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7 Party to the WaterFix Hearing
8 Principal, California Water Research

9
10 **BEFORE THE**
11 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

12 HEARING IN THE MATTER OF
13 CALIFORNIA DEPARTMENT OF WATER
14 RESOURCES AND UNITED STATES
15 BUREAU OF RECLAMATION
16 REQUEST FOR A CHANGE IN POINT OF
17 DIVERSION FOR CALIFORNIA WATER
18 FIX

19 MOTION TO LIMIT USE OF SWRCB-3
20 AND SWRCB-4 IN THE HEARING

21 The Department of Water Resources (“DWR”) has submitted exhibit SWRCB-3, entitled,
22 “2015 Public Draft Bay Delta Conservation Plan/California WaterFix Partially Recirculated
23 Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement
24 (RDEIR/SDEIS) and Comments,” (“2015 RDEIR/SDEIS”) and exhibit SWRCB-4, entitled,
25 “2013 Public Draft Environmental Impact Report/Environmental Impact Statement Bay Delta
26 Conservation Plan SWRCB,” (“2013 DEIR/DEIS”) as evidence in support of their case in chief.
27 DWR did not submit SWRCB-3 or SWRCB-4 as part of exhibits for the agency’s case in chief
28 by the deadline of May 31, 2016 noticed in the Hearing Ruling of April 25, 2016. As explained
below, at the request of the Hearing Officers, DWR and the United States Bureau of Reclamation
 (“USBR”) had previously announced that the 2015 CalSim modeling and model results used for
 the Biological Assessment would be used in the Petitioners’ case in chief. The 2013

1 DEIR/DEIS and 2015 RDEIR/SDEIS were only added as exhibits after the Hearing Officers
2 provided an extension to June 22, 2016 for the Petitioners to add staff exhibits to their case in
3 chief. As explained below, because the testimony of Petitioners' witnesses concerned the model
4 results presented for the case in chief, there is no authentication of the 2010 BDCP/WaterFix
5 CalSim modeling that is the foundation for the numeric results, graphs, and summary
6 conclusions presented in the 2013 DEIR/DEIS and 2015 RDEIR/SDEIS documents. There is
7 also a lack of evidence validating of the 2010 CalSim model results used in those documents, for
8 any use in the Hearing other than meeting requirements for a CEQA/NEPA analysis.

9 The notice requirement in the Board's regulations, Title 23 Cal. Code Regs. § 648.4,
10 mandates that any additions to exhibits as a result of changes in hearing deadlines, should not
11 result in prejudice to any party. For these reasons, and as argued on points and authorities
12 below, California Water Research moves that the use of the 2013 DEIR/DEIS and 2015
13 RDEIR/SDEIS be limited to meeting Water Code § 1701.3(b)(3).

15 HEARING OFFICERS' REQUEST FOR CLARIFICATION

16 Concerns about the conflicting versions of the BDCP/WaterFix modeling were raised in
17 the pre-hearing conference on January 28, 2016, and in letters following the pre-hearing
18 conference by Deirdre Des Jardins, principal at California Water Research ("California Water
19 Research") and the Sacramento Valley Water Users. In the March 4, 2016 Hearing ruling, the
20 Hearing Officers mandated that DWR and USBR clarify which hydrologic model versions were
21 to be used in the hearing:

22 Deirdre Des Jardins with California Water Research raised concerns with the
23 modeling analyses conducted to support the environmental documents and requested that
24 at a minimum the petitioners provide a complete list of the versions of all computer
25 models used in producing analyses for the WaterFix and that the petitioners make the
26 models and input and output data available to interested parties. Ms. Des Jardins also
27 requested that the petitioners make all supporting data for all sensitivity analyses
28 available. Ms. Des Jardins specifically requested that the modeling materials be
distributed using DWR's web server which it has used in the past to distribute similar
modeling materials. In letters dated February 17, 2016 (letter to DWR) and February 25,
2016 (letter to the State Water Board), the SVWU raised similar concerns and *requested*

1 *that the petitioners identify what hydrologic modeling the petitioners will rely on during*
2 *the hearing.* (p. 11, emphasis added.)

3 DWR and USBR announced in a response letter on March 11, 2016, entitled, “Written
4 Response to March 4 Requirement to Address Information Requests from California Water
5 Research and Sacramento Valley Water Users,” that the 2015 BDP/WaterFix CalSim version
6 used for the Biological Assessment would be the basis of information used for their case in chief.

7 That letter states in part:

8 However, because the Endangered Species Act has a requirement to use Best Commercially
9 Available Scientific Data, it was decided among USBR, USFWS, NMFS and DWR to use the
10 most recent version of CALSIM II (2015) and a longer patterning period for DSM2 (82-year
11 record) for the Biological Assessment. As noted in Table 1 above, the modeling conducted for the
12 BA is the basis of the information that will be used in the case-in-chief in the Hearing process.
13 (p. 6)

14 Arguably the information about the modeling to be used in the hearing was requested by
15 the Hearing Officers and submitted by the Petitioners under Water Code § 1701.3, which states:

16 1701.3 (a) After a petition is filed, the board may request
17 additional information reasonably necessary to clarify, amplify,
18 correct, or otherwise supplement the information required to be
19 submitted under this chapter. The board shall provide a reasonable
20 period for submitting the information.

21 (b) The additional information may include, but need not be
22 limited to, any of the following:

23 (1) Information needed to demonstrate that the change will not
24 injure any other legal user of water.

25 (2) Information needed to demonstrate that the change will comply
26 with any applicable requirements of the Fish and Game Code or the
27 federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.).

28 (3) Information needed to comply with Division 13 (commencing with
 Section 21000) of the Public Resources Code.

 Since DWR and USBR stated in the letter of March 11, 2016, that the 2015
BDP/WaterFix CalSim version would be used to determine compliance with the federal
Endangered Species Act, it is the 2015 BDCP/WaterFix CalSim models and model results which
are relevant to any determination with respect to Water Code 1701.3 (b)(2). Since DWR and
USBR stated in the letter of March 11, 2016 that the 2015 BDCP/WaterFix CalSim version

1 would be the basis of their case in chief, it is also the 2015 BDCP/WaterFix which are relevant to
2 any determination with respect to Water Code 1701.3 (b)(1).

3 Armin Munevar's written testimony (Exhibit DWR-71), submitted with DWR's May 31,
4 2016 case in chief also states in part:

5 At the request of the state and federal fisheries agencies, the CalSim II 2015 version was
6 used for the draft biological assessment. This same model version is also used for the
7 presentation of evidence in support of this petition (p. 9.)

8 As explained below, because the CEQA/NEPA documents use an older, incompatible
9 2010 version of the CalSim model, they should not be used for purposes in the hearing other than
10 for meeting the requirements of Water Code 1701.3 (b)(3) with respect to Division 13
11 (commencing with Section 21000) of the Public Resources Code.

12 INCOMPATIBLE CALSIM MODEL VERSIONS

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14 There is significant potential prejudice to the protestants if the Petitioners are allowed to
15 use results from 2010 versions of the BDCP/Water Fix CalSim II model in the draft
16 CEQA/NEPA documents for the purposes of meeting Water Code 1701.3 (b)(1) and 1701.3
17 (b)(2). Not only are the model versions different, the assumptions used are different.
18 Petitioners' March 11, 2016 letter states that the No Action Alternatives in the two models are
19 different. Armin Munevar's testimony (DWR-71), also states,

20 The NAA simulation includes the existing infrastructure, existing regulatory
21 restrictions including the recent Biological Opinions, future demands, climate, and sea
22 level rise at about year 2025 and reasonably foreseeable facilities and operational rules.
23 This base case model has a similar intent to the NEPA NAA in the EIR/EIS and it is
24 being referred to as the NAA; however, this model has been updated since the original
25 EIR/EIS NAA modeling in April 2010. (p. 14 at 23)

26 There is thus potentially severe confusion and prejudice to protestants in the hearing by
27 using results from both 2010 and 2015 BDCP/WaterFix versions of the CalSim model for the
28

1 purposes of determining impacts to water rights under 1701.3(b)(1) and to fish and wildlife
2 under 1701.3(b)(2.)

3 For these reasons, the 2013 and 2015 CEQA/NEPA documents (SWRCB-3 and SWRCB-
4 4), which are based on 2010 versions of the CalSim model, should be used solely for the
5 purposes of documenting Petitioners' compliance of complying with subdivision (b)(3) of Water
6 Code § 1701.3 (b)(3).

7 California Water Research also submitted a letter to the Hearing Officers on April 2,
8 2016, entitled "Significant Unresolved Issues."¹ The letter noted the contradictions in using the
9 2013 DEIR/DEIS and 2015 RDEIR/SDEIS documents to meet statutory requirements for the
10 Change Petition, and using a completely different set of modeling as the basis for the information
11 submitted for the case in chief for the Change Petition. The letter requested that the Hearing
12 Officers resolve the conflicts arising from different foundational modeling evidence.

13 For the above reasons, I respectfully request that the Hearing Officers limit the
14 use of SWRCB-3 and SWRCB-4 in the Hearing to meeting Water Code § 1701.3(b)(3).

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16 Respectfully submitted,

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20 Deirdre Des Jardins
21 Principal, California Water Research

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¹ The April 2, 2016 letter by California Water Research is incorporated in its entirety by reference.

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STATEMENT OF SERVICE

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

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

Motion to Limit Use of SWRCB-3 and SWRCB-4 in the Hearing

to be served **by Electronic Mail** (email), in parts due to server limitations, upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated October 6, 2016, 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 October 7, 2016.

Signature:



Name: Deirdre Des Jardins
Title: Principal, California Water Research

Party/Affiliation:
Deirdre Des Jardins

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