Prosecution Team. *See* Prosecution Team  
22 Rebuttal Evidence List for 30 July 2015 at p. 1.

23 In addition, as previously stated and because no substance of his proposed testimony has been  
24 provided, Mr. William “Dale” Harvey should not be permitted to testify as an expert. No summary of  
25 his testimony or opinions, basis for his opinions, or any other indications of the substance of their  
26 testimony has been provided to Valley Water besides broad topics that do not provide adequate  
27

1 information to avoid the prohibition on surprise testimony. The Prosecution Team merely states that  
2 Mr. Harvey “may testify to rebut the testimony, if given, of Valley Water experts Carlton and Jaspas.  
3 Specifically, he will rebut the statements of Mr. Jaspas regarding the adequacy of the *Report of Runoff*  
4 *Conditions at the Race Track Facility, Kern County, CA*, and the assumptions made therein, including  
5 interconnections of ponds, runoff, and freeboard. He will also be able to testify to weaknesses in Mr.  
6 Jaspas’s conclusions. For Mr. Carlton, Mr. Harvey will rebut the conclusions drawn by Mr. Carlton and  
7 first provided in the water balance sections in the Final Phase 2 Report dated 30 June 2015.” This fails  
8 to provide Valley Water with adequate notice of the testimony that may be provided at the hearing in  
9 order to properly prepare. Valley Water has no indication of what the rebuttal will be, what  
10 “weaknesses” are being referenced, or what conclusions are being challenged. Allowing this testimony  
11 would be prejudicial and violate rules of fundamental fairness. *See Bonds v. Roy* (1999) 20 Cal.4th 140,  
12 146-7 (“the very purpose of the expert witness discovery statute is to give fair notice of what an expert  
13 will say”).<sup>10</sup>

14  
15 **VII. CONCLUSION**

16 For the reasons set forth above, Valley Water requests that its objections be sustained and that  
17 the Prosecution Team’s objectionable rebuttal expert witnesses, evidence, and statements be excluded  
18 or prevented from becoming part of the record that is being provided to the Regional Board members  
19 for consideration at the upcoming adjudicatory hearing on July 30, 2015. In addition, Valley Water  
20 continues to request that the hearing be delayed to allow for the hearing to be held in Kern County as  
21 requested by Valley Water, Senator Fuller, and so many of the interested parties, and for more time at  
22 the upcoming hearing to adequately and fully present its case.

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26 <sup>10</sup> The Prosecution Team cited *U.S. v. Soto-Beniquez* (2003) 356 F.3d 1, 37-38 for the proposition that  
27 such testimony could be allowed. Besides being a criminal case under federal rules not applicable here,  
28 this case also imposed sanctions limiting the expert’s testimony. *Id.* at 38.

1 Respectfully submitted,

2 Dated: July 8, 2015

DOWNEY BRAND LLP

3  
4 By:   
5 MELISSA A. THORME  
6 Attorneys for  
7 VALLEY WATER MANAGEMENT COMPANY

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