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6 Attorney for Protestants Save the California Delta Alliance, et al.

7 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

9 **IN RE CALIFORNIA WATERFIX**
10 **CALIFORNIA DEPARTMENT OF**
11 **WATER RESOURCES AND U.S.**
12 **BUREAU OF RECLAMATION**
13 **PETITION FOR CHANGES IN**
14 **WATER RIGHTS, POINTS OF**
15 **DIVERSION/RE-DIVERSION**

PROTESTANT SAVE THE CALIFORNIA
DELTA ALLIANCES ET AL'S MOTION TO
CONTINUE HEARINGS FOR 90 DAYS TO
ALLOW REFORMATION OF WATERFIX
HEARINGS TO CONFORM TO THE RULE
OF LAW

1 Save the California Delta Alliance, et al. , hereby moves the Board for a short and definite
2 continuance for good cause shown, and which is required by the substantive and procedural
3 constitutional due process rights, and the First Amendment rights, of Protestants to these hearings.

4 A continuance is necessary to allow for Reformation of these WaterFix Hearings to conform
5 to the rule of law and to allow for an ultimate decision that will not be irrevocably tainted by the
6 extensive, ongoing, willful, substantive, unlawful ex parte communications between WaterFix
7 Hearing Team members and Petitioner DWR, which were for the purpose of preparing materials
8 that were then later submitted as evidence by DWR. Delta Alliance therefore respectfully urges the
9 Hearing Officers to **GRANT** a continuance of these Hearings, **EXTEND** all currently scheduled
10 Hearing dates for **NINETY DAYS**, and **SCHEDULE A REFORMATION HEARING** to
11 consider Protestants’ suggestions for reforming the Hearings to conform to the rule of law, within
12 that ninety day period.

13 **I. Extensive Unlawful Ex Parte Collaboration Between Hearing Team Members**
14 **And DWR In Preparation of DWR’s Evidence Requires Reformation of These**
15 **Hearings.**

16 The Hearing Officers are aware of the unlawful ex parte communications through our recent
17 Public Records Act communications, which we filed in the WaterFix Proceedings in the interest of
18 transparency and to keep the Hearing Officers updated.¹ Subsequent to our filing of the PRA
19 communication, Board attorney Nicole Kuenzi filed a responsive letter which denies any violations
20 of ex parte communication rules or standards of legal ethics. However, the evidence shows that
21 Board staff guided Petitioner over many months in the preparation of Petitioner’s evidence and
22 Petitioner got advance information from Hearing Team members about what evidence would be
23 acceptable for admission into the record and for use in determining the outcome of the Hearings.

24 Near the end of that long process, Petitioner made changes in Appendix 5E to cover up the
25 level of Hearing Team members’ involvement. The Draft Appendix 5E stated that the Board

26 ¹ Because of the short time available to draft this motion, and in the interest of non-repetition of materials that the
27 Hearing Officers have already read, we incorporate by reference our PRA correspondence of December 28, 2018, which
28 was filed in these Hearings on December 28, along with all of its attachments into this motion. We are also filing under
separate cover today (partly due to file size) our PRA correspondence of January 10, 2018, to DWR with its attachments
and incorporate it into this motion as well.

1 directed DWR in the conduct the B1–B2 modeling. DWR then changed the language to make it
2 appear that the Hearing Team members' involvement was less than it actually was. The Draft
3 Appendix 5E stated that “*At the request of State Water Board staff*, supplemental modeling and
4 analysis at year 2025 ([Early Long Term [ELT]]) was conducted for 3 scenarios: Boundary 1,
5 Boundary 2 and a scenario that included additional outflow beyond that included in Boundary 2 ...
6 .” (Attachment 1, *emphasis added*)

7 Then, before final publication, Hearing Team members directed DWR to change the
8 language to make it appear that Boundary 1, Boundary 2 modeling was not requested by Board
9 staff. To a neutral observer, including, ultimately, a reviewing court, Ms. Kuenzi’s explanation that
10 the original text showing the Board’s involvement in the Boundary 1, Boundary 2 modeling was
11 merely a scrivener's error lacks facial plausibility.

12 Ms. Kuenzi’s explanation that the EIR is not at issue in the Hearings is also not consistent
13 with the Board’s statement of key issues for Part 2 of the Hearing, which include “Should the Final
14 Environmental Impact Report be entered into the administrative record for the Petition?” DWR also
15 relies on the EIR throughout as *evidence* of impacts or lack of impacts.

16 In a telephone conversation on January 10, 2018, at 10:30 a.m., Ms. Kuenzi informed the
17 undersigned that substantial materials, such as drafts of Appendix 5E, meeting agendas, slides, and
18 other tangible materials were present and/or utilized at evidence preparation meetings between
19 DWR and Hearing Team members, either in physical form at in-person meetings or as on-screen
20 presentations at remotely conducted meetings. We were informed by Ms. Kuenzi that at the
21 conclusion of each of the in-person meetings DWR personnel swept up all of the materials and took
22 them back to DWR headquarters. Ms. Kuenzi informed us that DWR personnel were scrupulous
23 about collecting all of the materials and not allowing Hearing Team members or other non-DWR
24 personnel to retain any of the materials. To any neutral observer it is hard to find any explanation
25 for this behavior other than a conscious attempt to cover up wrongdoing by hoarding evidence
26 where it cannot be easily found.

27 Hearing Team members, including Board legal counsel Dana Heinrich and Hearing Team
28 Member and Board lead engineer Diane Riddle, met ex parte with DWR WaterFix attorneys and

1 engineers serving as proponents of the Project before the Board at least nine times between January
2 4, 2016, and October 4, 2016. The purpose of the meetings was a collaboration between Board
3 Hearing Team members and DWR Petition proponents to prepare the evidence that DWR would
4 then present to the Board as its *sole* evidence to convince the Board to approve the change petition.

5 Board Hearing team members unlawfully heard *ex parte* evidence from DWR and
6 unlawfully gave DWR *ex parte* direction about the content of DWR’s evidence to be presented later
7 publicly to the Board with respect to the impact analysis in the EIR, with respect to the input and
8 output of Boundary 1–Boundary 2 modeling, and with respect to legal issues that were, and are,
9 before the Board as an adjudicatory body.

10 As it stands, these proceedings and the evidence upon which they rely are irrevocably
11 tainted. “The *ex parte* communications in this case did violate the law of legal ethics. ... [S]uch
12 misconduct [is] prejudicial as a miscarriage of justice ... and sufficiently heinous to warrant
13 reversal ... because it shows bias on the part of the tribunal.” (*Mathew Zaheri Corporation v. New*
14 *Motor Vehicle Board* (1997) 55 Cal. App. 4th 1305, 1315.)

15 It would be hard to conceive a set of facts constituting a more egregious violation of
16 administrative integrity, violation of Protestant’s constitutional substantive and procedural due
17 process rights, violation of the California Administrative Procedure Act’s prohibitions on *ex parte*
18 communications, and violation of the “common law ... of legal ethics.” (“ethics violations”)
19 (*Mathew Zaheri Corporation v. New Motor Vehicle Board* (1997) 55 Cal. App. 4th 1305, 1315–
20 1317.)

21 On Monday April 11, 2016, Hearing Team member and environmental scientist John
22 Gerlach, wrote of an upcoming meeting, with copies to DWR personnel and Hearing Team leaders
23 Riddle and Heinrich, that “It sounds like the meeting should include more than technical staff as the
24 issues likely go beyond pure technical issues. Given the different statements that I’ve read, could
25 you please clarify what modeling will be relied on for the case-in-chief for each of the three phases
26 of the hearing—1A, 1B, and 2.” (Attachment 2.) Any discussion of Petitioner’s strategy for
27 presenting evidence must take place with notice to, and opportunity to be heard from, all parties.
28 Mr. Gerlach’s *ex parte* communications about DWR’s presentation of evidence was an ethical

1 violation, especially when he expressly recognized that the subject matter went “beyond pure
2 technical issues.”

3 Again on Monday April 11, 2016, Gerlach also wrote, in a separate email to DWR Change
4 Petition proponents, that “After you bring me up to speed on the new modeling Diane would like a
5 meeting with the larger group to discuss the CEQA effects analysis based on the modeling.”
6 (Attachment 3.) The EIR and its CEQA effect analysis *is evidence* in the hearings about whether or
7 not the Project will harm legal users of water or the environment. Hearing Team members meeting
8 ex parte with a “larger group” including DWR to discuss DWR’s evidence was an ethical violation.

9 The modeling repeatedly discussed is the modeling in Appendix 5E of the WaterFix EIR,
10 which is the Boundary 1–Boundary 2 analysis. “This web conference is a follow-up meeting to
11 discuss the approach to developing Appendix 5E.” (Attachment 4.) Appendix 5E contains two
12 boundary “scenarios, each at year 2025 (Early Long Term [ELT]) that were presented in the State
13 Water Board water rights petition process (Boundary 1 and Boundary 2). Boundaries 1 and 2 were
14 presented to the State Water Board during the water rights petition process as a means to represent a
15 potential range of operations that could occur as a result of the proposed Adaptive Management
16 Program,” during operation of the WaterFix Project. (Appendix 5E, FEIR, p. 5E-1.) (Attachment 5)
17 The correspondence produced on December 18 repeatedly references Hearing-Team-coached
18 development of the Boundary 1–Boundary 2 analysis.

19 And this same Boundary 1–Boundary 2 analysis is the only evidence DWR presents on the
20 key hearing issue of whether the proposed changes will “alter water flows” or “alter water quality”
21 in a way that causes injury to other users of water, fish and wildlife, and recreation. (October 30,
22 2015 Hearing Notice, p. 11–12.) As DWR summarized it, “In Part 1 of this hearing Petitioners
23 presented the boundary analysis of B1 to B2 in order to demonstrate no impact to legal users of
24 water within the range of foreseeable outcomes of the adaptive management process.” (September
25 8, 2017, Letter From DWR and USBR to hearing Officers p. 2.) (Attachment 6) DWR has put forth
26 that same Boundary 1–Boundary 2 analysis and CEQA effects analysis derived therefrom as the
27 basis for its case-in-chief for Part 2 as well.

28

1 These meetings, and intense, virtually non-stop collaboration over thirteen months, were far
2 removed from any legitimate role the Board played as a Responsible Agency under CEQA in
3 suggesting a Board-preferred alternative. There is no reason why Hearing Team members should be
4 involved in any substantive ex parte communications with the Petitioner for any reason. And the
5 intimate collaboration was not about SWRCB suggested alternatives; it was about preparing DWR’s
6 evidence in a manner that would allow the Petition to be approved by the Board.

7 Enclosure D to the October 30, 2015, Notice of Petition states that “During the pendency of
8 this proceeding, there shall be no *ex parte* communications between State Water Board members *or*
9 *State Water Board hearing team staff* and any of the other participants” In the face of the
10 undeniable substantive ex parte communications between key Hearing Team staff and DWR
11 Petition proponents, which were undeniably *for the purpose of preparing materials that were later*
12 *submitted as evidence in the hearings*, Ms. Kuenzi’s denial that any ethical violations have taken
13 place is not tenable.

14 Hearing Team staff are heavily invested in the adequacy of the EIR evidence as well as in the
15 integrity of the modeling evidence and effects analysis evidence, which they worked hard to produce over
16 many months. They cannot now, as has been the case and is contemplated to be the case going forward,
17 advise the Hearing Officers as to the admissibility and weight of that evidence in these Proceedings.

18 The purpose of appointing a Hearing Team is to preserve the separation of functions. As the
19 courts have explained to this Board:

20 In the absence of financial or other personal interest, and when rules mandating an
21 agency’s internal separation of functions *and prohibiting ex parte communications*
22 *are observed*, the presumption of impartiality can be overcome only by specific
evidence demonstrating actual bias or a particular combination of circumstances
creating an unacceptable risk of bias.

23 (*Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal. 4th 731,
24 741, *emphasis added*) Here, rules prohibiting ex parte communications were not observed. Hearing
25 Team staff members violated the Board’s *own rule expressly prohibiting* ex parte communications
26 between *Hearing Team staff* and Petitioner. This alone is adequate to demonstrate bias. In addition,
27 all the factors are now present demonstrating actual bias and the particular combination of
28 circumstances creating an unacceptable risk of bias.

1 There is no reason why DWR personnel, including attorneys familiar with the rules of
2 conduct and case law, could not have observed the separation of functions by refraining from any
3 substantive communications with Hearing Team members, about anything related to the WaterFix
4 Project. It is not possible, short of actual bribery, to conceive a “particular combination of
5 circumstances creating an unacceptable risk of bias,” greater than those that occurred here.

6 “Where, as here, an administrative agency conducts adjudicative proceedings, the
7 constitutional guarantee of due process of law requires a fair tribunal.” (*Morongo Band*, 45 Cal. 4th
8 at 737.) Proof of actual bias, such as a financial interest or outright statements of bias need not be
9 shown to establish a violation of due process rights. Violation of the due process guarantee occurs
10 “in a situation in which experience teaches that the probability of actual bias on the part of the judge
11 or decisionmaker is too high to be constitutionally tolerable.” (*Morongo Band*, 45 Cal. 4th at 737.)
12 Where there is a “clear appearance of bias and unfairness at the administrative hearing” an agency’s
13 ultimate decision will be reversed. (*Quintero v. City of Santa Ana* (2003) 114 Cal. App. 4th 810,
14 812.) The interests of the Board, and frankly of Petitioner, are not served by continuing to a
15 decision that will be reversed on due process grounds.

16 It is time to take stock and acknowledge that the Board violated its own rules and then
17 determine how the Hearings can proceed in a way that respects Protestants’ rights under applicable
18 statutory and case law, and the constitutional requirements of a fundamentally fair hearing. To
19 achieve this result, the Hearings must be reformed before any further evidentiary proceedings take
20 place. This cannot be achieved between now and next Thursday, therefore a continuance is required.

21 **II. Steps That Can Be Taken To Reform The Hearings Include Some or All of The**
22 **Following.**

23 The revelations about the ex parte collaboration were slow in coming and are as yet
24 incomplete. Mr. Patrick Porgans made a PRA request for all ex parte communications between the
25 Hearing Team and DWR on August 31, 2017. No documents were produced until October 18, 2017,
26 and this production was missing the revelatory documents. A second production was forwarded on
27 December 18, 2017, over fifteen weeks after the original request.

28

1 This second production contained the inculpatory emails, which formed the basis of our
2 follow up request of December 28, 2017. In response to our follow up request of December 28, we
3 received further inculpatory documents, including a version of Appendix 5E with track changes that
4 show DWR attorney Kenneth Bogdan attempting to cover up the extent of Hearing Team members’
5 involvement in production of the B1–B2 modeling evidence.

6 We are still waiting on further documents, including the notes taken by Hearing Team
7 members at the evidence collaboration meetings, which Ms. Kuenzi has promised to produce. We
8 learned from Ms. Kuenzi on January 10 that DWR swept up all the evidence at the end of each of
9 the evidence collaboration meetings and took it away, not allowing Hearing Team members to
10 retain any of the materials. On this basis, we made a PRA request to DWR by the end of the day on
11 January 10. We are moving swiftly. However, time does not allow us to formulate a complete
12 proposal for reformation of the Hearings and we need the continuance to allow for that formulation,
13 the other parties’ response, and a disposition by the Hearing Officers. We also need full production
14 from the Board and DWR so we know the extent of constitutional violations that must be redressed
15 and can formulate comprehensive remedial measures.

16 The following are items we will consider in our WaterFix Hearing Reformation proposal.²

17 **A. Disqualification of the Hearing Officers and/or Hearing Team and Replacement**
18 **With An Administrative Law Judge.**

19 Many administrative agencies conduct evidentiary hearings through the Office of
20 Administrative Law (“OAL”) which provides qualified administrative law judges and staff to
21 conduct evidentiary hearings. To the best of our knowledge, these services are available to the
22 Board.

23 The tainted modeling and EIR have both been the subject of extensive evidentiary
24 objections. Rulings on these objections were biased against the objectors.

25

26 ² The Board can, and is urged to take any and all immediate actions, such as disqualifying Hearing Team members,
27 setting a WaterFix Hearing Reformation briefing schedule, setting oral argument on WaterFix Hearing Reformation,
28 removing the determination of Appropriate Delta Flow Criteria from these Hearings and placing it in the proceedings
updating the 2006 WQCP, requiring Petitioner to comply with 23 CCR § 794, including submitting operating criteria, or
simply dismissing the Petition without prejudice, and any other actions the Board deems appropriate to right the ship.

1 It may be that appointing an administrative law judge to re-hear those objections is the only
2 way to correct the dispositive prejudice against Protestants.

3 **B. Removing Appropriate Flow Criteria From the WaterFix Evidentiary Hearings**
4 **And Combining it with the Update of the Water Quality Control Plan.**

5 Although the Board rejected repeated requests to bifurcate the process and treat the
6 determination of appropriate flow criteria in a rulemaking, rather than adjudicative process, the
7 Boards' approach to determining flow criteria has in fact been through a rulemaking-like process—
8 meeting repeatedly with interested parties in an informal give-and-take setting, gathering
9 information, and forging the Boundary 1–Boundary 2 analysis through an iterative, collaborative
10 process. This may be an effective way to shape appropriate flow criteria, however rulemaking
11 cannot exclude the parties affected by the rule—here all protestants. In addition to unlawful ex parte
12 communication, the Boundary 1–Boundary 2 collaboration resulted in an underground regulation.

13 If there is to be a collaborative process between the Board and parties to the hearings to
14 develop the modeling upon which the Petition (and appropriate flow criteria) will be decided, the
15 parties participating in modeling collaboration with the Board cannot be limited to the Petitioner, as
16 has been the case thus far. Protestants are legally entitled to an equal role in shaping the Boundary
17 1–Boundary 2 analysis, if that analysis is to serve as evidence in these hearings or be used to
18 determine flow criteria at all. Protestants must be given the opportunity for input into substantial
19 additional modeling and that can be achieved by moving the determination of Appropriate Flow
20 Criteria to the rulemaking setting of the WQCP update.

21 **C. Dismissal Of The Petition.**

22 Given the extent of constitutional violations shown, and the lack of any legitimate reason for
23 these Hearings (as demonstrated in the following section) to proceed at this time in the first place,
24 the Board needs to seriously re-consider dismissing the Petition without prejudice. DWR and USBR
25 can resubmit the Petition when they are actually ready to do so and have a complete Project
26 description, and other necessary documentation in place.
27
28

1 If the Board decides in favor of Reformation instead of Dismissal, our suggestion to extend
2 hearing dates for ninety days, rather than suspend them entirely, will allow Reformed Hearings to
3 go forward.

4 **III. All Factors Weigh In Favor Of A Continuance.**

5 Delta Alliance will suffer irreparable injury, including violation of its fundamental due
6 process rights and Frist Amendment right to petition the government for a redress of grievances if
7 an immediate continuance of proceedings is not granted. A continuance will preserve the status quo,
8 and prevent irreparable harm pending the Board’s careful consideration of our forthcoming
9 WaterFix Reformation Motion. On the other hand no factors weigh in favor of denying the motion
10 for continuance. Petitioner DWR has no standing to oppose the motion for continuance. DWR
11 comes with unclean hands, having acted with malice to rig the Hearings and to cover up evidence of
12 its wrongdoing. It cannot now plead inconvenience because of the need to pause to redress its
13 malicious tampering with the administrative process.

14 Further, as the Board is aware, DWR has never complied with 23 CCR § 794 and no
15 complete application that would allow a lawful consideration of DWR’s Petition to change the point
16 of diversion has ever been submitted. DWR employed subterfuge to make it appear that modeling
17 criteria presented to the Board were actually part of a project description and did not finally admit
18 that it has never submitted *any* operating criteria for the Project until forced to do so by Delta
19 Alliance’s letter of August 3, 2107. (Attachment 7.)

20 Moreover, the Board’s own recognition that Part 2 cannot coherently commence until the
21 ESA process is complete and USBR has issued a Final Environmental Impact Statement and Record
22 of Decision have never been satisfied. (Attachment 8) It remains today as true as it was on February
23 11, 2016, when the Board noted that “DWR has requested an expedited hearing schedule because of
24 the likelihood of a lengthy hearing, but has not clearly explained why the hearing process should
25 begin now, notwithstanding the arguments of other parties.” (February 11, 2016, Ruling Letter, p. 1)
26 (Attachment 8).

27 The tainted B1–B2 modeling further reinforces the need to make determination of
28 appropriate Delta Flow Criteria a part of the Board’s update of the 2006 WQCP. The three-year

1 update of the WQCP is now nine years behind schedule. Further delaying the Board’s statutory duty
2 to timely update the WQCP in order to allow tampered evidence in the WaterFix Hearing to
3 preclude a careful consideration of Delta-wide flow criteria in the WQCP update further militates in
4 favor of a continuance in order to facilitate moving Appropriate Delta Flow Criteria from the
5 WaterFix Hearings back to the WQCP update where it belongs.

6 Finally, the Hearings were continued twice at DWRs request and all then set Hearing dates
7 suspended for no reason other than that DWR needed more time to prepare its case—and when
8 DWR had complete control over when it submitted the Petition in the first place. In other words,
9 DWR submitted the Petition before it was ready to present its case, and then when the Board acted
10 on the Petition and set hearing dates, DWR requested and was twice granted continuances to allow
11 it more time to prepare its evidence. (Attachment 9) After having granted these accommodations to
12 DWR, equity requires granting this short and definite continuance, which is for good cause shown
13 and to redress emergencies which have arisen from no fault of Protestants.


14 On March 28, 2016, one day before its evidence was due, Petitioner wrote to the Board
15 requesting a 60-day continuance. All factors related to this request were under Petitioner’s complete
16 control. The next day, March 29, 2016, the Board granted the request. We therefore request in
17 equity that this request for continuance be granted on Tuesday, January 18, 2018.

18

19 Dated: January 12, 2018

20

21 Respectfully Submitted,

22 

23 Michael A. Brodsky
24 Counsel for Protestant
25 Save the California Delta Alliance, et al.

26

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ATTACHMENT 1

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**Supplemental Modeling ~~Requested by~~ Related to the
State Water Resources Control Board ~~Related to~~
~~Increased Delta Outflows~~ Decisions**

Supplemental Modeling ~~Requested by~~ Related to the State Water Resources Control Board ~~Related to~~ ~~Increased Delta Outflows~~ Decisions

5E.1 Introduction and Purpose of the Supplemental Modeling

The State Water Resources Control Board (State Water Board) is expected to issue discretionary approvals considered a “project” under California Environmental Quality Act (CEQA), and therefore, the State Water Board is identified as a Responsible Agency for purposes of California Department of Water Resources (DWR’s) CEQA document. DWR prepared the Bay Delta Conservation Plan (BDCP) Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) in consideration of the State Water Board and other Responsible Agency approvals and specifically included Alternative 8 in the BDCP Draft EIR/EIS at the request of State Water Board. In the 2015 Partially Recirculated Draft EIR/Supplemental Draft EIS (RDEIR/SDEIS) included, at the request of State Water Board staff, supplemental modeling at year 2025 (Early Long Term [ELT]), conducted to evaluate an operational scenario that provides higher Delta outflows than the Preferred Alternative (Alternative 4A), while including model assumptions that avoid impacts to fish and aquatic resources attributable to reductions in cold water pool storage and flow modifications under Alternative 8 and other higher outflow scenarios analyzed in the BDCP Draft EIR/EIS. ~~However, as with many Responsible Agencies, the State Water Board’s consideration of the proposed project is not limited to the scope of the CEQA analysis and the State Water Board water right approval process may require consideration of issues beyond that required in CEQA.~~

~~Therefore,~~ this appendix updates the State Water Board requested scenario that was presented in the RDEIR/SDEIS (referred to as Scenario 2 in this appendix) and also provides supplemental modeling and analysis of 32 additional scenarios, each at year 2025 (Early Long Term [ELT]) that were presented -Consistent with- in the State Water Board water rights petition process, (Boundary 1 and Boundary 2) modeling and analysis is presented below, parallel to the testimony provided during the hearings in 2016. Boundaries 1 and 2 were presented to the State Water Board during the water rights petition process as a means to represent a potential range of operations that could occur as a result of the proposed Adaptive Management Program, which would incorporate the ongoing regulatory review of U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Fish and Wildlife, and State Water Board. -and a ~~At the request of State Water Board staff, supplemental modeling and analysis at year 2025 (Early Long Term [ELT]) was also conducted for 3 scenarios: Boundary 1, Boundary 2 and a scenario that included additional outflow beyond that included in Boundary 2, which updates the scenario that was evaluated in this appendix in the REIR/SEIS. This scenario is referred to as ‘Scenario 2’ in this appendix~~ State Water Board staff scenario. Boundaries 1 and 2 were presented to the State Water Board during the water rights petition process as a means to represent a potential range of operations that could occur as a result of Adaptive Management. The State Water Board staff scenario ~~Scenario 2~~ Scenario 2 was modeled to evaluate an operational scenario that provides higher Delta outflows than Alternative

1 4A, while including model assumptions that avoid impacts to fish and aquatic resources attributable
 2 to reductions in cold water pool storage and flow modifications under Alternative 8 and other
 3 higher outflow scenarios analyzed in the BDCP Draft EIR/EIS. The evaluations for Boundary ~~ies 1 and~~
 4 2 and ~~the State Water Board scenario~~ [Scenario 2](#) were conducted primarily to consider
 5 ~~changes~~ ~~increases~~ in outflow, without ~~specific~~ consideration of ~~water supply benefits, and as such, an~~
 6 ~~alternative that included this operational scenario would likely not meet~~ the project objectives or
 7 purpose and need statement. Overall, the purpose of this evaluation was to provide a ~~broader~~ range
 8 of Delta outflows and other operational parameters to consider ~~as a part of the CEQA/NEPA process~~
 9 ~~as well as~~ during ~~agency decision-making, including~~ the State Water Board’s water rights hearing on
 10 the petition for changes in State Water Project (SWP) and Central Valley Project (CVP) authorized
 11 points of diversion necessary to implement the proposed project.

12 5E.2 Modeling Assumptions

13 Three scenarios were evaluated in this appendix: Boundary 1, Boundary 2, and ~~a State Water Board~~
 14 ~~staff scenario~~ [Scenario 2](#) [Scenario 2](#). Additionally, modeling for Alternatives 4H3 and 4H4 was
 15 conducted for the State Water Board petition process. The modeling results of Alternative 4H3,
 16 Alternative 4H4, Boundary 1 and Boundary 2 are included as Attachment 5E-1. The modeling results
 17 for ~~the State Water Board staff scenario~~ [Scenario 2](#) [Scenario 2](#) are included below in Section 5E.3.
 18 Tables 5E-1 through 5E-5 below includes the assumptions for the 3 scenarios evaluated in this
 19 appendix, plus the No Action Alternative (for reference).

20 **Table 5E-1. Key CalSim II CWF No Action Alternative, CPOD Boundary 1 and Boundary 2, and ~~SWRCB~~**
 21 **~~Staff Scenario~~ [Scenario 2](#) Inputs and Assumptions**

	No Action Alternative (NAA)	Boundary 1	Boundary 2	SWRCB Staff Scenario Scenario 2
Planning horizon ^a	Year 2030	Same as NAA	Same as NAA	Same as Boundary 2
Inflows/ Supplies	Historical with modifications for operations upstream of rim reservoirs and with changed climate at Year 2030	Same as NAA	Same as NAA	Same as Boundary 2
Facilities				
North Delta Diversion Intakes	Not included	9,000 cfs north Delta diversion intake on the Sacramento River at Hood	Same as Boundary 1	Same as Boundary 2
Head of Old River Gate	Temporary Head of Old River Barrier installed in the fall months	Permanent Head of Old River (HOR) Gate	Same as Boundary 1	Same as Boundary 2
North Delta Diversion Operations Criteria				

	No Action Alternative (NAA)	Boundary 1	Boundary 2	SWRCB Staff Scenario Scenario 2
North Delta Diversion Bypass Flows	Not included	Sacramento River bypass flow requirements downstream of the proposed intakes as described in Table 2 below. In addition, a constraint on the potential diversion at the north Delta intakes, to account for the fish screen sweeping velocity criteria of 0.4 fps. The constraint was derived based on resulting diversions from the DSM2 modeling.	Same as Boundary 1	Same as Boundary 2
Minimum flow near Rio Vista	SWRCB D-1641	Same as NAA with additional minimum flow requirement of 3,000 cfs from January to August.	Same as Boundary 1	Same as Boundary 2
South Delta Export Restrictions				
South Delta exports (Jones PP and Banks PP)	SWRCB D-1641. Vernalis flow-based export limits Apr 1 – May 31 as required by NMFS BiOp (Jun, 2009) Action IV.2.1 (additional 500 cfs allowed for Jul – Sep for reducing impact on SWP)	SWRCB D-1641. Pumping at the south Delta intakes are preferred during the July through September months up to a total pumping of 3,000 cfs to minimize potential water quality degradation in the south Delta channels. No specific intake preference is assumed beyond 3,000 cfs.	Same as Boundary 1	Same as Boundary 2
Combined Flow in Old and Middle River (OMR)	FWS BiOp (Dec 2008) Actions 1 through 3 and NMFS BiOp (Jun 2009) Action IV.2.3	Same as NAA	New OMR criteria in Table 3 below or same as the NAA, whichever results in less negative OMR flows	Same as Boundary 2
Head of Old River Barrier/Gate	Head of Old River Barrier (HORB) is only installed in the fall months per FWS Delta Smelt BiOp Action 5; it is assumed to be not installed in April or May.	Same as NAA	HOR gate operations assumptions (% OPEN) Oct - Dec 100%, Jan - Feb 50%, Mar - Jun 0%, Jul - Sep 100%; HOR gate will be open 100% whenever flows are greater than 10,000 cfs at Vernalis.; Oct-Nov: Before the D-1641 pulse = HOR gate open, During the D-1641 pulse = for 2 weeks HOR gate closed; After D-1641 pulse: HORB open 50% for 2 weeks	Same as Boundary 2

Attachment 2

From: Gerlach, John@Waterboards </O=MMS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GERLACH, JOHN81D2F47C-5AB7-4479-AFC3-0420CE8BAB51CF4>
Sent: Monday, April 11, 2016 10:53 AM
Subject: RE: Water Board modeling for WaterFix

How does meeting at 3:30 pm on Thursday April 21st work for everyone?

From: Pierre, Jennifer [mailto:Jennifer.Pierre@icfi.com]
Sent: Monday, April 11, 2016 10:06 AM
To: Bogdan, Kenneth M.@DWR; Gerlach, John@Waterboards; Chandra.Chilmakuri@CH2M.com
Cc: Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards
Subject: RE: Water Board modeling for WaterFix

Good morning. I'm not available until 1pm. Any chance we could meet in the afternoon of the 21st?

Jennifer

From: Bogdan, Kenneth [M.@DWR \[mailto:Kenneth.Bogdan@water.ca.gov\]](mailto:Kenneth.Bogdan@water.ca.gov)
Sent: Monday, April 11, 2016 10:03 AM
To: Gerlach, John@Waterboards <John.Gerlach@waterboards.ca.gov>; Chandra.Chilmakuri@CH2M.com
Cc: Riddle, Diane@Waterboards <Diane.Riddle@waterboards.ca.gov>; Heinrich, Dana@Waterboards <Dana.Heinrich@waterboards.ca.gov>; Pierre, Jennifer <Jennifer.Pierre@icfi.com>
Subject: RE: Water Board modeling for WaterFix

Hi John – thanks for the response. Let's chat about all of this when we meet face to face.

I have a meeting that ends at 11:00 on the 21st. Any chance we could meet here? Otherwise maybe schedule it for 11:30? Let's see if Jennifer can make it as well.

Thanks,

Ken

Kenneth M Bogdan
Senior Staff Counsel
Office of Chief Counsel
CA Department of Water Resources

11th Floor
1416 9th Street
Sacramento CA 95814
Office 916.651.2988
Cell 916.607.7852

From: Gerlach, John@Waterboards
Sent: Monday, April 11, 2016 9:55 AM
To: Bogdan, Kenneth M.@DWR; Chandra.Chilmakuri@CH2M.com

Cc: Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards
Subject: RE: Water Board modeling for WaterFix

Thanks Ken.

It sounds as if the meeting should include more than technical staff as the issues likely go beyond pure technical issues.

Given the different statements that I've read, could you please clarify what modeling will be relied on for the case-in-chief for each of the three phases of the hearing - 1A, 1B, and 2. It's not clear to me from the tables in the March 11, 2015 letter from DWR and Reclamation to the SWRCB how the WaterFix RDEIR/SDEIS modeling for water quality (DSM2 16 year period) and the BA modeling for endangered species (82 year period) are being used in the various hearing phases.

Based on what I can see on Diane's Outlook calendar, could we set up a meeting at 11 am on Thursday April 21st?

Thank you,

John

From: Bogdan, Kenneth M.@DWR
Sent: Monday, April 11, 2016 9:10 AM
To: Gerlach, John@Waterboards; Chandra.Chilmakuri@CH2M.com
Subject: RE: Water Board modeling for WaterFix

Hi John and Chandra – just to clarify (I am sure I wasn't clear with Dana since modeling is not my specialty!), Chandra has not run the latter end H4 analysis and wanted to talk with you on several assumptions (including whether to use the 2015 version of Calsim). I'd like to be part of the discussion as there are a few things that may weigh into the decisions on moving forward with the modeling. I have also been the bottle neck on the impact analysis side of things and can give an update about that too.

Ken

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CA Department of Water Resources

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Cell 916.607.7852

From: Gerlach, John@Waterboards
Sent: Monday, April 11, 2016 7:21 AM
To: Chandra.Chilmakuri@CH2M.com
Cc: Bogdan, Kenneth M.@DWR
Subject: Water Board modeling for WaterFix

Hi Chandra,

Ken mentioned to one of our attorneys that you had completed some additional modeling for the Water Boards scenario using H4 as the baseline. Dianne Riddle asked me to contact you so that you could provide some technical

Attachment 3

Cc: Riddle, Diane@Waterboards; Heinrich, Dana@Waterboards
Subject: RE: Water Board modeling for WaterFix

Thanks Ken.

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Given the different statements that I've read, could you please clarify what modeling will be relied on for the case-in-chief for each of the three phases of the hearing - 1A, 1B, and 2. It's not clear to me from the tables in the March 11, 2015 letter from DWR and Reclamation to the SWRCB how the WaterFix RDEIR/SDEIS modeling for water quality (DSM2 16 year period) and the BA modeling for endangered species (82 year period) are being used in the various hearing phases.

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Thank you,

John

From: Bogdan, Kenneth M.@DWR
Sent: Monday, April 11, 2016 9:10 AM
To: Gerlach, John@Waterboards; Chandra.Chilmakuri@CH2M.com
Subject: RE: Water Board modeling for WaterFix

Hi John and Chandra – just to clarify (I am sure I wasn't clear with Dana since modeling is not my specialty!), Chandra has not run the latter end H4 analysis and wanted to talk with you on several assumptions (including whether to use the 2015 version of Calsim). I'd like to be part of the discussion as there are a few things that may weigh into the decisions on moving forward with the modeling. I have also been the bottle neck on the impact analysis side of things and can give an update about that too.

Ken

Kenneth M Bogdan
Senior Staff Counsel
Office of Chief Counsel
CA Department of Water Resources

11th Floor
1416 9th Street
Sacramento CA 95814
Office 916.651.2988
Cell 916.607.7852

From: Gerlach, John@Waterboards
Sent: Monday, April 11, 2016 7:21 AM
To: Chandra.Chilmakuri@CH2M.com
Cc: Bogdan, Kenneth M.@DWR
Subject: Water Board modeling for WaterFix

Hi Chandra,

Ken mentioned to one of our attorneys that you had completed some additional modeling for the Water Boards scenario using H4 as the baseline. Dianne Riddle asked me to contact you so that you could provide some technical

specifics to me about the new modeling. Our discussion will be focused on the modeling and not the effects analysis. My third hand information is that while the H3 baseline was based on the 2010 version of CalSim2 that the H4 baseline might be based on the 2015 version of CalSim2. We'd also like to know if both runs used the same analysis period, say ELT, and whether there are any other different assumptions.

After you bring me up to speed on the new modeling Diane would like a meeting with the larger group to discuss the CEQA effects analysis based on the modeling. I don't know the status of those efforts but if they have been completed Diane would like to set something up for late next week as she is out of town this week.

If you have an questions please feel free to give me a call.

Thanks,

John

=====
John Gerlach, Ph.D., J.D. | Senior Environmental Scientist
State Water Resources Control Board | Division of Water Rights
1001 "I" Street, 14th Floor | Sacramento, CA 95814
John.Gerlach@waterboards.ca.gov
P: (916) 341-5394

Attachment 4

California WaterFix Appendix 5E - Meeting

File Meeting Help Tell me what you want to do

YM
Mon 7/11/2016 12:56 PM
Yee, Marcus@DWR
California WaterFix Appendix 5E

Required
As the meeting organizer, you do not need to respond to the meeting.

When Thursday, July 14, 2016 3:00 PM-3:30 PM Location Goto meeting details will be sent out later this afternoon

This web conference is a follow-up meeting to discuss the approach to developing Appendix 5E.

Attachment 5

1
2
3

**Supplemental Modeling Related to the
State Water Resources Control Board**

Supplemental Modeling Related to the State Water Resources Control Board

5E.1 Introduction and Purpose of the Supplemental Modeling

The State Water Resources Control Board (State Water Board) is expected to issue discretionary approvals considered a “project” under California Environmental Quality Act (CEQA), and therefore, the State Water Board is identified as a Responsible Agency for purposes of California Department of Water Resources (DWR’s) CEQA document. DWR prepared the Bay Delta Conservation Plan (BDCP) Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS) in consideration of the State Water Board and other Responsible Agency approvals and specifically included Alternative 8 in the BDCP Draft EIR/EIS at the request of State Water Board staff. The 2015 Partially Recirculated Draft EIR/Supplemental Draft EIS (RDEIR/SDEIS) included, at the request of State Water Board staff, supplemental modeling at year 2025 (Early Long Term [ELT]), conducted to evaluate an operational scenario that provides higher Delta outflows than the Preferred Alternative (Alternative 4A), while including model assumptions that avoid impacts to fish and aquatic resources attributable to reductions in cold water pool storage and flow modifications under Alternative 8 and other higher outflow scenarios analyzed in the BDCP Draft EIR/EIS.

This appendix includes a revised and updated version of the State Water Board staff requested scenario that was presented in the RDEIR/SDEIS (referred to as Scenario 2 in this appendix) and also provides supplemental modeling and analysis of 2 additional scenarios, each at year 2025 (Early Long Term [ELT]) that were presented in the State Water Board water rights petition process (Boundary 1 and Boundary 2). Boundaries 1 and 2 were presented to the State Water Board during the water rights petition process as a means to represent a potential range of operations that could occur as a result of the proposed Adaptive Management Program, and the conditions of any approvals obtained as a result of the ongoing regulatory review of U.S. Fish and Wildlife Service, National Marine Fisheries Service, California Department of Fish and Wildlife, and State Water Board. The description and analysis included in this appendix for Boundaries 1 and 2 incorporates by reference the testimony presented to the State Water Board July 29 through September 27, 2016, for the California WaterFix change in point of diversion petition. The testimony exhibits on which this analysis relied are posted at:

http://cms.capitoltechsolutions.com/ClientData/CaliforniaWaterFix/uploads/CWF_ChangePetition_TOC_V212.pdf

The transcripts on which this analysis relied are posted at:

http://cms.capitoltechsolutions.com/ClientData/CaliforniaWaterFix/uploads/CWF_ChangePetitionHearingTranscript.pdf

1 Specifically, the modeling and water quality exhibits (DWR-5, DWR-513, DWR-514, and DWR-515)
2 and transcripts (August 19, 23, and 24, 2016) were relied upon for this analysis. Boundary 2 was
3 based on the higher Delta outflow operational scenario requested by State Water Board staff that
4 was evaluated in the 2015 RDEIR/SDEIS. Scenario 2 is identical to Boundary 2 in all respects except
5 for upstream releases from Lake Oroville in April and May to support the higher Delta outflow
6 requirements included in Scenario 2.

7 The evaluations for Boundaries 1 and 2 and Scenario 2 were conducted primarily to consider
8 changes in outflow, without specific consideration of the project objectives or purpose and need
9 statement. Overall, the purpose of this evaluation was to provide a range of Delta outflows and other
10 operational parameters to consider as a part of the CEQA/NEPA process as well as during agency
11 decision-making, including the State Water Board’s water rights hearing on the petition for changes
12 in State Water Project (SWP) and Central Valley Project (CVP) authorized points of diversion
13 necessary to implement the proposed project.

14 5E.2 Modeling Assumptions

15 Three scenarios were evaluated in this appendix: Boundary 1, Boundary 2, and Scenario 2.
16 Additionally, modeling for Alternatives 4H3 and 4H4 was conducted for the State Water Board
17 petition process. The modeling results of Alternative 4H3, Alternative 4H4, Boundary 1 and
18 Boundary 2 are included as Attachment 5E-1. The modeling results for Scenario 2 are included
19 below in Section 5E.3. Tables 5E-1 through 5E-5 below includes the assumptions for the 3 scenarios
20 evaluated in this appendix, plus the No Action Alternative (for reference).

21 **Table 5E-1. Key CALSIM II CWF No Action Alternative, CPOD Boundary 1 and Boundary 2, and Scenario**
22 **2 Inputs and Assumptions**

	No Action Alternative (NAA)	Boundary 1	Boundary 2	Scenario 2
Planning horizon ^a	Year 2030	Same as NAA	Same as NAA	Same as Boundary 2
Inflows/ Supplies	Historical with modifications for operations upstream of rim reservoirs and with changed climate at Year 2030	Same as NAA	Same as NAA	Same as Boundary 2
Facilities				
North Delta Diversion Intakes	Not included	9,000 cfs north Delta diversion intake on the Sacramento River at Hood	Same as Boundary 1	Same as Boundary 2
Head of Old River Gate	Temporary Head of Old River Barrier installed in the fall months	Permanent Head of Old River (HOR) Gate	Same as Boundary 1	Same as Boundary 2

Attachment 6



September 8, 2017

CWFhearing@waterboards.ca.gov via Email

Chair Felicia Marcus
Board Member Tam Doduc
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812-0100

Re: August 31, 2017 Ruling Regarding Scheduling of Part 2 and Other
Procedural Matters

Dear Chair Marcus and Board Member Doduc:

The California Department of Water Resources ("DWR") and the U.S. Bureau of Reclamation ("Reclamation")(jointly "Petitioners") are responding to your ruling of August 31, 2017. In that ruling you requested that, by September 8, 2017, Petitioners provide an "updated summary of operating criteria that makes explicit whether particular criteria are proposed conditions of operation or are set forth solely as modeling assumptions."

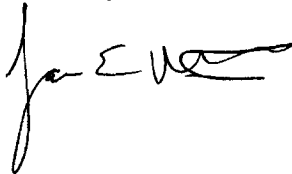
The attached tables describe a summary of the operating criteria for the project that was approved by DWR on July 21, 2017 and is described in the Final Environmental Impact Report and additional information made available to the public at that time. The tables also describe the operating criteria for the projects permitted by the National Marine Fisheries Service, U.S. Fish and Wildlife Service, and the California Department of Fish and Wildlife.

Petitioners propose that the California WaterFix be conditioned upon the terms contained in Water Rights Decision 1641 ("D-1641"). Modeling assumptions demonstrate it is possible to meet existing regulatory requirements inclusive of D-1641 and the 2008/2009 Biological Opinions. For purposes of this hearing, these modeling assumptions are not proposed as conditions but are presented in order to demonstrate compliance with the existing Water Quality Control Plan, which sets forth the thresholds for protecting beneficial uses.

The California WaterFix includes an adaptive management process. In Part 1 of this hearing Petitioners presented the boundary analysis of B1 to B2 in order to demonstrate no impact to legal users of water within the range of foreseeable outcomes of the adaptive management process. Through the adaptive management process, that was made a requirement of the Biological Opinions and 2081(b) Incidental Take Permit for the California WaterFix, new information can be assessed and, if appropriate, incorporated into the ESA/CESA permits. Therefore as part of this project, Petitioners are requesting that the Hearing Officers incorporate the adaptive management process into the water rights permits, and Petitioners are not proposing as conditions the operational criteria contained within the Biological Opinions and 2081(b) Incidental Take Permit.

Petitioners look forward to presenting evidence in Part 2 of the water rights hearing.

Sincerely,



Tripp Mizell
Senior Attorney
Office of the Chief Counsel
CA Department of Water Resources



Amy L. Aufdemberge
Assistant Regional Solicitor
Office of the Regional Solicitor
U.S. Department of the Interior

cc: *Electronic service*

Felicia Marcus, Chair & hearing officer, State Water Resources Control Board
Tam Doduc, Board Member & hearing officer, State Water Resources Control Board
Tom Howard, Executive Director, State Water Resources Control Board
Michael Lauffer, Chief Counsel, State Water Resources Control Board
Electronic service list as provided by the State Water Resources Control Board on August 11, 2017.

Personal service via U.S. Postal Service

Suzanne Womack and Sheldon Moore,
Clifton Court, L.P.,
3619 Land Park Drive,
Sacramento, CA 95818

ATTACHMENT 7

August 3, 2017

Felicia Marcus
State Water Board Chair
BDCP Alternative 4A (California WaterFix) Project Co-Hearing Officer

Tam M. Doduc
State Water Board Member
BDCP Alternative 4A (California WaterFix) Project Co-Hearing Officer

Re: California WaterFix July 27, 2017, Ruling

Dear Hearing Officers:

This letter is submitted on behalf of Save the California Delta Alliance. Delta Alliance expresses no opinion at this time about the main subject of the July 27, 2017, Ruling Denying Sacramento Valley Water Users' Request to Hold Open Part 1 of the Hearings—whether or not Part 1 should be held open for further submissions of evidence.

However, Delta Alliance is alarmed by statements made in the ruling that appear to indicate that the Board is considering beginning Part 2 of the hearings before Petitioners submit a complete project description in conformance with 23 CCR § 794, before Petitioners complete ESA consultation, and before Petitioner USBR issues a ROD or completes the EIS. All of these environmental process were required by the Board's February 11, 2016, Pre-Hearing Conference Ruling to be complete before Part 2 could commence.

As shown below, the recently certified FEIR does not contain a project description. The USBR ROD has not been issued, the FEIS has not been completed, and the ESA process, which largely determines the project description is far from complete.

- I. Petitioners Must Complete The ESA Standard Level Consultation On All Project Elements Before Part 2 Can Be Scheduled As Required By the February 11, 2016, Pre-Hearing Conference Ruling.**
 - A. The Submitted Petition and Project Description Were Incomplete Upon Commencement of Part 1 And The Board Assured Protestants The Petition And Project Description Would Be Complete Before Commencement of Part 2.**

In its February 11, 2016, Pre-Hearing Conference Ruling, the Board acknowledged that the Petition was incomplete. (*See* Pre-Hearing Conference Ruling, p. 6.) After concluding that the project description was inadequate, the Board stated that, “[s]uspending the due date for other parties to submit written testimony and exhibits until

after petitioners present their case in chief will address the need for an adequate project description.” (February 11, 2016, Pre-Hearing Conference Ruling, p. 7.) The Board noted that starting the hearing contrary to its regulations in this particular situation was “an appropriate middle ground to pursue at this time,” (*id.* at p. 2,) and “also is fair.” (*Id* at p. 7.)

The Board acknowledged that during “the pre-hearing conference, many parties made persuasive arguments that they cannot participate meaningfully in Part 1 because the draft CEQA document does not contain enough information concerning how the WaterFix will be operated and the potential impacts of the project on other legal users of water.” (Pre-Hearing Conference Ruling, p. 5.)

In order to move forward with Part 1, despite an incomplete Petition and inadequate project description, the Board promised all Protestants, as stated in the October 30, 2015, Hearing Notice, that:

To ensure compliance with the above requirements, and to better inform the hearing process, State Water Board staff does not propose to begin the second part of the hearing or act on the Petition until the ESA, CESA and CEQA processes are complete.

(October 30, 2015, Hearing Notice, p. 11.) This promise was reaffirmed in the Pre-Hearing Conference Ruling: “As previously planned, Part 2 of the hearing will *commence* following completion of the CEQA/NEPA and ESA/CESA processes.” (“Environmental Processes”) (Pre-Hearing Conference Ruling, p. 3. [emphasis added].)

Protestant Save the California Delta Alliance relied on the Board’s repeated assurances that these processes would be complete before Part 2 of the hearing would commence.

B. The Currently Incomplete ESA Process Must Be Completed Before Part 2 Can Be Scheduled.

It is necessary that the Environmental Processes be completed before Part 2 of the hearing can commence because it is these processes that will provide Petitioner the ability to furnish an intelligible and adequate project description. Petitioner has not, and cannot, furnish an intelligible project description because it does not know how the project will be operated or constructed. It cannot know until these processes, particularly the ESA processes, are complete.

The USFWS Programmatic Biological Opinion issued on June 29, 2017, is not what Petitioner wanted nor what the Board expected. It is only a work plan for the completion of the ESA process. It sets forth the sequence of steps needed to complete the ESA process rather than providing information indispensable to a complete project description. As revealed by the Biological Opinion, the project description and operating criteria will not be known until incidental take statements, or a finding that the action is not likely to adversely affect any listed species, are issued for the project components consisting of (1) construction of the North Delta Diversions (“NDD”); (2) construction of the Head of Old River Gate (“HORG”); (3) construction of the Contra Costa Water District (“CCWD”) settlement facilities; (4) operation of new and existing Central Valley Project (“CVP”) and State Water Project (“SWP”) water facilities under dual conveyance; (5) future maintenance; (6) compensatory mitigation associated with construction of the NDD, HORG, and CCWD settlement agreement facilities; and (7) the CWF Adaptive Management Program. (*See* USFWS Biological Opinion, p.2.)

It is the process of engaging with USFWS to obtain findings on items 1–7 above that provides Petitioner direction on how to develop its operating criteria and project description. That is why the Board recognized in its October 30, 2015, Hearing Notice, and reaffirmed in its February 11, 2016, Pre-Hearing Conference Ruling, that these ESA process would be complete before the beginning of Part 2 is scheduled. As the USFWS Programmatic Biological Opinion states, “subsequent consultations will address incidental take associated with those [items 1–7 above] activities,” and “[c]hanges to the operational scenario will be analyzed in subsequent consultation.” (June 23, 2017, USFWS Programmatic Biological Opinion, p. 2.)

Although Delta Alliance is not in a position to make representations to the Board about Petitioners’ time frames, it is Delta Alliances’ understanding that USFWS, USBR, and DWR are engaging in a concerted effort to complete consultation and development of operational criteria for Alternative 4A over the next 4 to 6 months. The Board may wish to inquire of Petitioners if Delta Alliance’s understanding is correct.

II. Petitioners Must Submit A Succinct And Complete Project Description Compliant With 23 CCR § 794 Before Part 2 Can Be Scheduled.

In its February 11, 2016, Pre-Hearing Conference Ruling, the Board stated that Petitioners must provide “the information required by section 794 of our regulations in a succinct and easily identifiable format.” (Pre-Hearing Conference Ruling, p. 7.) That information includes the operating criteria for the project. As the Board recognized, the Petition and Draft EIR did not provide operating criteria in a succinct and easily identifiable format. The Final EIR, certified on July 21, 2017, is no better.

After over a year of hearings, Petitioners still expect Protestants and the Board to rummage through multiple cross-referenced and re-cross-referenced sections of a half dozen documents to cobble together a description of the operating criteria. It is incumbent on Petitioner, however, to provide the operating criteria in a concise format in one document. If Petitioners knew how the project would be operated, they could provide this information in tabular format of no more than 10 pages. Delta Alliance suggests that one reasonable step the Board could take to inform its deliberations about the course forward (and course corrections) would be to require Petitioners to submit such a table forthwith.

The July 21, 2017, CEQA Findings of Fact and Statement of Overriding Considerations contains the most recent Project Description. Project operations are described at page 39:

Operational components of the water conveyance facilities under Alternative 4A will be similar, but not identical, to those described under Scenario H, as applied to Alternative 4 in Chapter 3, Section 3.6.4.2 of the Final EIR/EIS. Prior to operation of Alternative 4A, specific initial operating criteria will be determined through the continued adaptive management process as outlined in the ESA Section 7 consultation process and CESA 2081(b) permit prior to the start of construction. Appendix 5E, *Supplemental Modeling Requested by the State Water Resources Control Board Related to Increased Delta Outflows*, and Appendix 5F, *Comparison of FEIRS Alternative 2D, 4A, and 5A Modeling Results to RDEIR/SDEIS Modeling Results*, present a range of operational scenarios to depict potential operations that are expected to be approved during subsequent environmental permitting.

Chapter 3, Section 3.6.4.2 of the FEIR/S, is referenced as “similar” to the project, however it is cited as part of the project description by the CEQA findings. Note that the

CEQA Notice of Determination, filed by DWR on July 21, 2017, selects BDCP Alternative 4A as the project. However, the CEQA findings rely on the entire section 3.6.4.2 (pages 3-231–3-273 of the FEIR for the description of project operating criteria. The description of Alternative 4A operating criteria in the FEIR (pages 3-261–3-273) is incomplete.

Other portions of section 3.6.4.2 are obsolete. For example:

- Table 3-25 (describing scenario A) shows diversions of 10,000–15,000 cfs under a range hydrologic conditions at several different times of year. (FEIR, p. 3-235.) Scenario H (Alternative 4) refers the reader back to Scenario A: “The north Delta diversion bypass flow criteria under Scenario H would be the same as under Scenario A.” (FEIR/S, p. 3-254.)

Much of the description of Alternative 4A operating criteria is contradicted by the Biological Assessment as revised in June of 2017, the USFWS Biological Opinion dated June 23, 2017, and released to the public on June 26, and Petitioners’ witnesses. For example:

- Page 3-238 (scenario A) provides for January through August minimum flow of 3,000 cfs at Rio Vista. Scenario H, again refers the reader back to scenario A: “The Rio Vista minimum instream flow criteria under Scenario H would be the same as under Scenario A.” (p. 3-258.) Scenario H (Alternative 4A) reiterates “Rio Vista minimum instream flows” as “Jan-Aug: Minimum of 3,000 cfs.” (Page 3-269.) The Revised BA deletes the minimum 3,000 cfs Rio Vista flow. (See Revised BA, Updated June 2017, Chapter 3, p. 97 [Rio Vista flow shown in strikeout type].) Petitioners response to comments in the FEIR/S states that during the section 7 consultation process the minimum Rio Vista flow “was no longer continued.” (FEIR/S Response to Comments, Table 3-3, Response to Comments of Brodsky, Michael). Table 3-3 is not consecutively paginated so comments are difficult to locate. A copy of the comment and response just cited is attached for the Board’s convenience. The 3,000 cfs Rio Vista Minimum was included as a modeling criteria before the Board. (FEIR/S, p. 3-269.) However, it appears to be deleted from the operating criteria. Is the 3,000 cfs flow requirement included in the project description proffered to the Board or not?
- Page 3-238 (Scenario A) states that from July-September, Petitioner will “preferentially operate SWP and CVP south Delta export facilities up to 3,000 cfs of diversions before diverting from north Delta intakes.” Page 3-269 (Scenario H, Alternative 4A) reiterates the 3,000 cfs south Delta pumping preference as a modeling assumption to control water quality and residence time: “Jul-Sep: Prefer south Delta intake up to total puping of 3,000 cfs; No specific intake preference beyond 3,000 cfs.” The July 21, 2017, CEQA findings directly cite a different passage of the FEIR: “The Project operations include a preference for south Delta pumping in July through September to provide limited flushing” (July 21, 2017, CEQA Findings, p. 40 [citing p.3-261–3-263]). The passage cited in the CEQA Findings does not include the 3,000 cfs minimum, but only discusses south Delta preference. The USFWS BiOP does not include a 3,000 cfs south Delta summer pumping requirement and Petitioners’ Operations Chief testified that summer south Delta pumping was not part of the mandatory operating criteria but would be indirectly required in order to meet D-1641. (Record Transcript, Vol. II, p.139: 10–22.)

Whether there is any requirement for south Delta summer pumping and if it is to be a minimum of 3,000 cfs or just some pumping is vital to Delta Alliance. The bays of Discovery Bay are directly and drastically affected by the combination of north Delta diversions with little or no south Delta pumping preference requirement. It appears that

the 3,000 cfs preference was used as a modeling assumption but either is not a part of the project description or is at an unspecified or reduced rate.

• The CEQA Findings state that all criteria of SWRCB Decision 1641 “will continue to apply” subject to adaptive management. (July 21, 2017, CEQA Findings, p. 40.) However the June 2017 revised BA and the testimony of Petitioner’s witness, Jennifer Pierre, confirm that Petitioners are proposing to change how the D-1641 Export to Inflow ratio is calculated by excluding all exports diverted by the proposed North Delta Diversions (NDD) from the export term. This means that the NDD could be diverting 9,000 cfs at the same time as the existing south Delta diversion point was diverting 1,000 cfs and the total amount “counted” as being diverted would be only 1,000 cfs, rather than the 10,000 cfs actually being diverted. This is a significant change from the way the export to inflow ratio is currently calculated. (See June 2017 Revised BA, p. 3-97 [“Reclamation and DWR propose that the NDD be excluded from the E/I ratio calculation.”]; Record Transcript, Vol.4, p. 229–235. Ms. Pierre’s cross-examination on the change to the Export to Inflow ratio concluded with the remark from Hearing Officer Doduc that “Mr. Brodsky, you flagged this point. We will make sure that it is covered in later panels.” (*Id.* at 235: 14–16.) However, Petitioners have never stated in any project description or testimony that they seek to amend D-1641 in this manner. Petitioners may propose to change the E/I ratio, or for that matter to eliminate D-1641 entirely. However, they owe the Board and Protestants a clear explanation of what they are proposing. The combination of the change in the E/I ratio with the elimination of summer south Delta pumping preference would have a drastic impact on Discovery Bay.

The above are just examples of the confused and murky description of the project operating criteria. We believe that our request to have Petitioner submit all operating criteria in one document in concise tabular format, deleting all obsolete provisions and including all recently added provisions, is a reasonable first step in course correction.

III. Appendix 5E And 5F, And Boundry 1–Boundary 2 Are Not A Project Description Or Project Operating Criteria.

The July 21, 2017, CEQA Findings refer the reader to Appendix 5E and 5F of the FEIR for a project description. (CEQA Findings, p.39.) Appendix 5E refers to Table 5E-1 “Key CALSIM II ... Inputs and Assumptions” and clearly labels Table 5E-1 as “Modeling Assumptions.” (FEIR Appendix 5E, p. 5E-2.) Modeling assumptions are not operating criteria and do not constitute a project description. At best, they are weak evidence in an impact analysis.

The modeling assumptions include “minimum flow requirements of 3,000 cfs from January to August” at Rio Vista for Boundary 1 and Boundary 2(Appendix 5E, p. 5E-3.) However, as described above, DWR has abolished this requirement through its response to comments in the FEIR. The modeling assumption does not match the partial project description.

Table 5E-1 also includes the modeling assumption, for both Boundary 1 and Boundary 2, that pumping up to the first 3,000 cfs will utilize the south Delta diversion points during summer months before shifting any diversions to the NDD. (*Id.*) However, DWR has stated that this is not an operating criteria. If it is not an operating criteria it should not have been included as a modeling assumption. If it is necessary, then it should not have been excluded from operating criteria requirements. The modeling assumption does not match the partial project description.

Table 5E-2, North Delta Diversion Bypass Flow Criteria, is again clearly labeled as consisting only of modeling assumptions. “These parameters are for modeling purposes. Actual operations will be based on real-time monitoring of hydrologic conditions and fish presence / movement.” (Appendix 5E, p. 5E-5.)

Table 5E-2 provides for a bypass flow of only 5,000 cfs during the months of July through September. (FEIR, p. 5E-7.) Operations Chief Leahigh testified that he did not know if a diversion of 9,000 cfs during flows of 19,747 cfs during the month of August, leaving 10,747 flowing downstream of the NDD, would be possible meeting all applicable criteria. (Record Transcript Vol. II., p. 142–145.) Petitioners’ modeling panel testified that they did not believe it would be possible to divert as described above but could point to nothing specific to sustain that belief. Referring to DWR 5, p.25, Chief Leahigh was under the mistaken impression that more restrictive bypass criteria for the months of April through December also applied during August. (Record Transcript, p. 143: 18–p.145: 20.) The 5,000 cfs bypass criteria with a promise to meet D-1641 and an opinion that 45% of the river could probably not be diverted during the summer does not make a description of project operating criteria. Petitioner could correct their oversight in omitting summer operating criteria by amending DWR 5, p.25 to include the summer months, as Chief Leahigh thought it did.

The elimination/mismatch of modeling assumptions to operating requirements for summer south Delta pumping preference, the elimination of Rio Vista minimum flow requirements, and the gap in summer operating requirements are only examples of incomplete project description.

More generally, Petitioners proffering of modeling results that purport to show that twin 40 foot tunnels can be operated with comparatively little impact as opposed to existing conditions does not constitute a project description. The point of an evidentiary hearing is for Petitioner to bear the burden of proving that its proposed project, as described in the Petition, will not injure legal users of water. The evidentiary hearing does not serve the purpose of developing a project description. The conflation of impact analysis with a project description has resulted in no enforceable description of project operating criteria that could be included in any order approving a change in the point of diversion.

Petitioners deferral of almost all critical decisions to a future, as yet undefined, adaptive management process does not substitute for an adequate description of the adaptive management plan. Petitioners wish to develop their operating plan during the eleven or more years that the project is under construction. Petitioners wish for a broad and vague approval from the Board that would allow “adaptive management” to replace regulatory and adjudicatory proceedings in changing requirements of D-1641 and the Water Quality Control Plan for years to come. The law does not allow this approach. It would be more productive for Petitioners to focus on developing an accurate and enforceable description of operating criteria, and a real adaptive management plan, while accepting the fact that future changes, if any, will require future regulatory processes.

In order to have a complete project description, Petitioners must complete an adaptive management plan. Currently, Petitioners have developed a work plan to arrive at an adaptive management plan. Courts have regularly struck down adaptive management plans that lack specific monitoring plans, qualitative metrics for monitoring, quantitative triggers for action, and articulated responses to specific triggers. The level of specificity in the adaptive management plan submitted to the Board should include specific metrics for objectives and failure, description of monitoring protocols, quantified decision thresholds in monitoring, and specific actions that will be triggered when thresholds are crossed. A promise to define these metrics during construction of the tunnels is not an

adaptive management plan.

IV. Substantial Changes Being Wrought Through The Section 7 Consultation Process Are Critical To Delta Alliance's Appraisal Of The Project On Delta-Wide Recreation And Its Presentation In Part 2.

The June 2017 revisions to the BA and contents of the Biological Opinions thus far issued have especially altered the project with respect to its impacts on recreation in general and recreational boating in particular. These subjects are of primary concern to Delta Alliance. The BA has changed the number of barge trips and partially defined barge routes (which have substantial implications for recreational boating). It has apparently also significantly increased the number of truck trips on Delta island roads.

Section 7 consultation regarding the construction of the intakes has yet to occur. (*See* USFWS Biological Opinion, p. 2.) Section 7 consultation on construction of the tunnels (minus intakes) brought about substantial changes. It is likely that consultation on the construction of the intakes will result in even more substantial changes. The intakes are situated in a six mile long construction zone that will engulf the legacy community of Hood and generate an enormous amount of noise. The BA has revealed that construction in this zone will include driving thousands of piles and that pile drivers will make 8,100,000 discrete pile strikes at 102 dBA to 106 dBA each strike, over a period of eight years. It is very likely that this scenario will change substantially during further section 7 consultation and/or through completion of the EIS.

Through an acoustical engineering report commissioned by Delta Alliance and submitted to USBR, we have demonstrated that DWR has not developed any realistic plan to mitigate the impacts of this enormous amount of pile driving and has provided a substandard acoustical analysis. As it stands, the communities of Clarksburg and Hood will be largely abandoned, the Clarksburg Marina will be subjected to deafening noise and driven out of business, and the Clarksburg boat launch / fishing area will be subjected to unmitigated effects of pile driving directly across the river. It is unlikely that any court will allow such a flawed environmental analysis to unnecessarily doom two legacy communities, destroy a family business, and make a public recreational facility unusable. It is likely that USBR will, if they decide to go ahead at all, exercise prudent judgment and make some common sense, readily available, changes to the project to avoid these impacts.

There are substantial other areas where we believe USBR will take the reasonable and required "hard look" at the environmental consequences of the project and will make common sense, readily feasible, changes to avoid impacts and obviate the need for Delta Alliance to put on expert witnesses and evidence before the Board with regard to many of the currently configured project's impacts on recreation.

V. Petitioner's Request To Schedule Part 2 Even Before USBR Promulgates A Record Of Decision and Certifies The EIS Should Be Summarily Rejected.

On August 3 2017, Petitioner DWR submitted a request to the Board to schedule Part 2 before its Co-Petitioner, USBR, decides what, if any, project it will participate in and before USBR finishes its Environmental Impact Statement.

As described above in section I.A., this is contrary to the Board's prior orders and promises to Protestants that the NEPA process would be complete before Part 2 could commence. Further it ignores the purpose of the National Environmental Policy Act. DWR presumes that federal consideration of project impacts and selection of a project

alternative is mere paper-pushing and that DWR already knows the outcome. Such presumptions are contrary to law and contrary to the federal government's pact with its citizens to take a hard look at the environmental consequences of its decisions before making a commitment of resources.

There must, as a matter of law, be a real possibility that USBR will select the no project alternative. There must, as a matter of law, be a real possibility that USBR will adopt mitigation and avoidance measures substantially different than those considered by DWR in its EIR.

DWR's use of the word "delay" to describe requiring the completion of mandatory legal processes offends the rule of law and any sense of veracity. The completion of the USBR ROD and EIS *are entirely within the control of the parties seeking the change in water rights*. DWR infers that Protestants would delay the process when in reality it is DWR's Co-Petitioner that has not made up its mind whether or not to go forward.

No party has committed to any funding of this project. USBR apparently intends to await a signal from the Metropolitan Water District about its monetary participation at Met's September board meeting. If Met does not make a definitive commitment, it is entirely possible that these proceedings will become moot as early as October of this year.

References to "delay" or "postponing" the beginning of Part 2 are inapposite. In its February 11 Ruling, referring to beginning Part 1 early, the Board acknowledged that "DWR has requested an expedited hearing schedule because of the likelihood of a lengthy hearing, but has not clearly explained why the hearing process should begin now, notwithstanding the arguments of other parties." (February 11, 2016, Ruling, p.1.) And again, the Board recognized "DWR's lack of clarity on the need to begin the hearing process" (*Id.*)

A year and half later, DWR still is unable to provide any reason why all lawful requirements should be suspended in favor of jumping the gun on Part 2. DWR posits only that waiting for its partner to make up its mind whether there will be any project at all "may negatively affect the continuity of the evidentiary record." (August 3, 2017, Letter from Tripp Mizell to Tam Doduc and Felicia Marcus.) Bifurcated proceedings are very common and there is no danger that evidence will be lost, destroyed, or forgotten. There is every danger that proceeding on an incomplete project description and unfinished environmental documents will be a waste of party and administrative resources and will lead to a bad outcome.

DWR's reference to "Public Availability of Sufficient Information to Notice Part 2" serves to underscore the lack of a project description. It is not up to Protestants or the Board to scour the internet to find out what Petitioners are proposing or what impacts the project will have. Rather, if Petitioners believe they have a project description they should submit it as described above in one document, including all up to date information and excluding all outdated material.

VI. Conclusion.

Delta Alliance thanks the Hearing Officers and Hearing Team for considering the information presented herein. Delta Alliance respectfully urges the Board to clarify that the start of Part 2 will not be scheduled until at least 90 days after: (1) completion of all steps of the ESA process for components 1–7 as described above in section I.B.; (2) issuance of the USBR ROD and certification of the EIS; and (3) Petitioner submits a complete stand-alone project description in compliance with 23 CCR § 794 in a succinct

and easily understandable format, omitting all outdated elements of the description of project operating criteria and including all currently known elements of the description of project operating criteria.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Brodsky", with a long, sweeping horizontal stroke extending to the right.

Michael A. Brodsky
Counsel for Petitioner
Save the California Delta Alliance

Attachment: FEIR Rio Vista Flow Comment

Letter	Comment #	Comment	Relation to Final EIR/EIS
Brodsky, Michael	1	<p>CEQA and its implementing guidelines require recirculation of an EIR where "significant new information" is added to the EIR after a draft is circulated and before the final EIR is certified. (Public Resources Code § 21092.1; Cal. Code Regs., tit. 14, § 15088.5, subd. (a).) The sort of information that requires recirculation includes, for example, the information that shows that new significant impacts would occur, the severity of an environmental impact would substantially increase unless mitigation measures are adopted or the draft EIR "was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (Cal. Code Regs., tit. 14, § 15088.5, subd. (a).) NEPA's requirements are similar. (40 C.F.R., § 1502.9, subd. (c); Reclamation's NEPA Handbook (Feb. 2012) pp. 7-23 to 7-24.)</p> <p>The revised BA deletes the Rio Vista 3,000 cfs flow requirement. (Ch. 3, p. 97.) This change is not reflected in the FWS BO, where it describes the Rio Vista flow as January-August: Minimum of 3,000cfs. (See p. 33.) The NOAA BO, however, does not mention this requirement at all. The removal of the Rio Vista 3,000 cfs flow requirement constitutes "significant new information" added to the EIR because it will have a significant impact on water quality, including but not limited to salinity. Recirculation is required in order to reconcile the inconsistent assertions described above.</p>	<p>Based on the modeling conducted for the Biological Assessment, it was found that resulting flows under the California WaterFix Proposed Project at Rio Vista were always greater than the proposed Rio Vista flow requirement of 3000 cfs during Jan-Aug, as a result of other operational requirements such as the proposed north Delta diversion bypass flow requirements and the D-1641 requirements. The modeling results included in the Final EIR/EIS Appendix 5A Section C Table C-63-6 also confirm this finding. Therefore, during the formal consultation process this additional redundant flow requirement for the California WaterFix was no longer continued. California WaterFix continues to adhere to the existing D-1641 Rio Vista minimum flow requirement during September through December months.</p> <p>This comment does not raise any substantive new environmental information or analysis that was not previously addressed in the Final EIR/EIS.</p>
Chacon, Paul	1	No intake screens! Save the delta!	This comment does not raise any substantive new environmental information or analysis that was not previously addressed in the Final EIR/EIS.
Daly, Barbara (submitted by Michael Brodsky)	1	<p>I have lived in Clarksburg for 26 years. My husband and I put our five children through the Clarksburg public schools and we have been owners of the Cliff House Marina in Rio Vista for 25 years. Because my children were active in sports and other school activities, I was, and am, very engaged with the Clarksburg Grade School, Clarksburg Middle School, and Clarksburg High School. I am very familiar with these schools and their outdoor recreational facilities.</p> <p>I own and operate Delta Heartbeat Tours, which provides recreational tours throughout the Hood, Clarksburg, Locke, Walnut Grove, Rio Vista, and Isleton areas and beyond. Our tour map is attached. I am familiar with the history of the Delta and have acquired much knowledge of the Delta communities through living here for 26 years and operating my tours. I engage the tourists who I take around the Delta. I know that they come to the Delta for peace and quiet and a look at undisturbed rural and agricultural life. Clarksburg was established in 1850, the same year California became a state.</p> <p>Clarksburg, Hood, Walnut Grove, and Locke are all set in the historic landscape that is pretty much as it was when Clarksburg was established in 1850. Of course the levees have been built since Clarksburg was established, but our town has escaped suburban sprawl and gentrification. We do not have a Starbucks and we are proud of it. Locke was built in the early twentieth century, and retains its historic wooden buildings and sidewalks. Locke is a national historic district and is the largest, most complete example of a rural, Chinese-American agricultural community in the United States. Locke is preserved at a museum-quality state of historic integrity—throughout an</p>	This comment does not raise any substantive new environmental information or analysis that was not previously addressed in the Final EIR/EIS.

STATEMENT OF SERVICE


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

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

August 3, 2017, letter from Michael A. Brodsky to Hearing Officers re July 27, 2017, Ruling and schedule for Part 2

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated July 27, 2017, posted by the State Water Resources Control Board at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

I certify that the foregoing is true and correct and that this document was executed on August 3, 2017, at Discovery Bay, California.

Signature: 
Name: Michael A. Brodsky
Title: Attorney

Party/Affiliation:
Save the California Delta Alliance, et al.

Address:
Law Offices of Michael A. Brodsky
201 Esplanade, Upper Suite
Capitola, CA 95010



September 8, 2017

CWFhearing@waterboards.ca.gov via Email

Chair Felicia Marcus
Board Member Tam Doduc
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812-0100

Re: August 31, 2017 Ruling Regarding Scheduling of Part 2 and Other
Procedural Matters

Dear Chair Marcus and Board Member Doduc:

The California Department of Water Resources ("DWR") and the U.S. Bureau of Reclamation ("Reclamation")(jointly "Petitioners") are responding to your ruling of August 31, 2017. In that ruling you requested that, by September 8, 2017, Petitioners provide an "updated summary of operating criteria that makes explicit whether particular criteria are proposed conditions of operation or are set forth solely as modeling assumptions."

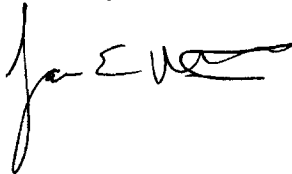
The attached tables describe a summary of the operating criteria for the project that was approved by DWR on July 21, 2017 and is described in the Final Environmental Impact Report and additional information made available to the public at that time. The tables also describe the operating criteria for the projects permitted by the National Marine Fisheries Service, U.S. Fish and Wildlife Service, and the California Department of Fish and Wildlife.

Petitioners propose that the California WaterFix be conditioned upon the terms contained in Water Rights Decision 1641 ("D-1641"). Modeling assumptions demonstrate it is possible to meet existing regulatory requirements inclusive of D-1641 and the 2008/2009 Biological Opinions. For purposes of this hearing, these modeling assumptions are not proposed as conditions but are presented in order to demonstrate compliance with the existing Water Quality Control Plan, which sets forth the thresholds for protecting beneficial uses.

The California WaterFix includes an adaptive management process. In Part 1 of this hearing Petitioners presented the boundary analysis of B1 to B2 in order to demonstrate no impact to legal users of water within the range of foreseeable outcomes of the adaptive management process. Through the adaptive management process, that was made a requirement of the Biological Opinions and 2081(b) Incidental Take Permit for the California WaterFix, new information can be assessed and, if appropriate, incorporated into the ESA/CESA permits. Therefore as part of this project, Petitioners are requesting that the Hearing Officers incorporate the adaptive management process into the water rights permits, and Petitioners are not proposing as conditions the operational criteria contained within the Biological Opinions and 2081(b) Incidental Take Permit.

Petitioners look forward to presenting evidence in Part 2 of the water rights hearing.

Sincerely,



Tripp Mizell
Senior Attorney
Office of the Chief Counsel
CA Department of Water Resources



Amy L. Aufdemberge
Assistant Regional Solicitor
Office of the Regional Solicitor
U.S. Department of the Interior

cc: *Electronic service*

Felicia Marcus, Chair & hearing officer, State Water Resources Control Board
Tam Doduc, Board Member & hearing officer, State Water Resources Control Board
Tom Howard, Executive Director, State Water Resources Control Board
Michael Lauffer, Chief Counsel, State Water Resources Control Board
Electronic service list as provided by the State Water Resources Control Board on August 11, 2017.

Personal service via U.S. Postal Service

Suzanne Womack and Sheldon Moore,
Clifton Court, L.P.,
3619 Land Park Drive,
Sacramento, CA 95818

September 22, 2017

Felicia Marcus
State Water Board Chair
BDCP Alternative 4A (California WaterFix) Project Co-Hearing Officer

Tam M. Doduc
State Water Board Member
BDCP Alternative 4A (California WaterFix) Project Co-Hearing Officer

Re: BDCP Alternative 4A (California WaterFix) Topics for Part 2 Pre-Hearing
Conference.

Delta Alliance believes that there are two appropriate topics for consideration at the pre-hearing conference: 1) How DWR will pay for costs expended by Protestants on expert witnesses if DWR withdraws or cancels the Petition prior to the Board taking final agency action on the change petition (issuing or denying a permit); and 2) Discussion of the “precautionary principle” standard of proof.¹

I. DWR’s Responsibility to Pay for Protestants’ Part 2 Experts

The current deadline for Protestants’ submission of written expert testimony and exhibits is November 30, 2017, and the deadline for Protestants’ general identification of experts and areas of expert testimony is October 13, 2017.

In order to have testimony and exhibits ready on time, parties must hire experts and begin work (and substantial expenditures) on expert presentations now. For example, Delta Alliance received a call from one of its experts wanting a yes or no answer this morning. If Delta Alliance doesn’t book the expert (and pay the retainer) within the next few days, it will lose the opportunity to present this expert. Competent experts are busy.

But that presents Petitioners with a Hobson’s Choice. It is more likely than not that expert testimony developed between now and November 30, 2017, will never be heard. The final death knell for the tunnels may not come until close to, or even beyond November 30. Protestants cannot forego their preparation and meeting deadlines in the hopes that the governor will see the light and declare the tunnels officially dead before November 30.

The tunnels may well take on the persona of the Yellow Man character in David Lynch’s dark masterpiece *Blue Velvet*. The character, dressed in a yellow suit, was shot in the brain at close range early in the film. However, the Yellow Man remained standing,

¹ By providing these good faith suggestions as requested by the Board, Delta Alliance does not acquiesce in the ongoing unlawful conduct of these hearings. The Board has a continuing non-discretionary ministerial duty to cancel the petition and should do so immediately.

blood oozing from the bullet hole in his temple, down his cheek and all over his yellow suit for the remainder of the film.²

Because DWR insists on going forward with hearings on what is at best a very shaky project, DWR should bear the costs of all expenditures made by Protestants from this point forward if DWR ultimately withdraws or cancels the Petition before the Board makes a decision to issue or deny the permit. Of course, if somehow the project survives to a final Board decision then DWR would not have to pay for Protestants' experts through the Board's offices.

However, section 1021.5 would not be available to Protestants if DWR withdraws the Petition because the tunnels have failed outside these hearings.

Delta Alliance believes that the pre-hearing conference would be the appropriate venue to discuss DWR's reimbursement arrangements with Protestants.

In the alternative, the Board could *sua sponte* continue the due date for general identification of experts from October 13 to November 17 and continue the following dates similarly by approximately 30 days each. The Metropolitan Water District is scheduled to vote on the tunnels on October 10. It does not make sense to force Protestants to expend money on experts before that date. But Protestants cannot afford to wait until after October 10 to begin preparation unless due dates before the Board are extended. After that date, there may be no project.

There are also two lawsuits that may be decided dispositively against the tunnels on or before November 17. Ordinarily validation actions (which the governor has instituted to get court permission to issue state bonds) and CEQA actions (which multiple plaintiffs have initiated against the state) take many months, if not years, to conclude. However, with regard to the tunnels, dispositive motions that would strike down the tunnels and result in early final judgments will be heard in both cases on or before November 17. Although the tunnels may have already turned into Yellow Man, it is also possible that litigation can give Yellow Man a decent burial in the near future.

These sorts of considerations are particularly appropriate in scheduling these hearings because of "DWR's lack of clarity on the need to begin the hearing process" (February 11, 2016, Pre-Hearing Conference Ruling, p. 1.). Memories will not fade and evidence will not be lost in 30 days.

Delta Alliance will respectfully agree to disagree with the Board on characterizing such a continuance as "delay." However, finding out if there is any prospect of a project or not before forcing expenditures on experts might save a lot of parties and the Board a lot of grief and a lot of money—regardless of how the brief interregnum is named.

II. The Parties Should Discuss The Applicable Standard of Proof

In Act One of these hearings, DWR insisted on going forward with their plot to conceal the true nature of the project description. DWR misled the Board to believe that project operating criteria (such as flow in cfs at Rio Vista, Bypass Flow at the NDD, South Delta summer pumping, etc.) were part of the description of the Project that the Board has been considering for over a year. After playing cat and mouse for more than a year, DWR was finally cornered by Delta Alliance's August 3, 2017, letter and admitted in their letter of September 8, 2017, that there are no operating criteria at all before the Board.

The Project description, as far as these proceedings are concerned, consists of cartoon-level 10% engineering drawings and a promise to meet D-1641. That's it.

In Act Two, DWR proposes to go forward based on suggestions that there is a lot

² Although filmed on location in Wilmington North Carolina, some of the quaint residential neighborhoods in the film bear a striking resemblance to small California Central Valley towns in the heart of the Westlands Water District.

of information about the project publicly available on the internet. DWR makes the absurd suggestion that ample information exists to conduct an evidentiary hearing because materials not submitted into evidence, not a part of the Project application, and explicitly excluded from the Project description can help participants understand what is being proposed. But none of that information is before the Board and DWR has expressly disavowed any potential Board permit conditions that would incorporate that information.

The Board has mentioned that all of this will place a higher burden on DWR. What burden? Is the Board proposing to suspend the substantial evidence standard? Under these circumstances, should DWR be required to bear the burden of production and burden of persuasion that the precautionary principle has been satisfied? A “precautionary standard” would require DWR to show beyond a reasonable doubt that the project will not harm the environment or other legal users of water. Absent operating criteria of any kind, perhaps this would be a workable standard of proof. Under the precautionary standard, DWR would have to show that there is no possible operation of the tunnels that could harm the environment or legal users of water.

Perhaps other parties will have different suggestions for filling in the details of the Board’s suggestion that DWR will have to meet a higher burden because of the way it has presented its application.

Sincerely,


Michael A. Brodsky
Counsel for Petitioner
Save the California Delta Alliance

STATEMENT OF SERVICE

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

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

Delta Alliance's September 22, 2017, suggested Part 2 Pre-Hearing Conference Topics

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated September 12, 2017, posted by the State Water Resources Control Board at

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

I certify that the foregoing is true and correct and that this document was executed on September 22, 2017, at Discovery Bay, California.



Signature: _____

Name: Michael A. Brodsky

Title: Attorney

Party/Affiliation:

Save the California Delta Alliance, et al.

Address:

Law Offices of Michael A. Brodsky

201 Esplanade, Upper Suite

Capitola, CA 95010

ATTACHMENT 8

State Water Resources Control Board

February 11, 2016

Enclosed Service List of Hearing Parties:

CALIFORNIA WATERFIX PROJECT PRE-HEARING CONFERENCE RULING

On October 30, 2015, the State Water Resources Control Board (State Water Board) issued a [Notice of Petition and Notice of Public Hearing and Pre-Hearing Conference](#) (Hearing Notice), regarding the petition submitted by the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Reclamation) (collectively referred to as “petitioners”) to change their water rights as part of the California WaterFix Project (WaterFix). To organize the conduct of the hearing, the State Water Board held a pre-hearing conference on Thursday, January 28, 2016.

By [letter dated January 15, 2016](#), we circulated a draft agenda to the parties and requested written comments in advance of the pre-hearing conference. We appreciate the written comments submitted by many of the parties and the parties’ participation during the pre-hearing conference, which was generally succinct and thoughtful and allowed for a very informative and efficient day. The discussion at the pre-hearing conference was organized into two general topic areas: 1) timing of the hearing; and 2) hearing logistics. This letter constitutes the hearing officers’ response and rulings on various procedural issues.

Timing

The first procedural topic relates to the timing of the hearing on the water right change petition in relationship to other regulatory processes, including environmental review under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA), compliance with the federal Endangered Species Act (ESA) and the California Endangered Species Act (CESA), and update to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). Many parties argued that it is inappropriate to begin the hearing before these other processes have been completed. DWR has requested an expedited hearing schedule because of the likelihood of a lengthy hearing, but has not clearly explained why the hearing process should begin now, notwithstanding the arguments of the other parties.

Despite the parties’ arguments regarding the timing of the hearing and DWR’s lack of clarity on the need to begin the hearing process, we believe that it is appropriate to move forward with the hearing now in a modified manner as described in more detail below. Specifically, we plan to

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

begin the hearing on schedule with policy statements, followed by petitioners' cases in chief (now Part 1A of the hearing). For petitioners, the noon March 1, 2016 deadline for submitting written testimony and exhibits will remain the same. For the other parties participating in Part 1 of the hearing, the deadline for submitting written testimony and exhibits will be extended until noon on May 16, 2016. The other parties participating in Part 1 of the hearing will present their cases in chief beginning on June 23, 2016 (now Part 1B of the hearing). This approach will give petitioners the opportunity to fully explain their proposed project and should give the other hearing parties the ability to better evaluate how their interests may be affected before they begin their cases. If petitioners fail to adequately describe their project, it also gives the State Water Board the opportunity to make course corrections.

We believe that staging the hearing in this manner is an appropriate middle ground to pursue at this time. The WaterFix is a key component of petitioners' plans to address critical water supply and ecosystem concerns in the Bay-Delta. As such, it is in the public interest to resolve without further delay whether and how the WaterFix will be part of the solution to longstanding problems in the Bay-Delta. Project planning has been ongoing for many years now, which has helped to refine the proposal and highlight key issues requiring resolution. The water right hearing process is an appropriate venue to address some of the issues that need to be resolved in order to inform water supply planning and ecosystem protection efforts of statewide importance, although it is not the only venue.

The revised hearing schedule is identified below. In addition, the specific timing concerns raised by the parties are addressed in detail below.

Revised Hearing Schedule

The hearing schedule is revised as follows:

- | | |
|-------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 12:00 noon, Tuesday, March 1, 2016 | Deadline for receipt and service of petitioners' cases in chief, including witnesses' proposed testimony, witness qualifications, exhibits, list of exhibits, and a statement of service for Part 1A of the hearing and Reclamation's time estimates for oral summaries of direct testimony. |
| 12:00 noon, Tuesday, March 15, 2016 | Due date for receipt of any written procedural/ evidentiary objections concerning petitioners' cases in chief. Rulings to follow as appropriate and necessary. (See also discussion on motion practice generally below.) |
| 12:00 noon, Tuesday, March 15, 2016 | Due date for receipt of proposed groupings and order of parties for cross examination in Part 1A of the hearing. |

- 9:00 am, Thursday, April 7, 2016 Begin policy statements followed immediately by Part 1A with petitioners' cases in chief and cross examination of petitioners' witnesses. (Additional information regarding policy statements will be provided shortly in a separate correspondence.)
- 12:00 noon, Monday, May 16, 2016 Due date for receipt and service of all other parties' cases in chief for Part 1B of the hearing, including witnesses' proposed testimony, witness qualifications, exhibits, list of exhibits, a statement of service, and any requests for additional time for direct testimony.
- 12:00 noon, Tuesday, May 31, 2016 Due date for receipt of any written procedural/ evidentiary objections concerning Part 1B parties' cases in chief. Rulings to follow as appropriate and necessary. (See also discussion on motion practice generally below.)
- 12:00 noon, Tuesday, May 31, 2016 Due date for receipt of proposed groupings and order of parties for direct testimony in Part 1B and proposed order of parties for cross examination.
- 9:00 am, Thursday, June 23, 2016 Part 1B of the hearing commences, beginning with other parties' cases in chief for Part 1 of the hearing, including direct testimony, cross-examination, any redirect, and any recross-examination. Following the cases in chief, petitioners and other parties may present rebuttal testimony and exhibits.

As previously planned, Part 2 of the hearing will commence following completion of the CEQA/NEPA and ESA/CESA processes. In order to inform planning for Part 2 of the hearing, State Water Board staff requested an update on the schedule for ESA and CESA compliance at the pre-hearing conference. **The Petitioners are directed to consult with the fisheries agencies and provide this update within two weeks from the date of this letter, along with a written update for the CEQA/NEPA schedule provided during the pre-hearing conference.**

Bay-Delta Plan

Several parties objected to holding a hearing on the WaterFix petition before the State Water Board updates the Bay-Delta Plan. Parties argued that the State Water Board cannot use the current Bay-Delta Plan, as implemented in accordance with State Water Board Decision

1641(2000) (D-1641), as the measure for determining the level of protection that should be afforded to fish and wildlife and other public trust resources.

As the Hearing Notice stated, the State Water Board is currently developing updates to the Bay-Delta Plan and its implementation through a phased process. Phase 1 involves updating the San Joaquin River flow and southern Delta salinity objectives and their associated program of implementation. Phase 2 involves other changes to the Bay-Delta Plan to protect beneficial uses not addressed in Phase 1, including Delta outflows, Sacramento River flows, export restrictions, Delta Cross Channel gate closure requirements and potential new reverse flow limits for Old and Middle Rivers. Phase 1 is expected to be complete in the fall of 2016 and Phase 2 is expected to be complete in mid-2018. Following the updates to the Bay-Delta Plan, the State Water Board will undertake proceedings to implement the Bay-Delta Plan through water rights or other measures, referred to as Phase 3 of the planning process.

We do not agree with some parties' assertion that the State Water Board cannot proceed with a water right decision prior to updating the Bay-Delta Plan. The Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act) establishes additional requirements related to the WaterFix that are distinct and separate from the Bay-Delta Plan. The Delta Reform Act requires that any order approving the water right change petition must include "appropriate Delta flow criteria." Those flow criteria must be informed by flow criteria to protect the Delta ecosystem, which the State Water Board developed in 2010.

We do not interpret "appropriate Delta flow criteria" to mean the same thing as either existing or revised water quality objectives. Determination of appropriate flow criteria for purposes of this proceeding will entail a balancing of the need for flows to protect water quality in the Bay-Delta and the need for water to meet the demands of the State Water Project (SWP) and Central Valley Project (CVP). The flow criteria imposed as a condition of any approval would be an interim requirement until Phases 2 and 3 of the Bay-Delta Plan update and subsequent implementation processes are complete, at which point the flow criteria would be revisited. The appropriate Delta flow criteria will be more stringent than petitioners' current obligations and may well be more stringent than the petitioners' preferred project.

Just as appropriate Delta flow criteria are not limited to existing requirements, development of appropriate flow criteria for the WaterFix does not require promulgation of new water quality objectives. Unlike the more narrow focus of this proceeding, developing any necessary revisions to the water quality objectives contained in the Bay-Delta Plan along with implementation measures for those water quality objectives will entail a much more comprehensive evaluation of the effects of all diversions and other factors on the beneficial uses of water in the Bay-Delta. The Bay-Delta planning processes are not limited to consideration of the impacts of the SWP and CVP on water quality in the Bay-Delta. (See generally, *United States v. State Water Resources Control Board* (1983) 182 Cal.App.3d 82, 119-122 [promulgation of water quality objectives should not be constrained by or limited to requirements that can be imposed on the SWP and CVP].)

We acknowledge that the WaterFix, if approved, would be a significant component of Delta operations, and it would be preferable to have Phase 2 completed prior to acting on the change

petition. Unfortunately, emergency actions in response to the ongoing drought have delayed the Bay-Delta planning process. At this point, waiting until completion of Phase 2 would significantly delay processing of the change petition. Moreover, completion of Phase 2 will not resolve the issue of appropriate flow criteria for the WaterFix because the various obligations of responsible parties to meet the revised objectives, including the obligations of the CVP and SWP, will not be established until completion of Phase 3 of the State Water Board's Bay-Delta planning processes.

In determining appropriate Delta flow criteria, the State Water Board intends to rely on the best available science, including the 2010 Delta flow criteria and the Scientific Basis Report for revisions to the Bay-Delta Plan that is being developed to support Phase 2 of the Bay-Delta Plan update. A complete Bay-Delta Plan update is not required, however, prior to processing the change petition.

We acknowledge the concerns raised by some of the parties regarding how application of the prohibition against ex parte communications in this proceeding could restrict otherwise permissible communications in the Bay-Delta planning process. At this time, it is not clear to what extent, if any, issues concerning the WaterFix will be relevant in the larger planning process. If this becomes a problem as Phase 2 progresses, the State Water Board will reach out to stakeholders and parties and determine the best way to allow any necessary open dialogue in the planning arena consistent with the ex parte rule applicable to the WaterFix hearing.

CEQA/NEPA and ESA/CESA

Parties have also objected to moving forward with the hearing prior to completion of the CEQA/NEPA and ESA/CESA consultation processes. We previously explained that it was standard practice for the State Water Board to begin a water right hearing before a final CEQA document has been prepared, and that Part 2 of the hearing (focused on environmental issues) would not commence before these processes were final. We also agree that an adequate project description is necessary for parties to prepare a case in chief in Part 1.

The Hearing Notice required all Part 1 parties and petitioners to submit their testimony and exhibits by March 1, 2016. During the pre-hearing conference, many parties made persuasive arguments that they cannot participate meaningfully in Part 1 because the draft CEQA document does not contain enough information concerning how the WaterFix will be operated and the potential impacts of the project on other legal users of water. California Code of Regulations, title 23, section 794 contains a detailed list of information that must be provided in a change petition, including effects on other known users of water, and any quantified changes in water quality, quantity, timing of diversion and use, reduction in return flows and other pertinent information. The petitioners' change petition specifies that this information is contained in the CEQA/NEPA documents. (See Environmental Information form attached to Petition at 1 [Specific discussions of the components of Alternative 4A most relevant to petition found within the Partially Recirculated Draft Environmental Impact Report /Supplemental Draft Environmental Impact Statement at sections 1.1, 1.1.4, 4.1, 4.1.2.2-4, 4.3.7-8, 11.1.2, Appendix A and 3B.]

The CEQA/NEPA documents do contain a significant amount of detailed information about proposed operations associated with the petition. (See, e.g., section 4.1.2.2 (Water Conveyance Facility Operations) [Table 4.1-2 cross-referencing Tables 3-16 in the Draft EIR/EIS and 3.4.1-2 in the BDCP Public draft for North Delta bypass flows].) Further, petitioners submitted a post-pre-hearing conference letter stating that additional CALSIM and DSM2 hydrologic and water quality modeling data prepared for the biological assessment for the WaterFix ESA processes are available upon request. We encourage petitioners to post this information on their WaterFix website. Petitioners pointed out that the biological assessment is also publicly available. We appreciate petitioners' supplemental information and direction to where parties can locate relevant information, but also understand the difficulty parties face sorting through voluminous documents to decipher relevant details necessary to assess whether the petition will cause injury. The available information lacks clarity in several ways, including whether operational criteria are intended to constrain project operations or are identified for modeling purposes only, areas where a specific operational component or mitigation measure is not yet chosen or identified, operational parameters that are not defined and deferred to an adaptive management process, and lack of clarity concerning some mitigation measures.

We recognize that not all of these uncertainties need to be resolved for a satisfactory project description. Indeed, precisely what mitigation measures should be required and what flow criteria are appropriate, should the State Water Board approve the petition, are issues that will comprise a significant portion of the issues to be decided on the hearing record. At a minimum, however, petitioners should provide the information required by section 794, subdivision (a) of our regulations. We also strongly suggest that petitioners develop proposed permit conditions for the change as part of their exhibits in order to focus the discussion on the decision to be made and more clearly define the proposed project. (Protestants and others are also encouraged to propose specific permit conditions as part of their cases.) We also agree with some of the parties that, absent a more complete and succinct submittal of information by petitioners, project opponents will not be able to fully-develop their cases in chief, and much substantive content will be deferred to the rebuttal stage of the hearing.

The lack of information concerning project operations and potential effects is due in part to the fact that, at the petitioners' request, the State Water Board skipped the protest resolution process that would normally precede a hearing on a water right change petition. The petition process under Water Code sections 1701 et seq. includes various procedures designed to supply supporting information and narrow issues prior to any Board hearing or decision. A petition for change must include detailed information and the State Water Board may request additional information reasonably necessary to clarify, amplify, correct, or otherwise supplement the information submitted by a petitioner. Similarly, any protests to the petition must include specific information and the State Water Board may request additional information reasonably necessary to supplement the information submitted by protestants. The State Board may request additional information from petitioners or protestants to attempt to resolve a protest. The State Board may cancel a petition or a protest if requested information is not provided. (Wat. Code, §§ 1701.4; 1703.6.) This type of information exchange would have served to fill information gaps, narrow the focus of hearing issues, and increase the efficiency of the hearing.

During the pre-hearing conference, the Sacramento Valley Water Users (SVWU) proposed a staggered schedule for the submission of exhibits and the presentation of testimony in Part 1. Many other parties supported such a process. As stated above, we find it appropriate to allow petitioners to present their cases in chief without delay (Part 1A of the hearing) and allow other parties to submit the written testimony and exhibits for their cases in chief at a subsequent date (Part 1B of the hearing), with rebuttal occurring after both the petitioners and other parties have completed their cases in chief, including cross-examination. Suspending the due date for other parties to submit written testimony and exhibits until after petitioners present their cases in chief will address the need for an adequate project description. The petitioners' cases in chief must, to the extent possible, contain the information required by section 794 of our regulations in a succinct and easily identifiable format. The other parties will then be able to more accurately assess whether the proposed changes would cause injury. This staggered approach allows the hearing to move forward while focusing the hearing issues and capturing efficiencies from the protest resolution process that normally precede a Board hearing. This approach also is fair, in light of the fact that petitioners bear the burden of establishing that the proposed changes will not injure legal users of water, and petitioners will be afforded ample opportunity for rebuttal.

Protest Resolution/Settlement Agreements

Some parties raised the issue of canceling protests or the petition. Given that the protest resolution process was truncated, we do not intend to cancel the petition or any protests while the hearing is pending, and will not entertain any motions to do so at this time. We expect petitioners to meet their burden of proof and protestants to support the allegations in their protests during the hearing. We will resolve the issues raised by protestants and other project opponents in any order adopted by the State Water Board after the hearing concludes.

Parties also requested that a portion of the hearing be dedicated to address settlement agreements. The State Water Board is generally supportive of settlement agreements and encourages parties to attempt to resolve outstanding issues. As stated earlier, we also encourage petitioners to submit proposed permit terms that may resolve certain issues. If petitioners are committed to certain mitigation measures, it would be useful to specifically identify such mitigation. If parties believe that any such mitigation would alleviate a portion or all of their issues, it would be useful to make that information available as well. Nevertheless, it may not be possible for the State Water Board to consider approving any proposed settlements, especially related to flow, until all portions of the hearing are concluded. Given the uncertainty concerning whether and when settlement agreements will be reached, and the content of any agreements, we will not set aside any separate procedure for hearing settlement agreements at this time, but may consider hearing settlement agreements at a later date.

Water Quality Certification

In our letter of January 15, 2016, and at the pre-hearing conference, we requested input on the proposal to process DWR's Clean Water Act section 401 application for water quality certification for the WaterFix (401 Application) in a proceeding separate from the hearing on the water right change petition, and under the delegated authority of the State Water Board's Executive Director. Any decision by the Executive Director would then be subject to

reconsideration by the State Water Board. The public notices for the 401 Application and the water right petition proposed that the Executive Director would rely on some or all of the information in the hearing record to inform the decision on the 401 Application, but also that the Executive Director may act on the 401 Application before the close of the hearing record.

There was broad consensus by many parties in their responses to our January 15, 2016 letter and at the pre-hearing conference that the decision on the 401 Application should be informed by the complete hearing record for the water right petition because the proceedings involve very similar issues. Accordingly, the parties argued that a decision on the 401 Application should not be made until after the hearing record on the water right petition closes. In order to ensure that parties do not have to duplicate their participation in two proceedings with overlapping issues, and to allow the decision on the 401 Application to be informed by the significant information that will be produced in the hearing process, the Executive Director will not issue a decision on the 401 Application until after the hearing record for the water right petition closes. As before, the State Water Board plans to process and act on the 401 Application separately.

Some parties argued that the State Water Board should make the original decision on the 401 Application rather than the Executive Director. It is standard practice for the Executive Director to initially act under delegated authority on 401 Applications within the State Water Board's jurisdiction and for the State Water Board to act on any petitions for reconsideration of the Executive Director's decision. This standard practice is also appropriate for consideration of the 401 Application for the WaterFix for several reasons. The Executive Director will have the advantage of being able to rely on both the hearing record for the water right petition and any other information that may be appropriate for consideration in the 401 Application decision. All of the information that the Executive Director relies upon and any comments received in the 401 Application process will be posted on the State Water Board's website, ensuring that all of the interested parties have access to the information. There is no close to the comment period on the 401 Application, which will allow the Executive Director to consider information that may be developed after parts of the hearing are complete, ensuring the most up to date information may be relied upon. The standard 401 Application process also allows for informal collaboration with agencies and interested persons, including those that may not participate in the water right petition evidentiary hearing process. Further, any concerns with consistency between the Executive Director's decision on the 401 Application and the State Water Board's decision on the water right petition can be addressed through the petition for reconsideration process for the 401 Application decision.

CEQA Compliance

In our January 15, 2016 letter regarding the issues to be discussed at the pre-hearing conference, we explained that the State Water Board's role as a responsible agency under CEQA is limited, and for that reason the adequacy of the CEQA documentation for the WaterFix for purposes of CEQA is not a key hearing issue. Despite this admonition, several parties argued that the draft Environmental Impact Report (EIR) that DWR has prepared for the project is inadequate, and that an adequate document must be prepared before the State Water Board may hold a hearing on the change petition. Among other alleged inadequacies, the parties

argued that the draft EIR does not include a reasonable range of alternatives that is adequate for purposes of the State Water Board's decision-making process.

We are not persuaded by the parties' arguments that the State Water Board must assume the role of the CEQA lead agency, or that any additional CEQA documentation must be prepared before conducting Part 1 of the hearing. (See Cal. Code Regs., tit. 14, §§ 15051 [criteria for identifying lead agency], 15052 [shift in lead agency designation], 15096 [process for responsible agency].) We recognize that ultimately the final EIR must be adequate to support the State Water Board's decision in this proceeding. DWR has evaluated a range of alternatives that DWR has determined will meet its project objectives. If during the course of this proceeding, the State Water Board determines that the range of alternatives evaluated by DWR is not adequate to support the Board's decision, then either DWR or the Board will need to prepare subsequent or supplemental documentation. (See *id.*, §§ 15096, subd. (e), 15162, 15163.) At this point, however, it is uncertain whether any subsequent or supplemental documentation will be required.

Hearing Logistics

The second discussion topic in the pre-hearing conference concerned a variety of logistical issues associated with the hearing. Any procedural requirements not addressed below remain as stated in the Hearing Notice. Several minor issues raised and not yet addressed will be addressed as needed as the hearing progresses.

Opening Statements/Closing Briefs

Written opening statements are due at the same time as the written testimony and exhibits for each party's case in chief and shall include an overview of the party's legal arguments. Written opening statements shall be limited to 20 pages in 12 point Arial font, except for good cause shown in a written request that is approved by the hearing officers. Parties will have 20 minutes each to summarize their opening statement. There will be an opportunity to provide more detailed legal arguments in written closing briefs submitted after completion of Part 1. As specified in our January 15, 2016 letter, a summary of written, direct testimony is also required to be submitted with the testimony.

Time Limits/Group Consolidation

DWR has requested 13 hours to summarize its witnesses' direct testimony. Reclamation has not yet provided time estimates for its witnesses' direct testimony. The additional time requested by DWR is granted. As most parties agreed, petitioners should be afforded more time to present their cases. Reclamation shall provide time estimates for oral summaries of its witnesses' direct testimony together with its written testimony and exhibits, which are due at noon on March 1, 2016. Commensurate time will be afforded for cross-examination, and we expect that parties will be efficient in that process. Additional details on time limits may need to be provided as the process moves forward.

We will not alter the time limits for other parties at this time. The time limits specified in the Hearing Notice remain in force and effect. Parties must show good cause for any proposed

time limits that differ from what is provided in the Hearing Notice. As specified above, parties must include any requests for additional time with their written testimony and exhibits. Due dates for identification of any proposed groupings with other parties for direct testimony or cross examination and any proposals regarding orders of parties are specified above.

Procedural Motions

Due dates for written procedural motions/evidentiary objections are specified in the modified schedule above. The hearing officers will rule as appropriate and necessary. The hearing officers or hearing staff may request a party to promptly respond to a motion. We are committed to providing a fair and open process in this hearing and will provide parties ample opportunities to be heard and to participate. Excessive motion practice is not encouraged. Parties should limit motions to those that are absolutely necessary and those that help focus the hearing in an efficient manner. Due to the number of parties, we strongly discourage flurries of unsolicited correspondence, follow-up comments on rulings, and duplicative motions on items already addressed.

Scope of Part 1 and Part 2 and Cross Examination

As discussed at the pre-hearing conference, some issues could crossover Part 1 and 2, but generally Part 1 focusses on human uses of water (water right and water use impacts) and Part 2 focusses on environmental issues. Part 1 can address human uses that extend beyond the strict definition of legal users of water, including flood control issues and environmental justice concerns. If a human use is associated with the health of a fishery or recreation, testimony on this matter should be presented in Part 2.

Some parties questioned whether parties to Part 2 of the hearing would be permitted to cross examine witnesses during Part 1 of the hearing. If parties to Part 2 wish to cross examine witnesses in Part 1, and have not indicated their intent to do so in their Notice of Intent to Appear (NOI), they should submit a **revised NOI by February 26, 2016**, clearly indicating how they wish to participate in the hearing.

Exhibits

Several parties requested clarification concerning how the State Water Board plans to treat the staff exhibits included in Enclosure B of the Hearing Notice (pages 19-24) and posted on the State Water Board's website at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/index.shtml. As stated at the pre-hearing conference, hearing team staff compiled the

staff exhibits simply as a convenience to the parties in the interest of efficiency. The intent was to avoid having multiple parties submit the same document for the record and refer to that document in each party's testimony with different exhibit names and numbers. The staff exhibits are all public documents that contain information that is relevant to the hearing issues. The hearing team staff will not be serving as project advocates, and do not plan to present testimony to authenticate or otherwise support any of the staff exhibits.

In response to concerns raised by parties, hearing team staff do not currently propose to offer the staff exhibits into evidence at the hearing (although staff may introduce exhibits if strictly necessary). The staff exhibits are marked for reference and will remain on the State Water Board's web page for the convenience of the parties. Parties should carefully review the list of staff exhibits before compiling their own lists of exhibits to avoid submitting duplicative exhibits, which will not be accepted. It is incumbent on the parties to provide their own testimony to authenticate or otherwise support any of the staff exhibits they wish to rely on and offer into evidence at the hearing. Staff exhibits may be offered into evidence as exhibits by reference. As set forth in the Hearing Notice, other public records also may be offered into evidence as exhibits by reference in accordance with California Code of Regulations, title 23, section 648.3. Any objections to the staff exhibits offered into evidence by parties will be addressed on a case-by-case basis.

There was also a discussion about whether parties could submit the cover page of a document and only pages relevant to their testimony as an exhibit. As a general rule, parties should submit the entire document as an exhibit and identify specific pages they are relying on. This is particularly important for technical documents.

Service List

At the pre-hearing conference, parties expressed concern over the size of the service list and whether it may pose a problem when exhibits are due and required to be served on the other parties. Hearing staff are working on a better way for parties to exchange exhibits and submit them to the State Water Board. Hearing Staff will provide additional information on this issue in a separate letter in the near future.

Notice

One party suggested that adequate notice of this hearing was not provided to people in the Delta. As explained below, the State Water Board exceeded legal noticing requirements in an effort to provide broad public notice. Also, additional interested parties are not precluded from presenting policy statements.

Water Code section 1703 and California Code of Regulations, title 23, section 795 specify the noticing requirements for change petitions. The petitioner must give or publish notice in the manner required by the State Water Board, and also must notify the Department of Fish and Wildlife in writing. If a hearing is held, notice shall be given by mail not less than 20 days before the date of the hearing to the petitioner and to any protestant. (Wat. Code, § 1704.) In addition, persons who have requested notice of change petitions in writing must receive notice of any proposed change. (Cal. Code Regs., tit. 23, § 795, subd. (b).) "The board's notice requirements shall be based on the potential effects of the proposed change(s) on legal users of water and on fish, wildlife, and other instream beneficial uses." (Cal. Code Regs., tit. 23, § 795, sub. (a).)

The State Water Board and petitioners have satisfied notice requirements. The Hearing Notice was (1) emailed to 3,563 unique email addresses on five Board Lyris distribution lists (WaterFix, Bay-Delta, Petitions, Hearings, and 401 Certification), (2) mailed to 1,083 Delta surface water

diverters who collectively hold 2,725 water rights (permits or licenses) or claims of water rights (Statements of Water Diversion and Use), (3) mailed to 214 interested persons on the "standard" petition mailing list, (4) mailed to 24 land owners at the proposed points of diversion and/or redirection, and (5) published in 24 newspapers in counties within which the SWP and CVP operate.

Thank you again for your participation in the pre-hearing conference and for your efforts to assist the State Water Board in conducting a fair and efficient hearing. If you have non-controversial procedural questions regarding this ruling, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.

Sincerely,



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



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

Enclosure:

Service List of Hearing Parties (Parties to Exchange Information Identified in Table 1)

Table 1
Service List of Parties to Exchange Information
Parties Participating in Direct Testimony, Cross-Examination or Rebuttal
(Note: All Parties Listed Below are Included in Table 1)

California WaterFix Petition Hearing
(Scheduled to Commence on April 7, 2016)

Dated February 10, 2016

Be sure to copy all documents and correspondence addressed to the State Water Resources Control Board Members or staff regarding this hearing to CWFhearing@waterboards.ca.gov.

Parties Participating in Part I (May also be Parties in Part II)

THE FOLLOWING PARTIES MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The parties listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

Party	Authorized Representative/ Attorney	Authorized Representative's Affiliation	Email Address of Authorized Representative/ Attorney
California Department of Water Resources	James (Tripp) Mizell		james.mizell@water.ca.gov
U.S. Department of the Interior, The	Amy L. Aufdemberge, Esq.		amy.aufdemberge@sol.doi.gov
Sacramento County Water Agency	Aaron Ferguson	Somach Simmons & Dunn	aferguson@somachlaw.com
Carmichael Water District, The	Aaron Ferguson	Somach Simmons & Dunn	aferguson@somachlaw.com
City of Roseville, The	Alan Lilly & Ryan Bezerra	Bartkiewicz, Kronick & Shanahan	abl@bkslawfirm.com; rsb@bkslawfirm.com
Sacramento Suburban Water District	Alan Lilly & Ryan Bezerra	Bartkiewicz, Kronick & Shanahan	abl@bkslawfirm.com; rsb@bkslawfirm.com
San Juan Water District	Alan Lilly & Ryan Bezerra	Bartkiewicz, Kronick & Shanahan	abl@bkslawfirm.com; rsb@bkslawfirm.com
City of Folsom, The	Alan Lilly & Ryan Bezerra	Bartkiewicz, Kronick & Shanahan	abl@bkslawfirm.com; rsb@bkslawfirm.com
Yuba County Water Agency	Alan Lilly & Ryan Bezerra	Bartkiewicz, Kronick & Shanahan, P.C.	abl@bkslawfirm.com; rsb@bkslawfirm.com
South Valley Water Association, et al.	Alex M Peltzer	Peltzer & Richardson, LC	apeltzer@prlawcorp.com
Biggs-West Gridley Water District (BWGWD)	Andrew M. Hitchings	Somach Simmons & Dunn, PC	ahitchings@somachlaw.com

Party	Authorized Representative/ Attorney	Authorized Representative's Affiliation	Email Address of Authorized Representative/ Attorney
Glenn-Colusa Irrigation District (GCID)	Andrew M. Hitchings	Somach Simmons & Dunn	ahitchings@somachlaw.com
Restore the Delta	Barbara Barrigan-Parilla & Tim Strohane	Restore the Delta	barbara@restorethedelta.org; tim@restorethedelta.org
Barbara Daly / North Delta C.A.R.E.S.	Barbara Daly & Anna Swenson		bdalymn@citlink.net; deltaactioncommittee@gmail.com
SolAgra Corporation/ IDE Technologies	Barry Sgarrella	SolAgra Corporation	barry@solagra.com
California Delta Chambers & Visitor's Bureau	Bill Wells		info@californiadelta.org
Steamboat Resort	Brad & Emily Pappalardo		empappa@gmail.com; bradpappa@gmail.com
Brett G. Baker	Osha Meserve and Brett G. Baker		osha@semlawyers.com; brettgbaker@gmail.com
The Environmental Justice Coalition for Water	Osha Meserve and Esperanza Vielma and Colin Bailey, J.D.		osha@semlawyers.com; evielma@cafecoop.org; colin@ejcw.org
Placer County Water Agency, The	Daniel Kelly	Somach Simmons & Dunn	dkelly@somachlaw.com
City of Brentwood, The	David Aladjem	Downey Brand LLP	daladjem@downeybrand.com
Reclamation District No. 800 (Byron Tract)	David Aladjem	Downey Brand LLP	daladjem@downeybrand.com
Friant North Authority	David Orth		dorth@davidorthconsulting.com
Deirdre Des Jardins	Deirdre Des Jardins		ddj@cah2oresearch.com
Nevada Irrigation District (NID)	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper LLP	dcooper@minasianlaw.com
Butte Water District (BWD)	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper, LLP	dcooper@minasianlaw.com
Richvale Irrigation District (RID)	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper, LLP	dcooper@minasianlaw.com
Anderson - Cottonwood Irrigation District	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper, LLP	dcooper@minasianlaw.com
Plumas Mutual Water Company (PMWC)	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper, LLP	dcooper@minasianlaw.com
Reclamation District 1004	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper, LLP	dcooper@minasianlaw.com

Party	Authorized Representative/ Attorney	Authorized Representative's Affiliation	Email Address of Authorized Representative/ Attorney
South Feather Water and Power Agency	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper, LLP	dcooper@minasianlaw.com
Western Canal Water District (WCWD)	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper, LLP	dcooper@minasianlaw.com
Paradise Irrigation District	Dustin C. Cooper	Minasian, Meith, Soares, Sexton & Cooper, LLP	dcooper@minasianlaw.com
Friant Water Authority & Friant Water Authority Members	Fennemore Craig, Lauren Caster, Gregory Adams, Jennifer Buckman, and 13 others		lcaster@fclaw.com; gadams@fclaw.com; jbuckman@friantwater.org; thomas.esqueda@fresno.gov; kelweg1@aol.com; mlarsen@kdwcd.com; sdalke@kern-tulare.com; mhagman@lindmoreid.com; sae16@lsid.org; fmorrissey@orangecoveid.org; sgeivet@ocsnet.net; roland@ssjmud.org; jph@tulareid.org
East Bay Municipal Utility District	Fred Etheridge & Jonathan Salmon		fetherid@ebmud.com; jsalmon@ebmud.com
North San Joaquin Water Conservation District	Jennifer Spaletta	Spaletta Law	jennifer@spalettalaw.com
City of Sacramento, The	Joe Robinson / Martha Lennihan	Office of the City Attorney / Lennihan Law	jrobinson@cityofsacramento.org; mlennihan@lennihan.net
Central Delta Water Agency, South Delta Water Agency (Delta Agencies), Lafayette Ranch, Heritage Lands Inc., Mark Bachetti Farms and Rudy Mussi Investments L.P.	John Herrick, Esq. and Dean Ruiz, Esq.		jherrlaw@aol.com; dean@hprlaw.net
City of Stockton, The	John Luebberke & Tara Mazzanti		john.luebberke@stocktonca.gov; tara.mazzanti@stocktonca.gov
San Luis & Delta-Mendota Water Authority	Jon Rubin		Jon.Rubin@SLDMWA.org
Stockton East Water District	Karna E. Harrigfeld		kharrigfeld@herumcrabtree.com

Party	Authorized Representative/ Attorney	Authorized Representative's Affiliation	Email Address of Authorized Representative/ Attorney
North Delta Water Agency & Member Districts	Kevin O'Brien	Downey Brand LLP	kobrien@downeybrand.com
Brannan-Andrus Levee Maintenance District; Reclamation District 407; Reclamation District 2067; Reclamation District 317; Reclamation District 551; Reclamation District 563; Reclamation District 150; Reclamation District 2098	Kevin O'Brien & David Aladjem	Downey Brand LLP	kobrien@downeybrand.com; daladjem@downeybrand.com
Sacramento Valley Group, The	Kevin O'Brien & David Aladjem	Downey Brand LLP	kobrien@downeybrand.com; daladjem@downeybrand.com
Sacramento Municipal Utility District (SMUD)	Kevin O'Brien & David Aladjem	Downey Brand LLP	kobrien@downeybrand.com; daladjem@downeybrand.com
County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority	Kurtis C. Keller	Neumiller & Beardslee	kkeller@neumiller.com
County of Colusa, The	Marcos Kropf & Matthew C. Bently		mkropf@countyofcolusa.com; mbently@countyofcolusa.org
Save the California Delta Alliance; Janet & Michael McCleary; Frank Morgan; and Captain Morgan's Delta Adventures, LLC	Michael Brodsky	Law Offices of Michael A. Brodsky	michael@brodskylaw.net
Islands, Inc	Osha Meserve and Michael J. Van Zandt	Hanson Bridgett, LLP	osha@semlawyers.com; mvanzandt@hansonbridgett.com
California Sportfishing Protection Alliance (CSPA), California Water Impact Network (C-WIN), and AquAlliance	Michael Jackson, Bill Jennings, Chris Shutes, Barbara Vlamis, and Carolee Krieger	Law Offices of Michael Jackson	mjatty@sbcglobal.net; blancapaloma@msn.com; deltakeep@me.com; barbarav@aqualliance.net; caroleekrieger7@gmail.com;
Snug Harbor Resorts, LLC	Nicole S. Suard, Esq.		sunshine@snugharbor.net

Party	Authorized Representative/ Attorney	Authorized Representative's Affiliation	Email Address of Authorized Representative/ Attorney
Local Agencies of the North Delta	Osha Meserve		osha@semlawyers.com
Bogle Vineyards/Delta Watershed Landowner Coalition	Osha Meserve		osha@semlawyers.com
Diablo Vineyards and Brad Lange/Delta Watershed Landowner Coalition	Osha Meserve		osha@semlawyers.com
Stillwater Orchards/Delta Watershed Landowner Coalition	Osha Meserve		osha@semlawyers.com
Patrick Porgans	Patrick Porgans	Patrick Porgans & Associates	porgansinc@sbcglobal.net
San Joaquin River Exchange Contractors Water Authority	Paul R. Minasian	Minasian, Meith, Soares, Sexton & Cooper, LLP	pminasian@minasianlaw.com
Coalition for a Sustainable Delta, The	Paul S. Weiland		pweiland@nossaman.com
Sacramento Regional County Sanitation District	Paul S. Simmons	Somach Simmons & Dunn, PC	psimmons@somachlaw.com
Westlands Water District	Philip A Williams		pwilliams@westlandswater.org
County of Yolo, The	Philip J. Pogledich		philip.pogledich@yolocounty.org
City of Antioch	Ron Bernal		rbernal@ci.antioch.ca.us
Contra Costa County and Contra Costa County Water Agency	Ryan Hernandez		ryan.hernandez@dcd.cccounty.us; stephen.siptroth@cc.cccounty.us
Contra Costa Water District	Robert Maddow and Douglas E. Coty and Scott Shapiro and Kevin O'Brien	Downey Brand LLP and Bold, Polisner, Maddow, Nelson & Judson	rmaddow@bpmnj.com; dcoty@bpmnj.com; sshapiro@downeybrand.com; kobrien@downeybrand.com
Daniel Wilson	Osha Meserve and Daniel Wilson		osha@semlawyers.com; daniel@kaydix.com
State Water Contractors	Stefanie Morris		smorris@swc.org
Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources	Stephan C. Volker	Volker Law	svolker@volkerlaw.com

Party	Authorized Representative/ Attorney	Authorized Representative's Affiliation	Email Address of Authorized Representative/ Attorney
Tehama-Colusa Canal Authority & water service contractors in its service area	Steven Saxton, Meredith Nikkel & J. Mark Atlas	Downey Brand	ssaxton@downeybrand.com mnikkel@downeybrand.com matlas@jmatlaslaw.com
San Joaquin Tributaries Authority, The (SJTA), Merced Irrigation District, Modesto Irrigation District, Oakdale Irrigation District, South San Joaquin Irrigation District, Turlock Irrigation District, and City and County of San Francisco	Tim O' Laughlin & Valerie C. Kincaid	O'Laughlin & Paris, LLP	towater@olaughlinparis.com; vkincaid@olaughlinparis.com
Water Forum, The	Tom Gohring		tgohring@waterforum.org
Earthjustice	Trent W. Orr		torr@earthjustice.org
County of Solano	William Emlen		wfemlen@solanocounty.com

THE FOLLOWING PARTY MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The party listed below has not agreed to electronic service BY THE PETITIONERS and must be served a hard copy. The party listed below agreed to electronic service by all other parties (excluding the Petitioners) pursuant to the rules specified in the hearing notice.)

Party	Authorized Representative/ Attorney	Mailing Address of Authorized Representative/ Attorney	Email Address of Authorized Representative/ Attorney
Clifton Court, L.P.	Suzanne Womack & Sheldon Moore	3619 Land Park Drive Sacramento, CA 95818	jsagwomack@gmail.com

Table 1 continues on next page

Parties Participating in Part II Only (Must also be Served in Part I)

THE FOLLOWING PARTIES MUST BE SERVED WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (Note: The parties listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

Party	Authorized Representative/ Attorney	Authorized Representative's Affiliation	Email Address of Authorized Representative/ Attorney
County of Sacramento, The	Aaron Ferguson	Somach Simmons & Dunn	aferguson@somachlaw.com
Friends of the River	E. Robert Wright		bwright@friendsoftheriver.org
Environmental Council of Sacramento (ECOS)	Brenda Rose		office@ecosacramento.net
Trout Unlimited	Brian Johnson		bjohnson@tu.org
California Department of Fish and Wildlife	Carl Wilcox		carl.wilcox@wildlife.ca.gov
Environmental Water Caucus	Barbara Barrigan-Parilla and Tim Stroshane and Conner Everts		barbara@restorethedelta.org; tim@restorethedelta.org; connere@gmail.com
Sierra Club California	E. Robert Wright & Kyle Jones		bwright@friendsoftheriver.org; kyle.jones@sierraclub.org
Planning & Conservation League	Jonas Minton		jminton@pcl.org
Natural Resources Defense Council, The Bay Institute, and Defenders of Wildlife	Kate Poole	Natural Resources Defense Council	kpoole@nrdc.org; awaren@nrdc.org; bobker@bay.org; rzwilling@defenders.org; dobegi@nrdc.org
SAVE OUR SANDHILL CRANES	Osha Meserve & Mike Savino		osha@semlawyers.com; wirthsoscranes@yahoo.com
Friends of the San Francisco Estuary	Mitch Avalon		friendsofsfestuary@gmail.com
Friends of Stone Lakes National Wildlife Refuge	Osha Meserve		osha@semlawyers.com; rmburness@comcast.net
American Rivers, Inc.	Steve Rothert		srothert@americanrivers.org

ATTACHMENT 10



March 28, 2016

Via Email To:

CWFhearing@waterboards.ca.gov

Hearing Chair Tam Doduc
Hearing Officer Felicia Marcus
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: Request For a 60-Day Continuance of the Hearing on California Waterfix Water Rights Change Petition

Dear Hearing Chair Doduc and Hearing Officer Marcus:

The California Department of Water Resources (DWR) and U.S. Bureau of Reclamation (Reclamation) (jointly Petitioners) respectfully request a 60-day continuance of all dates and deadlines associated with the hearing on the petition requesting changes in water rights of Petitioners for the California WaterFix.

Based upon recent success settling issues raised in the EIR/EIS process and ongoing discussions with protestors, Petitioners believe that a continuance could provide additional time to resolve other protests to simplify and expedite the hearing process. The additional time would also reduce the State Water Board's burden of analyzing and deliberating on a number of parties' claims and scope of the hearing.

Within 30 days of granting this continuance, Petitioners propose to submit an update to the State Water Board to report on their status, potential proposed permit conditions, and any other additional modeling in support of the project description.

Since Petitioners' testimony would otherwise be due on March 30, Petitioners respectfully request approval of this request by tomorrow, March 29. Thank you for your consideration. We look forward to your response.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tripp Mizell".

Tripp Mizell
Senior Attorney
Office of the Chief Counsel
CA Department of Water Resources

A handwritten signature in blue ink, appearing to read "Amy L. Aufdemberge".

Amy L. Aufdemberge
Assistant Regional Solicitor
Office of the Regional Solicitor
U.S. Department of the Interior

cc: Electronic Service
Tom Howard, Executive Officer, State Water Resources Control Board
Michael Lauffer, Chief Counsel, State Water Resources Control Board
Electronic service list, March 22, 2016

Personal Service via U.S. Postal Service
Suzanne Womack and Sheldon Moore
Clifton Court, L.P.
3619 Land Park Drive
Sacramento, CA 95818



This is a message from the State Water Resources Control Board.

On March 28, 2016, the State Water Resources Control Board (State Water Board) hearing officers for the California WaterFix (WaterFix) water right change petition hearing received a letter from the Department of Water Resources and the U.S. Bureau of Reclamation (collectively Petitioners) requesting a 60-day continuance of all dates and deadlines associated with the hearing. On March 28, 2016, the hearing officers also received a request from several parties to dismiss the petition and on March 29, 2016, the State Water Board received additional requests to delay and stay the hearing pending resolution of several matters. All of these documents have been or will be posted on the State Water Board's website at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/.

In response to the various requests, the upcoming deadlines are suspended. A ruling will be issued in the near future formally addressing the requests and providing additional information about the hearing schedule. The hearing officers are cognizant of the inconvenience to the other parties of repeated delays to the hearing schedule. Accordingly, to inform our consideration, Petitioners are directed to confirm by noon on Friday, April 1, 2016 that they will be prepared to proceed without further delay should the 60-day continuance be granted.

If you have questions regarding the water right change petition and associated hearing for the WaterFix, you may contact the WaterFix hearing team at (916) 319-0960 or CWFhearing@waterboards.ca.gov.

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

Felicia Marcus
State Water Board WaterFix Co-Hearing Officer

State Water Resources Control Board

NOTICE OF RESCHEDULED PUBLIC HEARING TO CONSIDER A PETITION REQUESTING CHANGES IN WATER RIGHTS OF THE DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION FOR THE CALIFORNIA WATERFIX PROJECT

The public hearing listed above, originally scheduled to commence on April 7, 2016 at the Joe Serna Jr.-CalEPA Building, Byron Sher Auditorium, 1001 I Street, Second Floor, Sacramento, CA **has been rescheduled** and will commence according to the following schedule:

PART IA¹ of this hearing will commence on May 5, 2016 at 9 a.m. and continue, as necessary, as indicated on the dates and at the locations shown on Revised Enclosure A

PART IB will commence on July 26, 2016 at 9 a.m. and continue, as necessary, as indicated on the dates and at the locations shown on Revised Enclosure A

PART II of this Hearing will commence following completion of environmental and Endangered Species Act compliance for the project with dates to be noticed in the future

This notice supplements the [October 30, 2015 Notice of Petition and Notice of Public Hearing and Pre-Hearing Conference to Consider the Petition](#) available at:

www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/.

Subsequent to the issuance of the hearing notice, the hearing officers ruled on various hearing issues in letters dated January 15, 2016, February 11, 2016, and March 4, 2016. This notice sets forth the revised hearing schedule established in the March 4, 2016 ruling. Except to the extent expressly modified by the hearing officers, the hearing requirements set forth in the original hearing notice remain unchanged.

PURPOSE OF HEARING

The purpose of this hearing is for the State Water Resources Control Board (State Water Board or Board) to receive evidence relevant to determining whether the State Water Board should approve, subject to terms and conditions, the California Department of Water Resources' and the U.S. Bureau of Reclamation's (petitioners) joint petition to add three new points of diversion and/or points of rediversion of water to specified water right permits for the State Water Project and the Central Valley Project associated with the California WaterFix Project.

BIFURCATION OF PART I OF HEARING

Pursuant to the [October 30, 2015 hearing notice](#), the hearing officers held a pre-hearing conference on January 28, 2016, to organize the conduct of the WaterFix hearing. Following the pre-hearing conference, the hearing officers issued a [ruling dated February 11, 2016](#), which addressed numerous procedural issues. Among other things, the hearing officers decided to bifurcate Part I of the hearing

¹ Part I of this Hearing has been bifurcated into Part IA and Part IB

into Part IA (policy statements, followed by petitioners' cases in chief) and Part IB (cases in chief of the other parties' participating in Part I).

REVISED HEARING SCHEDULE FOR PARTS IA AND IB

Following additional input and requests for clarification from the parties to the hearing, as well as a request from the [petitioners](#) to postpone the start of Part IA of the hearing for 30 days, the hearing officers issued a [March 4, 2016 ruling](#), which granted the petitioners' request to delay the start of the hearing, revised the hearing schedule, and addressed other procedural issues.

Part IA of the hearing is currently scheduled to commence on **May 5, 2016 at 9 a.m.** and continue on the dates and in the locations shown on **Revised Enclosure A**. Part IB of the hearing is scheduled to commence on **July 26, 2016 at 9 a.m.** and continue on the dates and in the locations shown on Revised **Enclosure A**. The revised hearing schedule, including important deadlines, is set forth below.

Please note that the start times may be earlier than 9 a.m. on subsequent hearing days if the hearing officers determine that an earlier start time is necessary. Any change in start times will be announced at the conclusion of the previous hearing day.

A subsequent notice will be issued identifying the schedule for Part II of the hearing, including due dates for copies of witnesses' proposed testimony, witness qualifications, exhibits, and lists of exhibits. Part II is unlikely to begin before early December 2016.

SUMMARY OF REVISED HEARING SCHEDULE AND IMPORTANT DEADLINES FOR PARTIES:

12:00 noon, March 30, 2016	Deadline for receipt and service of petitioners' cases in chief , including witnesses' proposed testimony, witness qualifications, exhibits, list of exhibits, and a statement of service for Part IA of the hearing.
12:00 noon, April 15, 2016	Due date for receipt of any written procedural/evidentiary objections <u>from parties to the hearing concerning</u> petitioners' cases in chief. Rulings to follow as appropriate and necessary.
12:00 noon, April 15, 2016	Due date for receipt of proposed groupings and order of parties for cross examination in Part IA of the hearing.
9:00 am, May 5, 2016	Begin policy statements followed immediately by Part IA with petitioners' cases in chief and cross examination of petitioners' witnesses.
12:00 noon, June 15, 2016	Due date for receipt and service of all other parties' cases in chief for Part IB of the hearing, including witnesses' proposed testimony, witness qualifications, exhibits, list of exhibits, a statement of service, and any requests for additional time for direct testimony.
12:00 noon, June 30, 2016	Due date for receipt of any written procedural/evidentiary objections <u>from parties to the hearing concerning</u> Part IB parties' cases in chief. Rulings to follow as appropriate and necessary.

12:00 noon, June 30, 2016

Due date for receipt of proposed groupings and order of parties for direct testimony in Part IB and proposed order of parties for cross examination.

9:00 am, July 26, 2016

Part IB of the hearing commences, beginning with other parties' cases in chief for Part I of the hearing, including direct testimony, cross-examination, any redirect, and any recross-examination. Following the cases in chief, petitioners and other parties may present rebuttal testimony and exhibits.

POLICY STATEMENTS

Interested persons who are not participating in the evidentiary portion of the hearing may submit a written policy statement or present an oral policy statement. Please see the October 30, 2015 hearing notice for more information concerning policy statements. Policy statements will be heard at the beginning of Part IA of the hearing, on **May 5, 6 and 10**, and at the beginning of Part II, on dates to be determined. Policy statements at the beginning of Part IA may address Part I or Part II issues. The schedule for policy statements at the beginning of Part I is set forth below. Depending on the number of speakers making policy statements, the hearing may begin before 9 a.m. on the second and third day of the hearing (May 6 and 10) and may extend late into the evening.

May 5, 2016 - On Day 1, the State Water Board will hear policy statements from:

- Federal, state and local elected officials or their representatives
- Approximately 160 persons **not** affiliated with North Delta CARES who submitted an NOI by the January 5, 2016 deadline indicating an intent to present a policy statement

May 6, 2016 – On Day 2, the State Water Board will hear policy statements from:

- Persons affiliated with North Delta CARES, including those identified in the NOI submitted by Anna Swenson

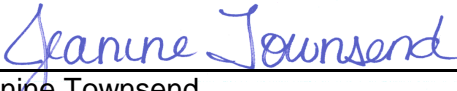
May 10, 2016 – On Day 3, the State Water Board will hear policy statements from:

- Interested persons who submitted an NOI and are listed in Table 2 of the service list who were not able to present on May 5 or May 6
- Interested persons who wish to make a policy statement who did not file an NOI by the January 5, 2016 deadline

Petitioners' opening statements and testimony will start immediately following policy statements, but no earlier than **9:00 a.m. on May 11, 2016**.

For more information, please contact Jeanine Townsend, Clerk to the State Water Board, at (916) 341-5600.

March 25, 2016
Date


Jeanine Townsend
Clerk to the Board

Revised Enclosure A: Part IA and IB Hearing Dates and Room Schedule

Revised Enclosure A:Hearing Dates and Room Schedule
California WaterFix

PART IA of the hearing will commence at 9 a.m. on ~~April 7, 2016~~ **May 5, 2016**, and continue, as necessary, on the following dates at the Joe Serna Jr.-CalEPA Building, 1001 I Street, Second Floor, Sacramento, CA. **Start times may be earlier than 9 a.m. on subsequent hearing days if the hearing officers determine it necessary. Any change in start times will be announced at the conclusion of the previous hearing day.**

DATE	HEARING ROOM
Thursday, April 07, 2016	Cancelled
Friday, April 08, 2016	Cancelled
Tuesday, April 12, 2016	Cancelled
Wednesday, April 13, 2016	Cancelled
Thursday, April 14, 2016	Cancelled
Friday, April 15, 2016	Cancelled
Thursday, April 21, 2016	Cancelled
Friday, April 22, 2016	Cancelled
Tuesday, April 26, 2016	Cancelled
Wednesday, April 27, 2016	Cancelled
Thursday, April 28, 2016	Cancelled
Friday, April 29, 2016	Cancelled
May 05, 2016	Byron Sher Auditorium
May 06, 2016	Byron Sher Auditorium
May 10, 2016	Byron Sher Auditorium
May 11, 2016	Byron Sher Auditorium
May 12, 2016	Byron Sher Auditorium
May 13, 2016	Coastal Hearing Room
May 19, 2016	Sierra Hearing Room
May 20, 2016	Coastal Hearing Room
May 24, 2016	Byron Sher Auditorium
May 25, 2016	Byron Sher Auditorium
May 26, 2016	Byron Sher Auditorium
Friday, May 27, 2016	Cancelled
Tuesday, May 31, 2016	Cancelled
June 01, 2016	Byron Sher Auditorium
June 02, 2016	Byron Sher Auditorium
June 03, 2016	Byron Sher Auditorium
June 09, 2016	Byron Sher Auditorium
June 10, 2016	Byron Sher Auditorium
June 14, 2016	Sierra Hearing Room
June 15, 2016	Sierra Hearing Room
June 16, 2016	Coastal Hearing Room
June 17, 2016	Byron Sher Auditorium
June 23, 2016	Sierra Hearing Room
June 24, 2016	Coastal Hearing Room

Revised Enclosure A: Hearing Dates and Room Schedule (continued)
California WaterFix

Part IB of the hearing will commence at 9 a.m. on July 26, 2016 and continue, as necessary, on the following dates at the Joe Serna Jr.-CalEPA Building, 1001 I Street, Second Floor, Sacramento, CA. Start times may be earlier than 9 a.m. on subsequent hearing days if the hearing officers determine it necessary. Any change in start times will be announced at the conclusion of the previous hearing day.

DATE	HEARING ROOM
July 26, 2016	Byron Sher Auditorium
July 27, 2016	Byron Sher Auditorium
July 28, 2016	Byron Sher Auditorium
July 29, 2016	Byron Sher Auditorium
August 04, 2016	Byron Sher Auditorium
August 05, 2016	Byron Sher Auditorium
August 09, 2016	Byron Sher Auditorium
August 10, 2016	Byron Sher Auditorium
August 11, 2016	Byron Sher Auditorium
August 12, 2016	Byron Sher Auditorium
August 18, 2016	Coastal Hearing Room
August 19, 2016	Coastal Hearing Room
August 23, 2016	Coastal Hearing Room
August 24, 2016	Byron Sher Auditorium
August 25, 2016	Byron Sher Auditorium
August 26, 2016	Byron Sher Auditorium
August 30, 2016	Byron Sher Auditorium
August 31, 2016	Byron Sher Auditorium
September 22, 2016	Sierra Hearing Room
September 23, 2016	Sierra Hearing Room
September 27, 2016	Byron Sher Auditorium
September 28, 2016	Byron Sher Auditorium
September 29, 2016	Byron Sher Auditorium
September 30, 2016	Byron Sher Auditorium
October 13, 2016	Byron Sher Auditorium
October 14, 2016	Byron Sher Auditorium
October 20, 2016	Coastal Hearing Room
October 21, 2016	Coastal Hearing Room
October 25, 2016	Byron Sher Auditorium
October 26, 2016	Byron Sher Auditorium
October 27, 2016	Byron Sher Auditorium
October 28, 2016	Byron Sher Auditorium

STATEMENT OF SERVICE


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

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

PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCES ET AL'S MOTION TO CONTINUE HEARINGS FOR 90 DAYS TO ALLOW REFORMATION OF WATERFIX HEARINGS TO CONFORM TO THE RULE OF LAW

to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated January 2, 2018, posted by the State Water Resources Control Board at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

I certify that the foregoing is true and correct and that this document was executed on January 12, 2018, at Capitola, California.

Signature: 
Name: Michael A. Brodsky
Title: Attorney

Party/Affiliation:
Save the California Delta Alliance, et al.

Address:
Law Offices of Michael A. Brodsky
201 Esplanade, Upper Suite
Capitola, CA 95010