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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 OBJECTION TO LATE FILINGS BY THE
20 PROTESTANTS AND MOTION FOR
21 CLARIFICATION OF SEPTEMBER 27,
22 2016 HEARING RULINGS

23 Deirdre Des Jardins, Principal at California Water Research (“California Water
24 Research”) hereby moves that the Hearing Officers clarify the Hearing Ruling of September 27,
25 2016, which potentially allows the Department of Water Resources (“DWR”) and the U.S.
26 Bureau of Reclamation (“USBR”) to add exhibits to their cases in chief months after the
27 deadlines set in the Hearing Rulings of April 25, 2016, and June 10, 2016.

28 The ruling also sets a deadline for protestants to respond to late submitted objections
to almost all testimony by almost all protestants, and to arguments on scope that were raised
seven months after the noticed consideration of scope in the January 28, 2016 pre-hearing
conference, without explicitly providing time for protestants to respond to the proposed changes
in Hearing procedures to allow consideration to the late objections and late arguments on scope.
As argued below, the October 30, 2015 Hearing notice has very clear requirements for parties to

1 notice any proposed exceptions to the Hearing procedures. The only exception that has been
2 noticed is an exception to deadlines for filing objections, and that was noticed on September 28,
3 2016. California Water Research appreciates that the Hearing Officers are trying to resolve
4 issues of scope in advance of Part 1B of the hearing starting on October 20, 2016, but
5 respectfully requests that the Hearing Officers ensure that there is explicit consideration of the
6 proposed changes to the Hearing schedule and Hearing deadlines, and that parties are explicitly
7 given a chance to respond to the proposed changes to the Hearing schedule and Hearing
8 deadlines. For this reason, California Water Research moves that the Hearing Officers clarify
9 the deadlines set in the September 28, 2016 Hearing ruling.

10 Filing, California Water Research notes that the Hearing Officers had previously
11 ruled on August 5, 2016 that no findings on reliability of Petitioner's modeling would be made
12 before filing of closing briefs. However, the schedule for consideration of some objections to
13 Petitioners' modeling evidence has changed, based on California Water Research's September
14 21, 2016 motion. As detailed below, California Water Research moves that the Hearing
15 Officers also reconsider the August 5, 2016 ruling, based on the changed schedule.

16 **1. Exceptions to Deadlines to File Exhibits and Exhibit Lists**

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18 Page 15 of the October 30, 2016 Hearing Notice set a deadline of March 1, 2016
19 for submission of exhibits, which was amended by the decisions in the Hearing rulings of
20 February 11, 2016, March 4, 2016, April 25, 2016, and June 10, 2016. Page 15 of the October
21 30, 2016 Hearing Notice also states,

22 All documents, including Notices of Intent to Appear, protests against the Petition, written
23 testimony, and other exhibits submitted to the State Water Board should be submitted in
24 accordance with the direction provided in Enclosure D "Information Concerning Appearance at
the California WaterFix Hearing." (p. 15)

25 Enclosure D of the Hearing Notice also states on page 33:

1 The following procedural requirements will apply and will be strictly enforced:

2 1. HEARING PROCEDURES GENERALLY (...)

3 Parties must file any requests for exceptions to procedural requirements in writing with
4 the State Water Board and must serve such requests on the other parties. To provide time
5 for parties to respond, the hearing officers will rule on procedural requests filed in writing
6 no sooner than fifteen days after receiving the request, unless an earlier ruling is
7 necessary to avoid disrupting the hearing.

8 California Water Research commends the Hearing Officer on the oral ruling in the
9 hearing on September 27, 2016, requiring DWR and USBR to file written notices of their
10 proposed revisions to exhibit lists. However, based on Enclosure D of the hearing notice,
11 parties should also be given fifteen days to respond to the proposed exception to the Hearing
12 deadlines.

13 California Water Research also hereby objects to any exception to the April 25,
14 2016 and June 10, 2016 deadlines for Petitioners to file exhibit lists and exhibits for Part 1A, on
15 the grounds that Petitioners did not file and serve a request for an exception to these deadlines,
16 per Provision 1 of Enclosure D of the October 30, 2016 Hearing Notice, prior to submitting the
17 additional exhibits. These kind of surprise tactics are creating significant issues in the hearing.

18 The proposed exceptions to the deadline are not minor. DWR filed a revised
19 exhibit list which included many gigabytes of modeling and modeling data which DWR had
20 repeatedly stated was NOT included in their exhibits, and had also argued did NOT require time
21 for protestants to analyze, based on the assertion that it was not being submitted as an exhibit.
22 USBR filed a spreadsheet with more new exhibits at 3:50 pm on September 28, 2016, which was
23 not even in conformance with the 12:00 pm, September 28, 2016 deadline set by the Hearing
24 Officers for submission of revised exhibit lists. USBR's revised exhibit list includes the original
25 petition filed with the State Water Resources Control Board.

26 The issue with USBR adding the original petition with the State Water Resources
27 Control Board is that DWR and USBR previously implicitly requested an exception to the

1 requirement that information in support of their Petition be provided with the Petition. DWR
2 and USBR announced on March 10, 2016, that the foundation for their case in chief was the
3 modeling for the Biological Assessment. There was no prior notice to the parties of the
4 requested exception.

5 The cumulative effect of these implicitly requested exceptions is an ever-shifting
6 foundation for the Petitioners' case in chief, which has resulted in significant uncertainty and
7 burden on the protestants. Due process and a fair hearing under the California Code of Civil
8 Procedure § 1094.5 requires that parties be given adequate notice of proposed exceptions to
9 Hearing deadlines and statutory and regulatory deadlines, and have a chance to respond.

10 **1. Exceptions to Deadline to File Objections to Testimony**

11
12 DWR has also proposed a second exception to hearing deadlines. DWR submitted
13 objections to testimony by almost every witness for almost every protestant on September 21,
14 2016. Because of this over-reach, the objections were received by the Board after the deadline
15 set in the Hearing Officer's September 9, 2016 ruling. That ruling stated in part:

16 The new due date for receipt of any written procedural/evidentiary objections from
17 parties to the hearing concerning Part 1B parties' cases in chief is now 12:00 noon,
18 September 21, 2016.

19 The Co-Hearing Officer has also confirmed that the deadline applies only to any motions
20 to disqualify witnesses or to exclude a witness's testimony, in whole or in part.

(p. 2 of pdf)

21 DWR made an oral argument in the hearing on September 27, 2016 that internal
22 time stamps on portable document format ("pdf") files is sufficient to meet Hearing deadlines,
23 and served the argument for the exception to Hearing procedures parties on September 28, 2016.
24 Since the argument for an exception to the Hearing procedures was only noticed to parties on
25 September 28, 2016, California Water Research hereby moves that protestants be given more
26 time than 48 hours to respond to the proposed exception.

1 **3. Exceptions to Hearing Schedule for Raising Issues of Scope**

2 There is a third issue in that DWR’s objections to testimony included arguments that
3 should have been raised at the January 28, 2016 pre-hearing conference. This has also resulted
4 in significant burden on the protestants. The October 30, 2015 Hearing Notice did clearly state
5 that the purpose of the pre-hearing conference was to consider the scope of the hearing and any
6 other procedural issues:

7 **PRE-HEARING CONFERENCE**

8 The hearing officers will conduct a pre-hearing conference *to discuss the scope of the*
9 *hearing and any other procedural issues* on Thursday, January 28, 2016, at 9:00 a.m. and
continuing, if necessary, on Friday, January 29, 2016. (p. 15, emphasis added)

10 Arguments about the scope of the hearing were raised in the January 28, 2016, pre-
11 hearing conference, and the Hearing Officers did make rulings on those arguments on February
12 11, 2016. The Hearing Officers made rulings during the Part 1A based on the assumed scope of
13 the hearing, including rulings on cross-examination. Protestants prepared their cases in chief for
14 Part 1B based on the rulings on the assumed scope.

15 For this reason, the consideration of motions to exclude testimony based on new
16 arguments about scope, unless the testimony that is filed is significantly different than that
17 noticed in the Notices of Intent, creates issues of due process. California Water Research
18 appreciates the announced intention of the Hearing Officers to provide direction on revisions to
19 testimony, but this does not completely address the due process issues.

20 For this reason, California Water Research objects to any consideration of DWR’s
21 arguments to limit the scope of noticed testimony without DWR explicitly justifying why these
22 arguments should even be considered seven months after the pre-hearing conference.

23 As far as objections raised to Deirdre Des Jardins’ testimony on climate change
24 for PCFFA, it was clearly noticed in the Notice of Intent. The Petitioners also repeatedly argued
25 in Part 1A of the hearing that any questions about the Petitioners’ modeling underestimating risk
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27

1 due to climate change should be addressed in testimony by Deirdre Des Jardins in Part 1B, and
2 the Hearing Officer made rulings based on those arguments. This is documented in Appendix A
3 to this motion.

4 Provision 1 of Enclosure D of the October 30, 2015 Hearing Notice, arguably
5 requires that DWR and other parties raising new arguments on scope of the Hearings request an
6 exception to the schedule in the October 30, 2015 Hearing Notice. No such exception was
7 requested. California Water Research hereby objects to the consideration of the new scoping
8 arguments, without explicit notice by the protestants of the requested exception to the Hearing
9 Schedule, and a chance for protestants to make arguments based on inconsistency with the
10 noticed hearing schedule.

11 DWR has also argued that Deirdre Des Jardins' testimony for California Water
12 Research as a party on CalSim's failure to meet basic engineering standards for verifiable
13 calibration and validation should be excluded, based on these issues being resolved in Part 1A.
14 California Water Research respectfully points out that the assertion by Petitioners attorneys that
15 the issues of reliability of the Petitioners' modeling is resolved solely by DWR's assertions in
16 their "Master Response To Similar Objections Made By Protestants Collectively," and the
17 testimony of DWR's witnesses, violates due process rights to rebut evidence. If there are factual
18 issues that need to be resolved before the start of Part 1B of the hearing, California Water
19 Research respectfully requests that the Hearing Officers designate the first part of the upcoming
20 October 20, 2016 block of hearing days for consideration of the issues.

22 **4. Hearing Schedule for Consideration of Issues Relating to Petitioners' Modeling**

23 Finally, California Water Research notes that the Hearing Schedule for consideration of
24 issues relating to Petitioners' modeling has changed somewhat. California Water Research filed
25 a motion on July 19, 2016, entitled "Motion to Introduce Foundational Evidence Into the Hearing
26 Record," The motion moved to introduce the peer reviews of the CalSim model that Petitioners
27

1 referenced into the Hearing record, moved to introduce excerpts from the peer reviews that
2 rebutted Petitioners' witnesses' testimony and Petitioners' assertions about the reliability of the
3 modeling, and requested that the Board designate a preliminary block of hearing days in Part 1A
4 to consider the issues:

5 I respectfully request that the Board consider designating a preliminary part of the
6 hearing to hear the testimony on choice of model runs and scenarios, and on certification
7 of the models as reliable, and receive comments or briefs on the foundational facts that
8 are presented, prior to making any findings based on this testimony. (p. 7)

8 The request had a footnote which stated:

9 In the recent case of *Sargon Enterprises, Inc., v. University of Southern California*, the
10 trial court held an eight day hearing on whether to exclude foundational evidence and
11 expert testimony on considerations of reliability under Evidence Code 801 and 802. The
12 trial court then issued a 33 page written opinion excluding the evidence. The Supreme
13 Court upheld the decision. See the California Bar Journal Article, "Supreme Court
14 clarifies role of trial judge in determining admissibility of expert testimony," available at
15 http://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=69. The foundational
16 evidence in this hearing is much more complex and technical than in *Sargon*, and the
17 hearing is governed by Evidence Code 801 and 802. (p. 8)

14 The Hearing Officer's August 5, 2016 response to the Motion stated in part:

15 The issues raised by Ms. Des Jardins concerning the modeling can be addressed through
16 the usual hearing process, and do not necessitate designating a preliminary part of the
17 hearing to hear testimony and argument on the choice of model runs and the reliability of
18 the models used by the petitioners. The State Water Board's ultimate decision on the
19 water right change petition for the WaterFix Project will be based on the entire
20 administrative record, and the State Water Board will not make any findings based on
21 petitioners' modeling evidence until all of the other parties have had an opportunity to test
22 the reliability of that evidence through cross-examination of petitioners' witnesses,
23 presentation of their own cases in chief, presentation of rebuttal, and submittal of closing
24 briefs.

21 California Water Research did make a motion on September 21, 2016, for Hearing
22 Officers to consider objections before the start of Part 1B, entitled, "Motion To Continue
23 Objection To Hearsay Testimony, To Exclude Evidence And Strike Written Testimony, To Rule
24 On Prior Objections, And To Allow Cross-Examination Of All Testimony" The following is
25 from that motion:

26 In the interests of fairness, and a fair hearing under California Code of Civil
27 Procedure § 1094.5(b), I hereby request that the Hearing Officers rule all prima facie

1 objections to Petitioners' case in chief at the close of Part 1A of the hearing, and prior to
2 commencement of Part 1B of the hearing. At the close of Part 1A, all of Petitioners' case
3 in chief exhibits will have been submitted, and all direct testimony by DWR's and
4 USBR's witnesses, as well as cross-examination, redirect and re-cross examination will
5 have been completed. The Hearing Officers will then have sufficient information to rule
6 on whether there is prima facie evidence that the case submitted by DWR and USBR to
7 meets statutory, regulatory, and Board requirements, as well as requirements of due
8 process and standards for use of scientific evidence in adjudicatory proceedings. I
9 hereby move that they do so.¹ (p. 7)

6 California Water Research commends the Hearing Officers for their consideration of the
7 due process arguments raised in the September 21, 2016 motion, and their announced plan to
8 rule on some of the objections. However, California Water Research hereby moves that Hearing
9 Officers' reconsider the August 5, 2016 ruling, in light of the new schedule for consideration of
10 objections.

11
12 In addition, DWR made many unsupported, misleading, and/or inaccurate statements
13 about the reliability of the CalSim modeling in their July 20, 2016 "Master Response To Similar
14 Objections Made By Protestants Collectively." California Water Research, and other
15 protestants, held off on filing responsive briefs, based on the statement by the Hearing Officers
16 in the August 5, 2016 ruling that issues of reliability of the modeling would be addressed in
17 closing briefs:

18 the State Water Board will not make any findings based on petitioners' modeling
19 evidence until all of the other parties have had an opportunity to test the reliability of that
20 evidence through cross-examination of petitioners' witnesses, presentation of their own
21 cases in chief, presentation of rebuttal, and submittal of closing briefs.

21 The October 30, Hearing Notice also mentioned that the filing of briefs should be at times
22 authorized by the Hearing Officers:

23 At the discretion of the hearing officers, parties may also be afforded the opportunity to
24 present closing statements or submit briefs.

26
27 ¹ "I" in this paragraph refers to Deirdre Des Jardins, principal at California Water Research, ("California Water
28 Research.")

1 For this reason, California Water Research respectfully requests that the Hearing Officers
2 designate a time to receive briefs replying to the arguments about the reliability of the modeling
3 in DWR's "Master Response To Similar Objections Made By Protestants Collectively," prior to
4 making any findings based on arguments in that filing.

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6 Respectfully submitted,

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10 Deirdre Des Jardins
11 Principal, California Water Research

1 **Appendix A**

2 **Rulings on Cross-Examination on Climate Change in Part 1A**

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4 In cross-examination of Jennifer Pierre in Part 1A, California Water Research
5 introduced tables and graphs from the Army Corps of Engineers' sea level rise calculator. The
6 tables and graphs included sea level rise projections by the Climate Change Center at the
7 National Oceanic and Atmospheric Association ("NOAA".) The closest sea level guage to the
8 project is in Port Chicago. NOAA's high sea level rise estimates are 14.8 inches by the projects'
9 projected start date of 2035, 39.4 inches by 2065, and almost 12 feet by 2135, the endpoint for
10 the 100 year projected lifetime of the project. In contrast, the Petitioners' modeling assumes six
11 inches of sea level rise when the project starts operations, and the Engineers testified that the
12 project is being designed to withstand 18 inches of sea level rise.

13 After California Water Research submitted the tables and graphs from the Army
14 Corps of Engineers' sea level rise calculator into evidence, Petitioners objected that graphs and
15 tables could not be accepted as exhibits without authentication, and the Hearing Officer excluded
16 the exhibits based on those objections, although California Water Research offered to provide a
17 statement authenticating the exhibits. On cross-examination of the Engineering panel by
18 PCFFA on August 9, 2016, PCFFA asked if the proposed project could withstand NOAA's
19 estimated sea level rise. DWR objected to the question as speculative:

20 MR. MIZELL: I'm going to object as speculative. And at this point, we would need to
21 provide the Engineers with something far more complete than an amorphous sea level
22 rise above the considered design criteria at the moment for them to give a coherent
23 answer. California Water Research noted that this was because DWR had excluded the
24 calculations at Port Chicago. (Partial Tr., August 9, 2016 131:12.)

25 On cross-examination of the modeling panel on August 26, 2016, California Water
26 Research asked the modelers what the risk was to deliveries, and water to meet in-basin needs.
27 Petitioners objected to the question based on the assertion that it should be addressed in
28 testimony by California Water Research.

1 MS. DES JARDINS: And these scenarios show -- the drier scenarios show the biggest
2 risk in terms of loss of deliveries, loss of water to meet upstream needs, in-basin needs; is
3 that not correct?

4 MR. MIZELL: At this point, I'm going to object. We have exploring the choice of the Q5
5 climate change scenario for quite some time now. And I've sort of let the questioner run
6 with it, hoping that we would get to some point where we would have some relevance as
7 to why the choice we made was misused. But I believe right now, all I've heard is that
8 Ms. DesJardins just doesn't agree with our choice. And she's happy to make that case in
9 her case in chief. I'm not sure if cross-examination is the right place for it though.

10 (Partial Tr. August 26, 2016, 270:4.)
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2 **STATEMENT OF SERVICE**

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

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

9 **OBJECTION TO PETITIONERS' LATE FILINGS AND MOTION FOR**
10 **CLARIFICATION**

11 to be served **by Electronic Mail** (email), in parts due to server limitations, upon the
12 parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition
13 Hearing, dated September 29, 2016, posted by the State Water Resources Control
14 Board at

15 [http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)
16 [waterfix/service_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

17 I certify that the foregoing is true and correct and that this document was
18 executed on September 30, 2016.

19 Signature:



20 Name: Deirdre Des Jardins

21 Title: Principal, California Water Research

22 Party/Affiliation:

23 Deirdre Des Jardins

24 Address:

25 145 Beel Dr

26 Santa Cruz, California 95060

1 incorporated into the design criteria at the time of
2 Predesign.

3 MR. EICHENBERG: So new criteria for additional
4 sea level rise may be incorporated into Final Design of
5 what's before the Board right now?

6 WITNESS BEDNARSKI: Yes. If that information
7 is passed down to the Engineering Team, we would
8 incorporate that.

9 MR. EICHENBERG: What kinds of design change
10 might you anticipate for there to be additional sea level
11 rise?

12 MR. MIZELL: I'm going to object as
13 speculative.

14 And at this point, we would need to provide the
15 Engineers with something far more complete than an
16 amorphous sea level rise above the considered design
17 criteria at the moment for them to give a coherent
18 answer.

19 CO-HEARING OFFICER DODUC: Answer to the best
20 of your ability.

21 WITNESS BEDNARSKI: Just in general, we'd
22 probably raise the elevation of structures to a higher
23 level to give us the same amount of safety factor that we
24 have now with the 18 inches.

25 MR. EICHENBERG: Which -- Which structures

1 WITNESS MUNEVAR: If you were to select only
2 that subset, it would be a drier -- a drier future both
3 in the no action and in the WaterFix that's correct.

4 MS. DES JARDINS: And these scenarios show --
5 the drier scenarios show the biggest risk in terms of
6 loss of deliveries, loss of water to meet upstream
7 needs, in-basin needs; is that not correct?

8 MR. MIZELL: At this point, I'm going to
9 object. We have exploring the choice of the Q5 climate
10 change scenario for quite some time now. And I've sort
11 of let the questioner run with it, hoping that we would
12 get to some point where we would have some relevance as
13 to why the choice we made was misused.

14 But I believe right now, all I've heard is
15 that Ms. DesJardins just doesn't agree with our choice.
16 And she's happy to make that case in her case in chief.
17 I'm not sure if cross-examination is the right place
18 for it though.

19 CO-HEARING OFFICER DODUC: Ms. Morris, did you
20 have something to add?

21 MS. MORRIS: No.

22 CO-HEARING OFFICER DODUC: Ms. Des Jardins,
23 did you have a specific question?

24 MS. DES JARDINS: The other thing I wanted to
25 know, because the Board -- I requested and the Board