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13 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

14 HEARING REGARDING PETITION FILED  
15 BY THE DEPARTMENT OF WATER  
16 RESOURCES AND U.S. BUREAU OF  
17 RECLAMATION REQUESTING  
18 CHANGES IN WATER RIGHTS FOR THE  
19 CALIFORNIA WATERFIX PROJECT

**PART 1 OPENING STATEMENT (AND  
IMBEDDED REQUESTS FOR OFFICIAL  
NOTICE) OF PROTESTANTS PACIFIC  
COAST FEDERATION OF FISHERMEN'S  
ASSOCIATIONS AND INSTITUTE FOR  
FISHERIES RESOURCES**

Filing Date: September 2, 2016  
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1 **I. INTRODUCTION**

2 The California WaterFix Change Petition submitted by the Department of Water  
3 Resources (“DWR”) and the U.S. Bureau of Reclamation (“Reclamation,” and together with  
4 DWR, “petitioners”) must be denied because the petitioners have failed “to demonstrate a  
5 reasonable likelihood that the proposed change will not injure any other legal user of water” as  
6 required by Water Code section 1701.2(d). Recognizing that their proposed removal of 9,000  
7 cubic feet per second of water from the Sacramento River over a 40-mile stretch from Clarksburg  
8 to Clifton Court Forebay will indeed cause substantial harm to legal users of water, petitioners  
9 have not even attempted to make that plainly impossible showing. Instead, they have argued only  
10 that (1) the California WaterFix (“WaterFix”) will comply with this Board’s Bay-Delta Water  
11 Quality Control Plan adopted in 1995, Decision-1641 (“D-1641”), and (2) operation of the  
12 WaterFix as hypothetically delimited by “Boundary 1” and “Boundary 2” will not harm existing  
13 water quality conditions as represented by the “No Action Alternative.” But the petitioners’  
14 argument requires this Board to indulge two false premises: First, petitioners ask this Board to  
15 assume that D-1641 adequately protects legal users of water. Manifestly, it has failed to do so.  
16 Second, petitioners ask this Board to assume that the No Action Alternative does not harm legal  
17 users of water. Again, it is indisputable that “existing conditions” are harming the Delta’s water  
18 quality, and all legal users who depend on it. For these reasons, as discussed below, this Board  
19 must deny and dismiss the WaterFix Change Petition.

20 **II. THE LEGAL PREMISES ON WHICH THE WATERFIX APPLICATION**  
21 **IS BASED ARE CONTRARY TO LAW.**

22 The twin premises on which petitioners base their application are not only demonstrably  
23 false as a matter of fact, but also plainly wrong as a matter of law. For thirty years it has been  
24 settled law that neither petitioners – nor this Board – may rely upon the ““without project””  
25 conditions “as the measure of water flows necessary to protect the existing water rights in the  
26 Delta against impairment by the [state and federal water] projects.” *United States v. State Water*  
27 *Resources Control Board* (1986) 182 Cal.App.3d 82, 116. For the same reason, this Board may  
28 not rely on the “without project” (i.e., existing) conditions “as the measure of water flows

1 necessary to protect” legal users of water under Water Code section 1701.2(d). As the Court of  
2 Appeal instructed this Board three decades ago, such an approach is “fundamentally defective.”  
3 *Id.*

4 The Court of Appeals’ reasons for overturning this Board’s mistaken reliance on this  
5 erroneous premise *then* remain fully applicable *today*. As the Court explained, this Board’s  
6 statutory duties include the “reasonable protection” of all “beneficial uses” in the Delta, not just  
7 water rights held by the large exporters:

8 The Board is obligated to adopt a water quality control plan consistent with  
9 the overall statewide interest in water quality . . . which will ensure “the  
10 reasonable protection of *beneficial uses*” . . . . Its legislated mission is to  
11 protect the “quality of all the waters of the state . . . for use and enjoyment  
12 by the people of the state.”

11 *Id.*

12 And, the governing statutes require an updated water quality plan by which this Board  
13 determines the measures by which these beneficial uses will be protected. To comply with this  
14 planning mandate, this Board is “currently developing updates to the Bay-Delta Plan and its  
15 implementation through a phased process” that by law must establish the water quality objectives  
16 that the WaterFix must implement. SWRCB Ruling February 11, 2016, p. 4. Consequently, this  
17 Board may not pretend – as petitioners urge – that the decades-old D-1641 is adequate, nor accept  
18 the petitioners’ claim that compliance with its demonstrably inadequate water quality standards is  
19 sufficient to show that legal users of water will not be harmed.

20 Nor may this Board give petitioners a pass on the WaterFix’s adverse impacts on public  
21 trust resources including recreation and fish and wildlife. The laws governing this Board’s  
22 approval of applications to appropriate water – including changes in points of diversion such as  
23 the WaterFix – require this Board to give particular attention to protecting all beneficial uses of  
24 water, including “[t]he use of water for recreation and preservation and enhancement of fish and  
25 wildlife resources.” Water Code §§ 1243, 1243.5. The Legislature has declared preservation and  
26 enhancement of fish and wildlife to be “a beneficial use of water,” and directed this Board, “[i]n  
27 determining the amount of water available for appropriation, to “take into account, whenever it is  
28

1 in the public interest, the amounts of water needed to *remain in the source* for protection of  
2 beneficial uses . . . .” Water Code § 1243.5 (emphasis added).

3 The Legislature placed such importance on these instream beneficial uses that it mandated  
4 this Board’s consideration of the quantity of water required for their protection *before* this Board  
5 may approve any appropriation of water:

6 In determining the amount of water available for appropriation for other  
7 beneficial uses, the board *shall* take into account, whenever it is in the  
8 public interest, the amounts of water required for recreation and the  
preservation and enhancement of fish and wildlife resources.

9 Water Code § 1243 (emphasis added). But contrary to this mandate, *petitioners have made no*  
10 *showing of the amount of water needed for these instream uses*, let alone that the WaterFix will  
11 not remove the very water needed for their protection as required by the Water Code. This  
12 omission is fatal to their Petition.

13 Petitioners must also show that their Petition is consistent with applicable water resource  
14 plans. The Legislature has directed that, in determining the “public interest” as required for  
15 approval of an application to appropriate water, the Board “*shall* give consideration to any general  
16 or co-ordinated plan looking toward the control, protection, development, utilization, and  
17 conservation of the water resources of the State . . . .” Water Code § 1256. There are two plans  
18 pertinent to this Board’s determination of the “public interest” as required for approval of the  
19 WaterFix: the Board’s own Bay-Delta Water Quality Control Plan (“WQCP”) adopted pursuant  
20 to Water Code sections 13050(j) and 13240-13246, and the Delta Plan that the Delta Stewardship  
21 Council must adopt pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009 (“Delta  
22 Reform Act”), Water Code sections 85000 et seq. As shown below, because neither of these  
23 plans is adequate, this Board may not consider the WaterFix for approval at this time.

24 Buttrressing and expanding on section 1256’s planning mandate, the Legislature has  
25 adopted twin statutory schemes that independently require this Board’s adherence to a principled  
26 planning process intended to protect and restore the Delta’s environment. With respect to the  
27 Bay-Delta WQCP, the Legislature has instructed that this Board, “in carrying out activities which  
28 may affect water quality, shall comply with water quality control plans approved or adopted by

1 [this Board] unless otherwise directed or authorized by statute . . . .” Water Code section 13247.

2 And, with respect to the Delta Plan prepared by the Delta Stewardship Council pursuant to the  
3 Delta Reform Act, the Legislature has directed that this Board

4 *shall*, pursuant to its public trust obligations, develop new flow criteria for  
5 the Delta ecosystem necessary to protect public trust resources. In carrying  
6 out this section, the board *shall* review existing water quality objectives  
and *use the best available scientific information*.

7 Water Code § 85086(c)(1) (emphasis added).

8 Pursuant to the foregoing statutory direction, six years ago this Board found – based on  
9 overwhelming, indisputable evidence – that the “best available science suggests that *current*  
10 *[Delta] flows are insufficient to protect public trust resources.*” SWRCB-25 at p. 2 (excerpted in  
11 PCFFA-4 at p. 1) (emphasis added). This finding was compelled because, as this Board  
12 specifically determined, “[r]ecent Delta flows are *insufficient* to support native Delta fishes for  
13 today’s habitats.” *Id.* at p. 5 (excerpted in PCFFA-4 at p. 4) (emphasis added).

14 Thus, by this Board’s own authoritative determination as mandated by statute, existing  
15 flows in the Delta under the *existing* WQCP – D-1641 – are “insufficient” to protect the Delta’s  
16 beleaguered fisheries from harm. Indeed, it is indisputable that those fisheries have been pushed  
17 to the brink of extinction. Hence the petitioners’ claim that the WaterFix will not harm existing  
18 conditions merely confirms that the WaterFix will do nothing to stem the Delta ecosystem’s  
19 ongoing collapse.

20 It follows from these indisputable facts and points of law that the petitioners have failed to  
21 demonstrate that the proposed change “will not injure any other legal user of water” as required  
22 by Water Code section 1701.2(d). Petitioners’ reliance on compliance with D-1641 and the “No  
23 Action Alternative” to demonstrate the absence of harm ignores the law. Applicable law does not  
24 allow this Board to use “without project” conditions “as the measure of water flows necessary to  
25 protect” legal users of water. *United States v. State Water Resources Control Board, supra*, 182  
26 Cal.App.3d at 116. Accordingly, this Board must deny and dismiss the WaterFix Petition.

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1           **III. THE DELTA IS DYING AND THE WATERFIX WILL MAKE**  
2                           **MATTERS WORSE.**

3           Every state and federal agency that manages the Delta’s fish and wildlife agrees that the  
4 Bay-Delta ecosystem is collapsing. The National Marine Fisheries Service (“NMFS”) and the  
5 Fish and Wildlife Service (“FWS”) concluded in 2008 and 2009, respectively, that continued  
6 operation of the Central Valley Project (“CVP”) and the State Water Project (“SWP”) would  
7 jeopardize the existence of Delta smelt, winter-run Chinook salmon, green sturgeon, and other  
8 imperiled fish species. *San Luis & Delta Mendota Water Authority v. Jewell*, 747 F.3d 581, 592  
9 (9th Cir. 2014) (quoting FWS’ Biological Opinion); *San Luis & Delta Mendota Water Authority*  
10 *v. Locke*, 776 F.3d 971, 981 (9th Cir. 2014) (quoting NMFS’ Biological Opinion). The  
11 Environmental Protection Agency (“EPA”) agrees. As EPA stated in its comments on the  
12 Recirculated Draft EIR/Supplemental Draft EIS (“RDEIR/SDEIS”) for the California WaterFix  
13 dated October 30, 2015, “[t]hese species have experienced sharp population declines in the last  
14 decade and showed record low abundance over the last five years.” PCFFA-5 at 3.

15           Far from protecting those species, the WaterFix will *hasten their demise*. EPA warned  
16 that “[i]nformation presented in the [RDEIR/SDEIS] shows that the WaterFix project could  
17 reduce habitat conditions for Delta smelt, winter-run Chinook salmon, green and white sturgeon,  
18 striped bass, and American shad, and result in a decline of long fin smelt abundance.” *Id.* EPA  
19 cautioned further that the WaterFix will cause a wholesale increase in salinity throughout the  
20 Bay-Delta, posing potentially catastrophic impacts on both fish and wildlife and municipal uses.  
21 *Id.*

22           It gets worse. Not only is the Bay-Delta ecosystem in free fall, all four safety nets that  
23 state and federal law require for protection of this dying estuary either confirm the WaterFix’s  
24 harm to legal users of water, or have themselves been ruled inadequate to prevent that harm.  
25 First, the Biological Assessment issued by Reclamation on August 2 concludes that the WaterFix  
26 is “likely to adversely affect” several fish species protected under the Endangered Species Act, 16  
27 U.S.C. section 1531 et seq. SWRCB-104 at p. 7-36, Table 7-1. Second, EPA has given the  
28 RDEIR/SDEIS a failing grade of “‘3’ (Inadequate).” PCFFA-5 at 4. Third, the Sacramento

1 Superior Court has set aside the Delta Stewardship Council’s Delta Plan – the very plan that the  
2 Legislature mandated to reverse the Delta’s “crisis” – because it fails to prescribe measureable  
3 and enforceable targets for restoring the Delta’s natural flows, reducing environmental harms and  
4 curtailing diversions of its flows.<sup>1</sup>

5 Fourth, and, most important of all, it is indisputable that the Bay-Delta Water Quality  
6 Control Plan adopted by this Board in 1995 – D-1641 – is obsolete. As this Board determined in  
7 2010, “current [Delta] flows are *insufficient* to protect public trust resources.” SWRCB-25 at p. 2  
8 (excerpted in PCFFA-4 at p. 1) (emphasis added). Because D-1641 allows reduced Delta flows  
9 that “are insufficient to support native Delta fishes,” it has failed to protect the Delta’s fish and  
10 wildlife. *Id.* at p. 5 (excerpted in PCFFA-4 at p. 4). That plan must therefore be updated to  
11 protect these beneficial uses as required by the Clean Water Act, 33 U.S.C. sections 1313(c)  
12 (triennial review), and 1341 (section 401 certification), and Water Code sections 13240 and  
13 13377.

14 The upshot? Unless and until all four of these fundamental gaps in the Delta’s required  
15 protection are rectified, there is no regulatory regime in place to provide an evidentiary basis for  
16 the Change Petition’s claim that compliance with D-1641 and maintenance of “no project”  
17 conditions will prevent harm to legal users of water. Because there are no updated and valid  
18 Delta water quality standards and plans in place, the petitioners’ assurances that the WaterFix’s  
19 claimed compliance with them satisfies Water Code sections 1701.2(d) and 1702 ring hollow.  
20 Accordingly, this Board must deny and dismiss the WaterFix Change Petition.

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24 <sup>1</sup> Ruling on Submitted Matter: Petitions for Writ of Mandate, Bifurcated Proceeding on Statutory  
25 Challenges filed May 18, 2016 (“Ruling”), in Delta Stewardship Council Cases (Judicial Council  
26 Coordination Proceeding No. 4758) at 26, setting aside the Delta Plan adopted by the Delta  
27 Stewardship Council in May, 2013 because it violates the Delta Reform Act, Water Code sections  
28 85001 et seq. PCFFA and IFR previously submitted this Ruling to this Board on July 12, 2016 as  
Exhibit 1 to their Motion to Disqualify Petitioners’ Witnesses and Exclude Their Testimony and  
Exhibits under 23 C.C.R., section 648.2, and official notice is respectfully requested again,  
consistent with Evidence Code section 451(a) (decisional law of this state must be noticed).

1           **IV. THE WATER QUALITY PROTECTIONS REQUIRED FOR LAWFUL**  
2           **EVALUATION OF THE WATERFIX PETITION ARE ABSENT.**

3           Petitioners’ testimony and exhibits are neither relevant nor reliable because they rest on  
4 the false premise that compliance with existing environmental standards will prevent harm to  
5 other legal users of the Delta’s water. *See, e.g.*, DWR-51 (Pierre testimony) at p. 12 (“[t]erms  
6 imposed through D-1641” “will not change”). As detailed below, the water quality protections  
7 required for lawful evaluation of the WaterFix Petition are either invalid, not yet adopted, or show  
8 that the WaterFix will harm rather than protect the Delta’s water flows and quality, and legal  
9 users who depend on them.

10           **A. THE 1995 BAY-DELTA PLAN HAS NOT BEEN UPDATED.**

11           The Water Quality Control Plan for the San Francisco Bay/San Joaquin-Sacramento Delta  
12 Estuary (WQCP) (Water Rights Decision 1641, D-1641) was adopted in 1995, and amended  
13 without substantive changes in 2006. “The State Water Board is in the process of a periodic  
14 update of the WQCP, which is occurring in phases.” (DWR-51 (Jennifer Pierre testimony) at p. 4  
15 fn. 4 (emphasis added). Indeed, as this Board recognized in its February 11, 2016, Ruling: “The  
16 appropriate Delta flow criteria will be more stringent than petitioners’ current obligations and  
17 may well be more stringent than petitioners’ preferred project.” *Id.* at 4. This Board further  
18 acknowledged “that the WaterFix, if approved, would be a significant component of Delta  
19 operations, and it would be preferable to have Phase 2 [of the Plan update] completed *prior to*  
20 acting on the change petition.” *Id.* at 4-5 (emphasis added).

21           Moreover, the Delta Reform Act mandates that any order by this Board approving a  
22 diversion point change “shall include appropriate Delta flow criteria and shall be informed by the  
23 analysis conducted pursuant to this section.” Water Code § 85086(c)(2). But contrary to this  
24 express mandate of the Delta Reform Act, this Board has failed to adopt appropriate Delta flow  
25 criteria before considering the Change Petition. This cart-before-the-horse error is highly  
26 prejudicial to all of the protestants. Because this Board must base its consideration of the Change  
27 Petition on “appropriate Delta flow criteria” rather than the other way around, the Change Petition  
28 must be denied at this time.

1           Because existing standards are known to be inadequate, petitioners’ speculative testimony  
2 that the WaterFix will comply with existing standards is not relevant. Comprehensive and  
3 adequate Bay-Delta water quality planning needs to take place before, not after, this Board may  
4 proceed with a hearing on the Change Petition.

5           **B.    THERE HAS BEEN NO COMPLIANCE WITH THE DELTA**  
6           **REFORM ACT.**

7           There is currently no valid Delta Plan in effect. On May 18, 2016, the Sacramento  
8 Superior Court issued its 73 page ruling in the seven coordinated Delta Stewardship Council  
9 Cases (Judicial Council Coordinated Proceeding No. 4758). In pertinent part, the Ruling ordered  
10 that:

11                   A peremptory writ shall issue from this Court to Respondent [the Delta  
12 Stewardship Council, or “DSC”], ordering Respondent to revise the  
Delta Plan and any applicable regulations to:

13                   Include quantified or otherwise measurable targets associated with  
14 achieving *reduced Delta reliance, reduced environmental harm* from  
15 invasive species, *restoring more natural flows*, and increased water  
supply reliability, in accordance with the Delta Reform Act.

16  
17 *Id.* at 26, 38. (emphasis added). This Board may and should take official notice of this Ruling  
18 under 23 C.C.R. section 648.2 because judicial notice would be proper (indeed mandatory) under  
19 Evidence Code sections 451(a), 452(a) and 453 as previously noted. The WaterFix’s compliance  
20 with the Delta Plan is pivotal, because that plan is designated as “the comprehensive, long-term  
21 management plan for the Delta as adopted by the [Delta Stewardship Council] in accordance with  
22 this division.” Water Code § 85059.

23           As the Ruling explains, Water Code section 85308(b) “provides that the Delta Plan shall  
24 ‘include quantified or otherwise measurable targets associated with achieving the objectives of  
25 the Delta Plan’” including a numeric or otherwise specific and identifiable standard. *Id.* at 8-9.  
26 Contrary to this mandate, “the Delta Plan fails to ‘include quantified or otherwise measurable  
27 targets associated with’ restoring more natural flows as required by the Delta Reform Act.” *Id.* at  
28 36. The Court held that Water Code section 85302(e)(4) “provides [that] [t]he following sub

1 goals and strategies for restoring a healthy ecosystem *shall* be included in the Delta Plan... (4)  
2 Restore Delta flows and channels to support a healthy estuary and other ecosystems.” *Id.* at 34  
3 (emphasis added). The Court reasoned that “simply recommending the BDCP’s completion does  
4 not promote any options” for better ways to achieve the Delta Reform Act’s goals. *Id.* at 37. The  
5 Court emphasized that the Delta Plan must be “legally enforceable.” *Id.* at 8-9.

6 On June 24, 2016, the Court issued a further Order in response to motions for clarification,  
7 adhering to and expanding upon its earlier Ruling, and explaining that “[s]pecifically, with regard  
8 to reduced Delta reliance, the Court found the Plan failed to include targets that would ensure  
9 reduced reliance, as required by the Delta Reform Act.”<sup>2</sup> The Court repeated its previous ruling  
10 that the Delta Plan must be revised “to include quantified or otherwise measurable targets  
11 associated with achieving reduced Delta reliance, . . . restoring more natural flows, and increased  
12 water supply reliability,” and emphasized that “[t]o be clear, the Delta Plan is invalid and must be  
13 set aside until proper revisions are completed.” *Id.*

14 As the Superior Court has repeatedly ruled, more stringent Delta flow criteria to “restor[e]  
15 more natural flows” and reduce dependence on the Delta for water supply are clearly necessary.  
16 The Delta Reform Act requires measures to “[r]estore Delta flows and channels to support a  
17 healthy estuary and other ecosystems.” Water Code § 85302(e)(4). The Act establishes State  
18 policy “to reduce reliance on the Delta in meeting California’s future water supply needs through  
19 a statewide strategy of investing in improved regional supplies, conservation, and water use  
20 efficiency.” Water Code § 85021. The primary purpose of this policy is to “[r]estore the Delta  
21 ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland  
22 ecosystem.” Water Code § 85020(c).

23 For these reasons, the status quo of a dying Delta under assault by unsustainable,  
24 excessive diversions does not satisfy the Delta Reform Act. Instead, reliance on the Delta by

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26 <sup>2</sup> PCFFA and IFR submitted this further Ruling to this Board on July 12, 2016 as Exhibit 2 to their  
27 Motion to Disqualify Petitioners’ Witnesses and Exclude Their Testimony and Exhibits, and  
28 hereby renew their request for official notice under 23 C.C.R. section 648.2 because judicial  
notice would be proper (indeed, mandatory) under Evidence Code sections 451(a), 452(c) and  
453.

1 consumptive users must be *reduced*, and more natural Delta flows must be *restored*.  
2 Consequently, petitioners’ testimony that the WaterFix will maintain existing conditions merely  
3 confirms that it will make the Delta’s plight worse. The law requires restoration of the Delta  
4 ecosystem, not continued degradation as is occurring under existing conditions. The petitioners’  
5 promise of “more of the same” requires denial and dismissal of their WaterFix Petition.

6 Like the Delta Stewardship Council, this Board will be sent back to the starting line for  
7 violating the law if it continues to consider the Change Petition without first adopting flow  
8 criteria sufficient to protect and *restore* public trust resources and to *reduce* exports as required by  
9 the Delta Reform Act, Water Code section 85086(c). In the absence of a valid Delta Plan, both  
10 the Delta Stewardship Council and this Board are powerless to make the required determination  
11 that the WaterFix is consistent with the statutorily-mandated Delta Plan. In the analogous context  
12 of the parallel requirement that local land use projects must be consistent with the applicable  
13 general plan, it has been settled law for over three decades that the absence of a valid general plan  
14 precludes any land use approval that requires a finding of general plan consistency.

15 *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184;  
16 *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806.

17 So too here, since there is no valid Delta Plan, neither this Board nor the Delta  
18 Stewardship Council can find that the WaterFix is consistent with that plan as required by Water  
19 Code section 85225. That section requires a written certification of consistency by both this  
20 Board and the Delta Stewardship Council before either may approve the WaterFix. Until that  
21 plan’s deficiencies noted by the Superior Court are rectified, this required certification of  
22 consistency cannot be made.

23 **C. THE WATERFIX/BDCP EIR/EIS IS PRELIMINARY AND**  
24 **INADEQUATE.**

25 It is axiomatic that this Board may not lawfully consider the WaterFix Petition unless it is  
26 accompanied by an adequate environmental impact report (“EIR”) as required by the California  
27 Environmental Quality Act (“CEQA”), Public Resources Code Section 21000 et seq. “The EIR’s  
28 function is to ensure that government officials who decide to build or approve a project do so with

1 a full understanding of the environmental consequences and, equally important, that the public is  
2 assured those consequences have been taken into account.” *Vineyard Area Citizens for*  
3 *Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449. Contrary to this  
4 mandate, petitioners have not prepared or approved a Final EIR/EIS for the WaterFix. The  
5 WaterFix’s RDEIR/SDEIS, including the Draft EIR/EIS that it modifies and incorporates, is  
6 merely a *preliminary* document. SWRCB-3. It does not identify a proposed project, nor does it  
7 address public concerns regarding the deficiencies in its analysis. *Id.* Because it is still an  
8 incomplete draft, its analysis and conclusions are subject to change. It has not been certified as  
9 complete or accurate by *any* decisionmaking body.

10 The RDEIR/SDEIS is also inadequate because it does not present a reasonable range of  
11 alternatives, as required by CEQA and the National Environmental Policy Act (“NEPA”), 42  
12 U.S.C. section 4321 et seq. Under CEQA, an EIR must consider a reasonable range of  
13 alternatives and “*should not approve* projects as proposed if there are feasible alternatives or  
14 feasible mitigation measures available which would substantially lessen the significant  
15 environmental effects of such projects.” *North Coast Rivers Alliance v. Kawamura* (2015) 243  
16 Cal.App.4th 647, 666 (emphasis added). Likewise under NEPA, federal agencies must consider a  
17 reasonable range of alternatives that would reduce a project’s environmental impacts, including  
18 reducing water diversions where, as here, they harm the Delta. *Pacific Coast Federation of*  
19 *Fishermen’s Associations v. U.S. Department of the Interior* (“PCFFA”), PCFFA-18 at p. 6, \_\_\_  
20 Fed. Appx. \_\_\_, 2016 WL 3974183\* 2, 3 (9th Cir. No. 14-15514, July 25, 2016 (not selected for  
21 publication)).

22 Contrary to both laws, the RDEIR/SDEIS fails to do so. Its range of alternatives is  
23 improperly and artificially curtailed by the petitioners’ project objectives, and fails to consider  
24 feasible alternatives that would reduce exports and restore natural flows. SWRCB-3 at Section 4.  
25 *Id.* Under the Ninth Circuit’s very recent ruling rejecting Reclamation’s refusal to consider  
26 reducing Delta exports to protect its fisheries, the Court ruled that Reclamation must “give full  
27 and meaningful consideration to the alternative of a reduction in maximum water quantities.”  
28 PCFFA-18 at 6; *PCFFA* \*2. Its failure to do so here is likewise “an abuse of discretion.” *Id.*

1           Instead of complying with CEQA and NEPA, petitioners’ RDEIR/SDEIS fails to study  
2 any alternative that would “give full and meaningful consideration to the alternative consistent  
3 with the Delta Reform Act, reduce diversions by the SWP and CVP – despite multiple comments  
4 requesting such an analysis. SWRCB-3 at Section 4. The Environmental Water Caucus prepared  
5 one such alternative, which was attached to the January 21, 2016, letter to this Board submitted by  
6 Friends of the River, *et al.*, but this alternative was dismissed from consideration. The  
7 petitioners’ summary rejection of this alternative violates both CEQA and NEPA. CEQA does  
8 not permit a lead agency to dismiss from consideration “any alternatives that feasibly might  
9 reduce the environmental impact of a project on the unanalyzed theory that such an alternative  
10 might not prove to be environmentally superior to the project.” *Habitat & Watershed Caretakers*  
11 *v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1305 (emphasis omitted). “The purpose of an  
12 EIR is to provide the facts and analysis that would support such a conclusion so that the decision  
13 maker can evaluate whether it is correct.” *Id.* Omission of this discussion “fail[s] to satisfy the  
14 informational purpose of CEQA.” *Id.*

15           CEQA requires an accurate description of the project in the context of the baseline  
16 environment. *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931,  
17 952-956. In the context of water diversion projects, an EIR must show how reservoir lake levels  
18 are correlated with downstream river flows, and explain the resulting impacts to “fisheries, river  
19 habitat, and recreational users.” *Id.* at 954-955. Similarly, a water project EIR must show  
20 precisely how “existing supplies can meet future demands for water” in the context of “minimum  
21 streamflow requirements,” since the latter “are designed in part to ensure the health of species in  
22 the river.” *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th  
23 859, 871. In particular, the cumulative impacts of the project on river flows and the dependent  
24 fisheries, together with other ongoing diversions, must be included in an accurate and  
25 comprehensive cumulative impacts analysis. *Id.* at 871-872.

1 Contrary to these requirements, the RDEIR/SDEIS fails to provide this critical  
2 information. EPA’s October 30, 2015 letter reviewing the RDEIR/SDEIS<sup>3</sup> gave the  
3 RDEIR/SDEIS a rating of “‘3’ (*Inadequate*).” *Id.* at p. 4. The EPA’s criticism that the  
4 RDEIR/SDEIS lacked essential information is consistent with this Board’s October 30, 2015,  
5 comment letter on the RDEIR/SDEIS, which stated on page 2 that “there is a large degree of  
6 uncertainty regarding the exact effects of the project due to a number of factors.” So even if this  
7 preliminary, draft document were instead a final one, it would still not provide a lawful basis for  
8 this Board’s review of the WaterFix Petition. *A fortiori*, because the RDEIR/SDEIS is a  
9 preliminary, incomplete *draft*, this Board *cannot* rely upon it for its decision in this proceeding.

10 Nor can this Board sidestep its CEQA responsibilities to base its review on an adequate,  
11 final EIR on the grounds it is only acting as a “responsible agency.” The Board has taken the  
12 position that because it is only a “responsible agency” rather than the “lead agency” under CEQA,  
13 it need not consider whether the RDEIR/SEIS – even assuming it were a final document – is  
14 adequate. The Board stated in its WaterFix Notice issued January 15, 2016 that

15 As a general rule, a responsible agency must assume that the CEQA document  
16 prepared by the lead agency is adequate for use by the responsible agency. (Cal.  
17 Code of Regs., tit. 14, § 15096, subd. (e).) *Accordingly, the adequacy of DWR’s*  
18 *EIR for the WaterFix Project for purposes of CEQA compliance is not a key*  
*hearing issue, and the parties should not submit evidence or argument on this*  
*issue.*

19 *Id.* at p. 2. This position appears to overlook several important duties owed by responsible  
20 agencies under CEQA that impact these hearing procedures. As the Board acknowledges, it must  
21 examine “the potential effects of the water right change petition on other legal users of water.”  
22 Those effects necessarily include the *environmental* impacts of the WaterFix. And, those impacts  
23 must be understood before the Board can make an informed determination of the availability of  
24 water for the project, and the terms and conditions governing its operation, including those  
25 needed to protect the environment, that should be imposed should the project be approved. *Id.*

26 \_\_\_\_\_  
27 <sup>3</sup> The October 30, 2015 EPA letter was attached to the November 24, 2015, letter to this Board  
28 submitted by protestants California Sportfishing Protection Alliance, Environmental Water  
Caucus, Friends of the River, and Restore the Delta. Pursuant to 23 C.C.R. section 648.2 and  
Evidence Code section 452(c), protestants hereby request official notice of the contents.

1 The Board is the principal responsible agency for the project and cannot make these  
2 essential determinations before CEQA review is complete. Where, as here, the Board acts as a  
3 “responsible agency” under CEQA, Public Resources Code (“PRC”) section 21069 and CEQA  
4 Guidelines [14 California Code of Regulations (“CCR”)] section 15096, the Board “must  
5 independently make its own findings and conclusions” in writing and “accompanied by a  
6 supporting statement of facts.” *Resource Defense Fund v. Local Agency Formation Commission*  
7 (1987) 191 Cal.App.3d 886, 896 (citing CEQA Guidelines §§ 15091 and 15096).

8 Thus, contrary to this Board’s disavowal of any duty to address the adequacy of the  
9 WaterFix EIR, it must fully participate in the environmental review process, *independently assess*  
10 *the adequacy of the final environmental impact report*, “make the findings required by [CEQA  
11 Guidelines] Section 15091 for each significant effect of the project and . . . make the findings in  
12 Section 15093 [i.e., a statement of overriding considerations] if necessary.” CEQA Guidelines §  
13 15096(h).

14 These are not merely procedural guidelines. They also impose substantive duties. CEQA  
15 directs that “no public agency shall approve or carry out a project for which an EIR has been  
16 certified which identifies one or more significant environmental effects of the project unless the  
17 public agency makes one or more written findings for each of those significant effects,  
18 accompanied by a brief explanation of the rationale for each finding.” CEQA Guidelines §  
19 15091(a). This prohibition applies fully to responsible agencies such as the Board. *RiverWatch v.*  
20 *Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1207.

21 CEQA’s findings requirement enforces its mandate “that public agencies should not  
22 approve projects as proposed if there are feasible alternatives or feasible mitigation measures  
23 available which would substantially lessen the significant environmental effects of such projects.”  
24 PRC § 21002. Where a project poses significant effects on the environment, “[e]ach public  
25 agency shall mitigate or avoid the significant effects on the environment of projects that it carries  
26 out or approves whenever it is feasible to do so.” PRC §§ 21002.1(b), 21081; CEQA Guidelines  
27 §§ 15091, 15093. To assure that agencies fully document their efforts to identify and mitigate a  
28 project’s potentially significant effects on the environment, CEQA directs:

1  
2 21081. No approval if significant effect unless findings

3 Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall  
4 approve or carry out a project for which an environmental impact report has been certified  
5 which identifies one or more significant effects on the environment that would occur if the  
6 project is approved or carried out unless both of the following occur:

7 (a) The public agency makes one or more of the following findings with respect to each  
8 significant effect:

9 (1) Changes or alterations have been required in, or incorporated into, the project  
10 which mitigate or avoid the significant effects on the environment,

11 (2) Those changes or alterations are within the responsibility and jurisdiction of  
12 another public agency and have been, or can and should be, adopted by that  
13 other agency,

14 (3) Specific economic, legal, social, technological, or other considerations,  
15 including consideration for the provision of employment opportunities for  
16 highly trained workers, make infeasible the mitigation measures or alternatives  
17 identified in the environmental impact report.

18 (b) With respect to significant effects which were subject to a finding under paragraph  
19 (3) of subdivision (a), the public agency finds that specific overriding economic,  
20 legal, social, technological, or other benefits of the project outweigh the significant  
21 effects on the environment.

22 PRC § 21081. In making these required findings, “the public agency shall base its findings on  
23 substantial evidence in the record.” PRC § 21081.5.

24 These rules are fully applicable to responsible agencies such as the Board in its WaterFix-  
25 related decisionmaking. “Before approving or carrying out part of a project under CEQA, a  
26 responsible agency . . . ‘must . . . issue its own findings regarding the feasibility of relevant  
27 mitigation measures or project alternatives that can substantially lessen or avoid significant  
28 environmental effects. Furthermore, where necessary, a responsible agency must issue its own  
statement of overriding considerations. [Citations.]” *RiverWatch v. Olivenhain Municipal Water  
Dist., supra*, 170 Cal.App.4th at 1207 (quoting Remy, et al., Guide to CEQA (11th ed. 2007), ch.  
III. B. 2., p. 53 and PRC § 21081). “If the responsible agency finds that any alternatives or  
mitigation measures within its powers are feasible and would substantially lessen or avoid a  
significant effect of the project, the responsible agency may not approve the project as proposed,

1 but must adopt the feasible mitigation measures or alternatives.” *Id.* at 1202 (quoting 1 Kostka &  
2 Zischke, Practice Under the California Environmental Quality Act (Cont. Ed. Bar 2d ed. 2008) §  
3 3.22, p. 126); CEQA Guidelines § 15096(g)(2). “[A]s with a lead agency . . . , ‘[b]efore  
4 approving the project, the [responsible] agency . . . must . . . find either that the project’s  
5 significant environmental effects identified in the EIR have been avoided or mitigated, or that  
6 unmitigated effects are outweighed by the project’s benefits.’” *Id.* at 1207 (quoting *Laurel*  
7 *Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 at 391).

8 Thus, the Board’s position that “a responsible agency must assume that the CEQA  
9 document prepared by the lead agency is adequate” is in error, and “the adequacy of DWR’s EIR  
10 for the WaterFix Project” is a “key hearing issue” that should be addressed prior to the Water  
11 Board’s review of the potential effects of the WaterFix on legal users of water. And, as explained  
12 below, the Board must determine the adequacy of the environmental impact report/statement prior  
13 to any Clean Water Act section 401 certification.

14 As PCFFA and IFR noted in Attachment 1 to their Protest submitted to the Board on  
15 January 5, 2016, and incorporated herein by reference, the Water Board has a duty under the  
16 federal Clean Water Act (“CWA”) to (1) designate beneficial uses (33 U.S.C. § 1313(c)(2)(A); 40  
17 C.F.R. § 131.6(a)) of the Sacramento/San Joaquin River Delta and San Francisco Bay (“Bay-  
18 Delta”), (2) establish water quality criteria (33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.6(c))  
19 sufficient to protect those uses, and (3) adopt an anti-degradation policy sufficient to identify and  
20 prevent degradation of the water quality mandated for a particular water body (40 C.F.R. §§  
21 131.6(d), 131.12(a)). The Board must submit its water quality criteria to EPA for review to  
22 confirm their adequacy for protection of designated uses, and must also review the adequacy of its  
23 water quality objectives (in federal parlance, “standards”) to assure that all designated uses are  
24 protected. 33 U.S.C. § 1313(1); 40 C.F.R. § 131.20. The Board has failed to complete this  
25 required review in a timely manner.

26 The current Bay-Delta Plan – D-1641 – was adopted over two decades ago. It does not  
27 protect fish, wildlife, and other public trust uses of the Bay-Delta. As a result of the Board’s past  
28 and continuing authorization of excessive diversions of freshwater flows, the Bay-Delta’s

1 ecological system is, as explained previously, collapsing. This imminent ecological crisis must be  
2 addressed *before* this Board may take any action on this project. In addition, the Board has  
3 neglected its duties under the California Constitution to avoid unreasonable uses of water (Art. 10  
4 § 2), and under the California Water Code to (1) take into account the amount of water required  
5 for fish, wildlife, and recreation (Water Code §§ 1243, 1243.5), (2) reduce reliance on the Delta  
6 (Water Code §§ 85020(c), 85021), and (3) fully consider fish and wildlife and other public trust  
7 uses that must be protected by a water quality control plan (Water Code §§ 1257, 1258).

8 In summary, designation of beneficial uses, water quality criteria, unreasonable uses of  
9 water, amounts need for fish, wildlife, and recreation, updating of the Bay Delta Water Quality  
10 Control Plan and other applicable water quality control plans to protect beneficial uses, and the  
11 neglected state and federal triennial reviews of the Bay-Delta Plan under CWA section 303(c) are  
12 all *key hearing issues* that must be addressed *prior* to any examination of the potential effects of  
13 the WaterFix’s water right change petition on legal users of water and prior to a Clean Water Act  
14 401 certification for the project.

15 As PCFFA and IFR have pointed out above and in their January 22, 2016 letter to this  
16 Board, to date the Board has neglected to take into account fundamental constitutional, statutory,  
17 and regulatory requirements. These issues are, indeed, the principal hearing issues that must be  
18 addressed prior to any consideration and determination of (1) the WaterFix’s potential injury to  
19 existing water rights, (2) the creation of new water rights, or (3) the required Clean Water Act  
20 section 401 certification. As explained above, NEPA, CEQA, ESA, the California Endangered  
21 Species Act (“CESA”) (Fish and Game Code section 2050 et seq.), the California Constitution,  
22 and relevant provisions of the Water Code all require protection for fish, wildlife, recreation and  
23 other public trust uses, and these protections must be determined after – not before – informed  
24 environmental review. Because that required review has not occurred, this Board must deny and  
25 dismiss the WaterFix Petition.

26 In conclusion, the starting point for determining whether there will be negative effects to  
27 legal users of water should be an adequate Final EIR/EIS with a robust analysis of alternatives,  
28 including an alternative that reduces water exports and restores natural flows in the Delta.

1 Instead, petitioners have presented testimony and exhibits that have never been examined in any  
2 final and adequate analysis of environmental impacts under California law. Rather than comply  
3 with CEQA, petitioners insist that this Board unlawfully proceed on the basis of petitioners' own  
4 self-serving testimony and exhibits. Their attempted evasion of CEQA's requirements must not  
5 be rewarded by allowing their premature Change Petition to proceed to hearing. Accordingly,  
6 their testimony and exhibits must, along with their Change Petition, be rejected.

7 **D. THE BIOLOGICAL OPINIONS REQUIRED UNDER THE ENDANGERED**  
8 **SPECIES ACT HAVE NOT BEEN PREPARED.**

9 As noted above, the Delta's threatened and endangered species, including winter- and  
10 spring-run chinook salmon, Central Valley steelhead, green sturgeon and the Delta smelt, are in  
11 sharp decline due to excessive diversions of fresh water flows from the Delta. The WaterFix does  
12 not propose to reduce these diversions. Instead, it proposes to maintain – and most likely,  
13 increase – this unsustainable level of excessive exports. Consequently, it is undisputed that the  
14 WaterFix project requires preparation of Biological Opinions by the NMFS (which has  
15 jurisdiction over anadromous fisheries such salmon and steelhead) and USFWS (which has  
16 jurisdiction over “inland” fisheries such as the Delta smelt). 16 U.S.C. § 1536(b)(3), (4); 50  
17 C.F.R. §§ 402.12-402.14.

18 The governing ESA regulations specify that “[e]ach Federal agency shall review its  
19 actions *at the earliest possible time* to determine whether any action may affect listed species or  
20 critical habitat. If such a determination is made, formal consultation is required . . .” *Karuk*  
21 *Tribe of California v. U.S. Forest Service*, 681 F.3d 1006, 1020 (9th Cir. 2012) (*en banc*)  
22 (emphasis added), *cert. denied*, 133 S.Ct. 1579 (2013). This is not an idle exercise. On August 2,  
23 2016, Reclamation issued its Biological Assessment (dated July 2016) for the WaterFix and  
24 requested formal consultation with both NMFS and USFWS because Reclamation has determined  
25 that the WaterFix is “likely to adversely affect” several endangered and threatened fish species  
26 and their designated critical habitats. SWRCB-104 at Chapter 7, Table 7-1, p. 7-36.

27 To proceed with further hearings on the WaterFix in the face of Reclamation's admission  
28 that Biological Opinions are *required* under ESA ignores the purpose of this required

1 consultation. It also contravenes this Board’s duty under CEQA (and Reclamation’s parallel duty  
2 under NEPA) to consider the WaterFix’s admittedly adverse impacts on threatened and  
3 endangered species as an integral part of the environmental reviews required under CEQA and  
4 NEPA. *Vineyard Area Citizens, supra*, 40 Cal.4th at 449 (overturning Sacramento County’s  
5 failure to address in its EIR the foreseeable “loss of Cosumnes River stream flows” “[e]specially  
6 given the sensitivity and listed status of the resident salmon species”); *Friends of the Eel River,*  
7 *supra*, 108 Cal.App.4th at 869-872 (setting aside an EIR that failed to adequately address a water  
8 project’s cumulative effects on the Russian River and its sensitive fisheries); 40 C.F.R. §  
9 1502.25(a) (“To the fullest extent possible, agencies shall prepare draft environmental impact  
10 statements *concurrently with and integrated with* environmental impact analyses and related  
11 surveys and studies required by the . . . Endangered Species Act . . . .”)

12 The Board’s seemingly cavalier approach to enforcing the petitioners’ compliance with  
13 the clear mandates of CEQA, NEPA and the ESA is puzzling, given the extraordinary resources  
14 whose survival hangs in the balance. Extinction is forever. This Board has the highest possible  
15 duty under these laws to assure that none of the species are extirpated because the strict  
16 requirements of CEQA, NEPA and the ESA were neglected.

17 **V. THIS BOARD SHOULD DISQUALIFY PETITIONERS’ WITNESSES**  
18 **AND EXCLUDE THEIR TESTIMONY AND EXHIBITS.**

19 As noted, the legal predicates for petitioners’ testimony and exhibits are absent, since the  
20 1995 Bay-Delta Plan is obsolete, the 2013 Delta Plan has been invalidated by the court, there is  
21 no CEQA-required final EIR/EIS for the WaterFix Project, and there is no ESA-required  
22 Biological Opinion. Absent valid, updated and adequate environmental standards against which  
23 to measure the impacts of the WaterFix, there is no basis for petitioners’ witnesses’ claims that  
24 the WaterFix will not harm legal users of water because it will conform to applicable  
25 environmental standards. Accordingly, petitioners have failed to provide evidence that identifies  
26 the specific impacts of the WaterFix on legal users of water. As shown below, despite this  
27 Board’s clear instruction that petitioners must provide this specific information, they have failed  
28

1 to do so. Accordingly, their witnesses, testimony and exhibits should be excluded, and their  
2 Petition must be denied and dismissed.

3 As PCFFA and IFR noted in their previous objections to petitioners' evidence, "even in  
4 [administrative] proceedings, with the relaxed standards of admissibility, the evidence must be  
5 relevant and reliable." *Aengst v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d  
6 275, 283. In recognition of this fundamental principle of administrative law, this Board has  
7 repeatedly instructed petitioners to make sure that their witnesses and evidence provided  
8 sufficient specificity based on fact rather than assumptions to demonstrate that other legal users of  
9 water would not be harmed by the Project. The Board's October 30, 2015 Notice of Petition, for  
10 example, required that all "[e]xhibits based on technical studies or models shall be accompanied  
11 by sufficient information to clearly identify and explain the logic, assumptions, development, and  
12 operation of the studies or models." *Id.* at 33. Further, the Board warned that "[e]xhibits that rely  
13 on unpublished technical documents *will be excluded* unless the unpublished technical documents  
14 are admitted as exhibits." *Id.* at 34, emphasis added.

15 Petitioners failed to comply with this direction. Consequently, in its February 11, 2016  
16 Pre-Hearing Conference Ruling, this Board warned petitioners that "the available information" –  
17 upon which petitioners had based their petition and which included many of the exhibits  
18 petitioners have now submitted as proposed evidence –

19 lack[ed] clarity in several ways, including whether operation criteria are intended  
20 to constrain project operations or are identified for modeling purposes only, areas  
21 where a specific operational component or mitigation measure is not yet chosen or  
22 identified, operational parameters that are not defined and deferred to an adaptive  
management process, and lack of clarity concerning some mitigation measures.

23 *Id.* at 6. Because of this lack of clarity, the Board directed petitioners to provide "the information  
24 required by section 794 of our regulations in a succinct and easily identifiable format. The other  
25 parties will then be able to more accurately assess whether the proposed changes would cause  
26 injury." *Id.* at 7. Among other information deemed vital to a petition for change in point of  
27 diversion, section 794 requires "the proposed diversion, release and return flow schedules," "any  
28

1 effects of the proposed change(s) on fish, wildlife, and other instream beneficial uses,” and  
2 “identification in quantitative terms of any projected change in water quantity, water quality,  
3 timing of diversion or use, consumptive use of the water, reduction in return flows, or reduction in  
4 the availability of water within the streams affected by the proposed change(s).” 23 C.C.R. §  
5 794(a)(6), (8), (9).

6         Petitioners now admit that they cannot provide the information required by the Board with  
7 particularity. “Since the BiOp has not been issued,” petitioners explain, “and DWR and  
8 Reclamation do not know the initial operational criteria, the analytical framework presented for  
9 Part 1 is a boundary analysis.” DWR 51 at p. 10, lines 8-10. While this “boundary analysis”  
10 attempts to “provide a broad range of operational criteria,” the conclusions stated in the written  
11 testimony offered by petitioners are not supported by the necessary data or analysis and do not  
12 contain the specificity necessary to satisfy the informational requirements of the Board's October  
13 30 Notice, February 11 Ruling, or regulations. DWR 51 at p. 10, line 10.

14         All testimony by petitioners’ witnesses on project modeling must be excluded because it is  
15 not based on principles or procedures that have gained general acceptance in their field. In 1976  
16 the California Supreme Court approved the venerable rule of admissibility for new scientific  
17 methodologies that the District of Columbia Circuit Court of Appeals had adopted in 1923.  
18 *People v. Kelly* (1976) 17 Cal.3d 24, 30 (approving and applying *Frye v. United States*, 293 F.  
19 1013, 1014 (D.C. Cir. 1923); *People v. Leahy* (1974) 8 Cal.4<sup>th</sup> 587, 594 (same). “Under the  
20 *Kelly-Frye* Rule, evidence based on a new scientific method of proof is admissible only upon a  
21 showing that the procedure has been generally accepted as reliable in the scientific community in  
22 which it was developed.” *In re Amber B.* (1987) 191 Cal.App.3d 682, 686. Petitioners’ proffered  
23 modeling evidence fails to meet this fundamental standard of general acceptance by the relevant  
24 scientific community. As shown in the accompanying testimony of Deirdre Des Jardins, it fails to  
25 address key factors that predict foreseeable droughts, sea level rise and other consequences of  
26 global warming and consequent climate change. *Id.* at pp. 3-15. Additionally, as noted above the  
27 petitioners’ modeling is erroneously premised on the false assumption that compliance with  
28

1 existing environmental standards will assure the WaterFix will harm no legal users of water.<sup>4</sup> To  
2 the contrary, since the primary environmental standards governing management of the Delta are  
3 either obsolete, have not yet been adopted, or have been deemed inadequate, petitioners' premise  
4 is a logical fallacy.

5 The modeling results relied upon by petitioners' witnesses do not meet the *Kelly* rule for  
6 the additional reason that they have failed to provide a proper foundation in actual data and  
7 understandable analysis to "provide a reasonable basis for the particular opinion offered."  
8 *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564. Under Evidence Code section 803,  
9 this Board "shall . . . exclude" opinion testimony in the form of an opinion that is based in whole  
10 or in significant part on matter that is not a proper basis for such an opinion."

11 This Board is well aware of the importance of providing adequate documentation of model  
12 assumptions, validation through testing, and adjustment by calibration. In 2012 this Board  
13 convened its own scientific panel to provide specific recommendations as to the requirements for  
14 assuring that hydrologic models are accurate and reliable. Neither of the models on which  
15 petitioners rely – CalSim II and DSM2 – has ever been validated for use by any external and  
16 disinterested experts. The absence of this required validation requires exclusion of petitioners'  
17 testimony based upon these models. *Seering v. Department of Social Services* (1987) 194  
18 Cal.App.3d 298, 310-311. Despite PCFFA's and IFR's repeated objections on this ground,  
19 petitioners have never addressed this fatal deficiency.

20 Yet this defect strikes at the heart of the entire basis for petitioners' claim that the  
21 WaterFix will not harm legal users of water. Numerous independent experts familiar with these  
22 models have questioned their validity. According to one review,

23 Better quality control is needed both for the model and its current version and the  
24 input data. Procedures for model calibration and verification are also needed.  
25 Currently many users are not sure of the accuracy of the results. A sensitivity and  
uncertainty prediction capability and analysis is needed.

26 \_\_\_\_\_  
27 <sup>4</sup> Worse – as PCFFA and IFR have shown through cross-examination of petitioners' witnesses –  
28 petitioners' modeling ignores the hundreds of days that they have requested and received this  
Board's approval of Temporary Urgency Change Petitions that allow deviation from even the  
weak and inadequate protections otherwise provided by D-1641. *See, e.g.,* PCFFA-12.

1 PCFFA-20 (California Bay Delta Science Program, *A Strategic Review of CalSim II and its Use*  
2 *for Water Planning, Management, and Operations in Central California* (Dec. 4, 2003) (“2003  
3 Peer Review”) at p. 8. The lack of acceptance of CalSim II has been persistent, as a subsequent  
4 peer review found that

5 CalSim II work fails to adequately report technical results that would give  
6 knowledgeable readers some sense of the quality, accuracy, sensitivity, or  
7 uncertainty present in the results. This issue was prominent in the previous CalSim  
8 review panel report.

9 PCFFA-79 (CALFED Science Program, *San Joaquin River Valley CalSim II Model Review*, (Jan.  
10 12, 2006) (“2006 Peer Review”) at p. 10. FWS also criticized petitioners’ modeling and had to  
11 develop its own alternative because it felt that CalSim II was *unusable*:

12 The inaccuracies in CALSIM lead us to use actual data to develop an empirical baseline  
13 . . . . We calculated monthly or multiple month averages or medians based on  
14 these daily hydrology data sets. The historical time series are intended to show  
15 where changes in water project operations have caused or contributed to changed  
16 Delta hydrology and to serve as an empirical baseline of SWP and CVP operations  
17 for comparison to proposed futures modeled using CALSIM II.

18 SWRCB-87 (2008 Fish and Wildlife Service Formal Endangered Species Act Consultation on the  
19 Proposed Coordinated Operations of the Central Valley Project (CVP) and State Water Project  
20 (SWP) at p. 205. FWS also thereby demonstrated that use of actual data for an empirical baseline  
21 was not only desirable, but also possible, further illustrating petitioners’ failure to use the best  
22 available science.

23 CalSim II has never been calibrated, in direct defiance of recommendations by qualified  
24 and disinterested experts who served on the 2003 and 2006 peer review panels, quoted above.  
25 Moreover, this lack of calibration is in direct contradiction to petitioners’ own responses to those  
26 peer reviews. PCFFA-80. (*Peer Review Response: A Report by DWR/Reclamation in Reply to*  
27 *the Peer Review of the CalSim-II Model Sponsored by the CALFED Science Program in*  
28 *December 2003*) (Aug. 2004) at p. 19.)

29 The 2006 Peer Review panel also recommended documentation of model assumptions and  
30 error analyses. Under “Uncertainty in Model Results,” the reviewers noted that “[c]urrently no

1 general guidance is available to indicate whether differences of 1 taf [thousand acre feet], 50 taf,  
2 100 taf, or 500 taf are significant enough to rise above the level of error and noise inherent in the  
3 model.” PCFFA-79, p. 6. As a result, the reviewers recommended, “[a]t a minimum, error  
4 analyses should be conducted, combining a sensitivity analysis of critical model results to some of  
5 the largest and least well supported model assumptions with an assessment of the likely range of  
6 error in these major model parameters and assumptions.” *Id.* While the 2007 Peer Review  
7 Response (DWR-507) attempts to do the mandated error analyses for the San Joaquin River  
8 component, the analyses were never externally reviewed. Other components of the model lack  
9 any detailed or meaningful error analysis. Without adequate error analysis, general acceptance by  
10 the scientific community is not possible, and petitioners’ modeling is not admissible evidence in  
11 an adjudicative hearing before the Board.

12         Petitioners have also failed to demonstrate that their models are based on “best available  
13 science.” A model is only as good as the data it utilizes, and petitioners have failed to  
14 demonstrate the accuracy and validity of the data on which their models rely. Supporting  
15 evidence should have been submitted with the Petition, so protestants would be able to review it  
16 in a timely manner. If modeling is not in evidence, protestants are deprived of their due process  
17 right to question petitioners’ witnesses about that modeling. “[I]n civil proceedings a party has a  
18 due process right under the Fifth and Fourteenth Amendments to the Federal Constitution to  
19 cross-examine and confront witnesses.” *Seering, supra*, 194 Cal.App.3d at 304, quoting *In re*  
20 *Mary S.* (1986) 186 Cal.App.3d 414, 419. “[In] a civil proceeding the constitutional right  
21 involves general notions of procedural due process.” *Id.* Because petitioners’ testimony based  
22 on their modeling fails to identify the underlying data as necessary to permit petitioners’ informed  
23 cross-examination, both the model and the testimony based thereon are objectionable on due  
24 process grounds. *Id.* Moreover, since the underlying data is not in evidence, such testimony is  
25 objectionable for the additional reason that it assumes facts not in evidence. *Dee v. PCS Property*  
26 *Management, Inc.* (2009) 174 Cal.App.4th 390, 404 (an opinion based on assumed facts, without  
27 adequate foundation for concluding that those facts exist, is unreliable and therefore should be  
28 excluded).

1 Finally, petitioners’ failure to disclose the basis for their preemptive exclusion of  
2 environmentally more protective alternatives (such as alternatives that would reduce exports and  
3 restore natural flows as required by the Delta Reform Act) is objectionable. For example,  
4 Appendix 3I of the Draft Bay Delta Conservation Plan (SWRCB-4) states that certain alternatives  
5 for flow criteria were eliminated from consideration by petitioners during preliminary modeling,  
6 with the Board’s agreement. This premature elimination of alternatives from consideration by the  
7 public – let alone the parties to this proceeding – impermissibly sidesteps the hearing process and  
8 protestants’ due process right to cross-examine petitioners’ witnesses as to the basis for their  
9 testimony.

10 In summary, petitioners’ witnesses have failed to demonstrate that the modeling on which  
11 they rely is “the sort of evidence on which responsible persons are accustomed to rely in the  
12 conduct of serious affairs.” Government Code § 11513(c). Petitioners have failed to provide a  
13 sufficient foundation for their modeling to demonstrate its reliability and accuracy. And, most  
14 importantly, petitioners have failed to demonstrate that the methodology employed in their  
15 modeling is generally accepted by the relevant scientific community as required under the *Kelly*  
16 standard. Accordingly, all of petitioners’ testimony and exhibits that are based on the CalSim II  
17 and DSM2 models must be excluded, and petitioners’ Change Petition must be denied and  
18 dismissed.

## 19 VI. CONCLUSION

20 For the foregoing reasons, petitioners have failed to “demonstrate a reasonable likelihood  
21 that the proposed change will not injure any other legal user of water.” Water Code § 1701.2(d).  
22 Their Change Petition is premature because it precedes, rather than follows, compliance with  
23 CEQA, NEPA, ESA, the Delta Reform Act, the Water Code and the Clean Water Act. And, all of  
24 petitioners’ proffered witnesses, testimony and exhibits are objectionable because the modeling  
25 on which they are premised is based on false and undisclosed assumptions, inaccurate,

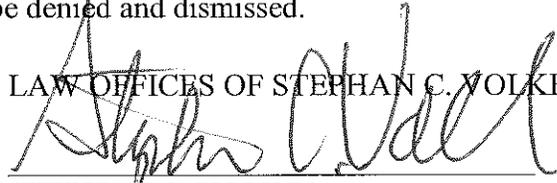
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1 inconsistent and unreliable. Accordingly, all of petitioners' evidence should be excluded, and  
2 petitioners' Change Petition should be denied and dismissed.

3 Dated: September 2, 2016

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PACIFIC COAST FEDERATION OF FISHERMEN'S  
ASSOCIATIONS and INSTITUTE FOR FISHERIES  
RESOURCES

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