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10 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
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12 HEARING IN THE MATTER OF
13 CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
14 BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF
15 DIVERSION FOR CALIFORNIA WATER
16 FIX

**CALIFORNIA DEPARTMENT OF WATER
RESOURCES' RESPONSE IN
OPPOSITION TO JOINT MOTION OF
PROTESTANTS FRIENDS OF THE
RIVER, SIERRA CLUB CALIFORNIA,
ENVIRONMENTAL WATER CAUCUS,
AND PLANNING AND CONSERVATION
LEAGUE, TO DISQUALIFY CERTAIN
PETITIONERS' WITNESSES AND TO
EXCLUDE CERTAIN WITNESS'S
TESTIMONY AND EXHIBITS IN WHOLE
OR IN PART, AND JOINT OBJECTIONS
TO PETITIONERS' WITNESSES'
TESTIMONY AND EXHIBITS.**

1 California Department of Water Resources ("DWR") files this response to
2 objections filed by the above-captioned Protestants to proposed evidence in the hearing
3 in the matter of DWR and U.S. Bureau of Reclamation's Request for a Change in Point
4 of Diversion for California Water Fix. DWR incorporates its Master Response to Similar
5 Objections Made by Protestants Collectively ("Master Response"), all DWR individual
6 responses to objections joined in by Protestants, and reserves the right to provide
7 additional responses to these objections and to respond to other objections that may be
8 raised later.

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10 **I. INTRODUCTION**

11 DWR refers to the Introduction to its Master Response to motions filed between
12 July 8, 2016 and noon on July 12, 2016 in this proceeding.

13 **II. STATEMENT OF FACTS**

14 DWR refers to the Statement of Facts in its Master Response to motions filed
15 between July 8, 2016 and noon on July 12, 2016 in this proceeding.

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17 **III. ARGUMENT**

18 **A. PROTESTANTS' MOTION TO DISQUALIFY 12 WITNESSES AND TO**
19 **EXCLUDE TESTIMONY AND EXHIBITS, AND OBJECTIONS SHOULD BE**
20 **DENIED**

21 **1. Petitioners' Proposed Evidence is Relevant and Reliable**

22 The Board has broad latitude in what evidence it may consider in these
23 administrative proceedings. "Adjudicative proceedings will be conducted in
24 accordance with the provisions and rules of evidence set forth in Government
25 Code section 11513. Hearsay evidence is admissible subject to the provisions of
26 Government Code section 11513." (23 CCR section 648.5.1). "The hearing need
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1 not be conducted according to technical rules relating to evidence and witnesses,
2 except as hereinafter provided. Any relevant evidence shall be admitted if it is the
3 sort of evidence on which responsible persons are accustomed to rely in the
4 conduct of serious affairs, regardless of the existence of any common law or
5 statutory rule which might make improper the admission of the evidence over
6 objection in civil actions." (Government Code section 11513 (c)).

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8 While Protestants correctly reference the applicable evidentiary standards,
9 they misconstrue their application to the proposed evidence. Furthermore, their
10 reliance on a medical malpractice case, *Aengst. V. Board of Medical Quality*
11 *Assurance* (1980) 110 Cal. App. 32 275, in which the polygraph of a physician
12 was excluded on the grounds that it was not scientifically reliable is not
13 persuasive as it relates to the nature of the evidence Petitioner seeks to introduce
14 in these proceedings.

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16 Moreover, one must query the logic of Protestants who if are so convinced
17 that the new diversion points are detrimental, then why limit the evidence which
18 the California State Water Resources Control Board ("Board") should consider to
19 arrive at a fully informed determination.

20 Protestants assert that no "responsible person" would rely on the petitioners'
21 evidence yet it is for the Board to examine that evidence, consider it, and
22 determine what weight to attribute to it, and whether to rely on it. Protestants
23 attempt therefore to remove the adjudicatory responsibilities from the Board.
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2. Petitioner Filed Sufficient Written Testimony for its Proposed Witnesses

Protestants spuriously object to the testimony of 12 witnesses: Steve Centerwall, Michael Anderson, Eric Reyes, Michael D. Bryan, Jamie Anderson, Tara Smith, Kristin White, Gwendolyn Buchholz, Mark A. Holderman, Shanmugam (Praba Piraroban, Sergion Valles, and Robert Cooke.

Protestants' characterization of the proposed testimony of these witnesses as of a "surprise" nature is unfounded. Their curricula vitae are on record, they are there to augment the record to the extent the Board seeks additional information, and they will be available for cross-examination, the scope of which is in control of those conducting the cross-examination and subject to rulings of the Board.

B. Protestants Seek Official Notice of Matters Not Relevant to this Proceeding

The Protestants seek official notice of the status of the State Water Board's Water Quality Control Plan (WQCP) and the May 18 and June 24 Sacramento Superior Court decisions in the Delta Stewardship Council cases (Judicial Council Coordination Proceeding No. 4758) invalidating the Delta Plan. While it is indisputable that the Board has the ability to take official notice of these matters, *if relevant* (23 Cal. Code Regs., tit. 23 § 648.2), no relevance exists here. [Italics added.] Protestant's request for official notice is a smokescreen to introduce irrelevant arguments. The operative inquiry in a petition for a change in point of diversion is set forth in Chapter 10 of the Water Code, appropriately titled "*Change of Point of Diversion, Place of Use, or Purpose of Use.*" [Italics added.] Water Code section 1700 *et seq.* and the Board's regulations, along with the Board orders issued to date in these proceedings, provide the relevant framework.

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C. Status of the Bay-Delta Water Quality Control Plan Update Is Not Relevant

With regard to the Water Quality Control Plan issue, the Board already soundly rejected Protestants' "cart before the horse" argument in its February 11, 2016 Ruling establishing the schedule and the staged hearing process for these proceedings:

We do not agree with some parties' assertion that the State Water Board cannot proceed with a water right decision prior to updating the Bay-Delta Plan. The Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act) establishes additional requirements related to the WaterFix that are distinct and separate from the Bay-Delta Plan. The Delta Reform Act requires that any order approving the water right change petition must include "appropriate Delta flow criteria." Those flow criteria must be informed by flow criteria to protect the Delta ecosystem, which the State Water Board developed in 2010. (Board California Water Fix Pre-Hearing Conference Ruling, Feb. 11, 2016, at p. 4)

The Board went on to interpret the "appropriate Delta flow criteria" language in the Delta Reform Act:

We do not interpret "appropriate Delta flow criteria" to mean the same thing as either existing or revised water quality objectives. Determination of appropriate flow criteria for purposes of this proceeding will entail a balancing of the need for flows to protect water quality in the Bay-Delta and the need for water to meet the demands of the State Water Project (SWP) and Central Valley Project (CVP). (Board California Water Fix Pre-Hearing Conference Ruling, Feb. 11, 2016, at p. 4) [Emphasis added.]

In its earlier Ruling, the Board also determined that critical public interest concerns are not served by further delay:

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

1 California Water Fix Pre-Hearing Conference Ruling, Feb. 11, 2016,
2 at p. 2)

3 Moreover, there is no need for official notice of matters on the Board's own
4 docket. As Protestants specifically acknowledge in their own motion, "The State
5 Water Board is aware of the status of its own planning." (p. 8 of Protestants'
6 Motion)

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8 Even if these matters that Protestants seek to have officially noticed were
9 relevant, Protestants point to no compelling legal authority that requires the Board
10 to refrain from fulfilling its statutory responsibilities with respect to water rights
11 administration during the pendency of these separate proceedings. Indeed, quite
12 the opposite is true. The Board's direction to proceed with the change petition at
13 this time is clearly established in Water Code Section 1700 *et seq.*

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15 **D. Status of the Delta Plan is Not Relevant**

16 With regard to the Delta Reform Act, the Protestants again conflate the
17 developments in separate proceedings and misstate statutes to argue that the
18 Board has violated the Delta Reform Act. The Protestants are correct that Water
19 Code section 85086(c)(2) of the Act contemplates the California Water Fix,
20 recognizing the importance of new Delta conveyance facilities to achieving the
21 Delta Reform Act's coequal goals of ecosystem restoration and water supply
22 reliability. The Protestants, however, incorrectly construe the statute to support
23 their assertion that the Board has violated the Delta Reform Act by failing to adopt
24 appropriate flow criteria. The Delta Reform Act, at Water Code section
25 85086(c)(2), provides:
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1 Any order approving a change in the point of diversion of the State Water
2 Project or the federal Central Valley Project from the southern Delta to a
3 point on the Sacramento River *shall include appropriate Delta flow*
4 *criteria* and shall be informed by the analysis conducted pursuant to this
5 section. The flow criteria shall be subject to modification over time based
6 on a science-based adaptive management program that integrates
7 scientific and monitoring results, including the contribution of habitat and
8 other conservation measures, into ongoing Delta water management.
9 (Water Code § 85086(c)(2))

10 Again, as discussed above, the Board's February 11 Ruling clearly rejected
11 Protestants' interpretation of Water Code section 85086(c)(2) and affirmed that
12 the Delta Reform Act mandate to include appropriate Delta flow criteria does not
13 require the Board to suspend consideration of the change petition pending
14 completion of the WQCP Update. (Board Pre-Hearing Conference Ruling, Feb.
15 11, 2016, at p. 4). Consideration of the change petition can occur under the
16 existing regulatory framework for the Delta provided by the WQCP and D-1641,
17 with flows subject to modification over time.

18 Finally, Protestants' distortions of legal authority fail to recognize the Delta
19 Reform Act's clear deference to the Board on water rights. The Act expressly
20 preserves the Board's authority over water rights administration. Specifically,
21 Water Code Section 85031(c)-(d) of the Delta Reform Act provides:

22 (c) Nothing in this division supersedes, limits, or otherwise modifies the
23 applicability of Chapter 10 (commencing with Section 1700) of Part 2 of
24 Division 2, including petitions related to any new conveyance constructed
25 or operated in accordance with Chapter 2 (commencing with Section
26 85320) of Part 4 of Division 35.

27 (d) Unless otherwise expressly provided, nothing in this division
28 supersedes, reduces, or otherwise affects existing legal protections, both
procedural and substantive, relating to the state board's regulation of
diversion and use of water, including, but not limited to, water right
priorities, the protection provided to municipal interests by Sections 106
and 106.5, and changes in water rights. Nothing in this division expands
or otherwise alters the board's existing authority to regulate the diversion
and use of water or the courts' concurrent jurisdiction over California

1 water rights.

2 Moreover, Water Code Section 85086(c)(3) states:

3 Nothing in this section amends or otherwise affects the application of the
4 board's authority under Part 2 (commencing with Section 1200) of
5 Division 2 to include terms and conditions in permits that in its judgment
6 will best develop, conserve, and utilize in the public interest the water
7 sought to be appropriated.

8 **E. Modeling Relied Upon is Relevant and Reliable**

9 DWR refers to its Master Response and DWR individual responses to
10 objections, to modeling-related testimony, joined in by Protestants.

11 **F. A Final EIR/EIS is Not Required to Commence the Hearing**

12 Although the Board did not find Protestants' argument to be persuasive the
13 first time around, Protestants again argue that there is no Final EIR/EIS or
14 adequate draft EIR/EIS at the commencement of the hearing, conflating the
15 CEQA and change petition processes. The Board's February 11, 2016 Ruling
16 makes clear that, as a matter of standard Board practice, a Final EIR/EIS is not
17 required at this stage:

18 Parties have also objected to moving forward with the hearing prior to
19 completion of the CEQA/NEPA and ESA/CESA consultation processes. We
20 previously explained that it was standard practice for the State Water
21 Board to begin a water right hearing before a final CEQA document has
22 been prepared, and that Part 2 of the hearing (focused on environmental
23 issues) would not commence before these processes were final. . .
24 ..California Code of Regulations, title 23, section 794 contains a detailed
25 list of information that must be provided in a change petition, including
26 effects on other known users of water, and any quantified changes in water
27 quality, quantity, timing of diversion and use, reduction in return flows and
28 other pertinent information The petitioners' change petition specifies that
this information is contained in the CEQA/NEPA documents. (Board Pre-
Hearing Conference Ruling, Feb. 11, 2016, at p. 5).

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1 **G. Protestants Confuse the CEQA and Change Petition Processes**

2 Protestants challenges to the adequacy of Petitioners' CEQA/NEPA compliance,
3 including the alternatives analysis, again confuse two separate processes. This
4 change petition proceeding is not a CEQA hearing, and the Board has already
5 rejected Protestants' CEQA arguments:

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

18 We are not persuaded by the parties' arguments that the State Water
19 Board must assume the role of the CEQA lead agency, or that any
20 additional CEQA documentation must be prepared before conducting Part
21 1 of the hearing. [citations omitted] We recognize that ultimately the final
22 EIR must be adequate to support the State Water Board's decision in this
23 proceeding. DWR has evaluated a range of alternatives that DWR has
24 determined will meet its project objectives. If during the course of this
25 proceeding, the State Water Board determines that the range of
26 alternatives evaluated by DWR is not adequate to support the Board's
27 decision, then either DWR or the Board will need to prepare subsequent or
28 supplemental documentation. [Citations omitted] At this point, however, it is
uncertain whether any subsequent or supplemental documentation will be
required. (Board Pre-Hearing Conference Ruling, Feb. 11, 2016, at p. 8-9).

In an effort to bolster their CEQA arguments, Protestants request official
notice of the EPA letter of October 30, 2015, from which they proceed to
selectively quote. The Protestants' omission of important context in the letter
misrepresents EPA's comments on the proposed project. When read in context,
the EPA letter does not in fact support Protestants' assertions of inadequate

1 CEQA compliance. Rather, the letter explains that the Agency's review will be
2 ongoing, as the WaterFix regulatory processes proceed and more information
3 becomes available:

4 All of the above listed regulatory processes will develop new data and likely
5 new compliance requirements beyond those provided in the SDEIS. EPA
6 understands that these as yet incomplete regulatory requirements will be
7 addressed through the pending actions by the State Water Resources
8 Control Board, FWS, NMFS, and Corps of Engineers. These key decisions,
9 and the analysis that will support them, are not yet done. Our statutory
10 responsibility is to review the NEPA document that is in front of us at this
11 time, however, the reality is that these future regulatory processes will have
12 an important bearing on the project. Because these subsequent regulatory
13 processes are likely to generate real world operational scenarios that are
14 significantly different from the operations proposed in the SDEIS, the
15 information is not yet available to reach definitive conclusions concerning
16 the environmental impacts of the proposed project.

17 The tunnels that are discussed in detail in this draft NEPA document are an
18 important improvement for water reliability, but the choices that will affect
19 the operation of the tunnels, and thus the overall impacts of the project, will
20 not be made until future regulatory actions are completed. These future
21 decisions will supply the missing pieces necessary to determine the
22 environmental impact of the entire project. The unusual circumstances of
23 this project mean that the information is not yet available for a complete
24 evaluation of environmental impacts – and for that reason a rating of “3”
25 (Inadequate) for the SDEIS is required – but EPA expects that the project
26 will continue to move forward, with those necessary additional pieces to be
27 supplied as the later regulatory processes proceed. Under the unique
28 circumstances of this case, the additional data, analysis and public input
associated with these future regulatory processes are expected to provide
the needed supplemental information to allow a full review of the
environmental impacts without requiring another draft supplemental EIS
EPA will have the opportunity to support Reclamation, other federal
agencies, and the State of California as they collectively continue to define
an environmentally sound and effective project that would operate in a
manner that simultaneously supports water supply reliability and enhances
the Delta's ecosystem. ... (EPA Letter, October 30, 2015, p. 4) [Emphasis
added.]

Finally, the information that the EPA and the State Water Board expect to
be included in the environmental documents, as expressed in the Agencies'
comments on the Draft EIR/EIS, have either already been provided to the two

1 Agencies, or will be provided to them in the Final EIR/EIS. The Petitioners will file
2 a final EIR/EIS with the State Water Board during the course of the public hearing
3 for this Petition. A final decision on this Petition is not requested until Petitioners
4 provide final environmental documents.
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6 **H. The Testimony of Specific Witnesses and Exhibits Objected to by**
7 **Protestants Should be Admitted**

- 8 1. Jennifer Pierre
- 9 2. John W. Leahigh
- 10 3. Parviz Nader-Tehrani
- 11 4. Armin Munevar
- 12 5. Maureen Sergent
- 13 6. Ron Milligan
- 14 7. Ray Sahlberg
- 15 8. John Bednarski

17 Adequate foundation for testimony is before the Board. DWR refers to its Master
18 Response and its individual responses to objections filed by other entities to these
19 same witnesses.
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21 **I. DWR-505, 507, 513, 514, 515, as well as DWR-5**

22 Protestants argument that these exhibits are not based on the best available
23 science goes to weight, not admissibility. The quality of the models is subject to
24 cross-examination, not exclusion. DWR refers to its Master Response and
25 individual responses to objections to these exhibits filed by other entities.
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1 **J. DWR – 3**

2 Protestants' mere disagreement with the contents of the Water Rights PowerPoint
3 does not justify its exclusion.
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5 **K. DWR-404, SWRCB-21, SWRCB-23, SWRCB-30**

6 The Water Rights Decision of 1641 standards should not be excluded.

7 Protestants argue that changes have occurred since their issuance. Introduction
8 of the standards does not preclude production of evidence of changes, if any, or
9 arguments concerning them but the mere assertion that changes have occurred
10 does not render them unreliable or inadmissible.
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13 **L. DWR-401, 402, 413**

14 The Bay-Delta Compliance Metrics should be admitted. Any allegations of
15 incomplete metrics are subject to exploration through cross-exam and are not
16 grounds for exclusion. Merely because Protestants put forth criticisms of the
17 exhibits does not render those criticisms valid and grounds for exclusion.
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20 **M. DWR-511**

21 The memo dated 8-22-13 to C. Crothers, Assistant Chief Counsel, from DWR's
22 experts on SWP and CVP modeling (Dr. Chung, Chief of the Bay-Delta Modeling
23 Support Branch and his staff, Dr. Nader-Tehrani, Erik Reyes, and Tara Smith) is
24 relevant because it explains use of Cal Sim II and DSM2 models when analyzing
25 delta water quality, including chloride, that is the subject of testimony regarding
26 injury to legal users of water in this Hearing. In addition, Protestant's have
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1 questioned the use the DSM2 model which is the subject of the memo and is
2 relevant to facts presented at the hearing. Dr. Nader-Tehrani refers to DWR-511
3 in his testimony. (DWR-66, at 4:2-9.) Dr. Nader-Tehrani can be cross examined
4 as to facts and analysis presented in the memo to authenticate its contents, even
5 as a draft memo. Dr. Nader-Tehrani's expert opinion of the information in the
6 memo will be subject to cross examination and Board's determination will go to
7 the weight of the evidence provided by the memo and it should not be excluded.
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10 **N. SWRCB-3, SWRCB-4, SWRCB-5, SWRCB-102**

- 11 1. As explained above and in other DWR responses, final documents are not
12 required at this phase and Protestants' desperate request to exclude all
13 relevant evidence must be denied.).
14

15 **IV. CONCLUSION**

16 Protestants are attempting to argue on the merits in order to accomplish exclusion
17 of evidence rather than allow the Board to fully consider the evidence to reach an
18 informed decision. Protestants objections should be denied in their entirety.
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20 Dated: July 22, 2016

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



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22 Robin McGinnis
23 Office of the Chief Counsel
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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):

California Department of Resources' Responses to Joinders, Objections, and/or Requests for Official Notice submitted by the following parties: (see Attachment A)

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated July 15, 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:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

	I caused a true and correct hard copy of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:
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	Method of Service: <u>U.S. Mail</u>
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I certify that the foregoing is true and correct and that this document was executed on July 22, 2016
Date

Signature: 

Name: Valentina German

Title: Legal Analyst

Party/Affiliation: DWR

Address: 1416 9th Street

Sacramento, CA 95821

Attachment A

I served DWR's responses to Joinders, Objections, and/or Requests for Official Notice submitted by the following parties:

North Delta Water Agency, et al.
Tehama-Colusa Canal Authority, et al.
Sacramento Valley Water Users
California Sportfishing Protection Alliance
Clifton Court, L.P.
Friends of the River
City of Brentwood
City of Stockton
Brannan-Andrus Levee Maintenance District, et al.
Islands, Inc. (Cavanaugh)
Local Agencies of the North Delta, et al.
Pacific Coast Federation of Fishermen's Associations, et al.
Sacramento Regional County Sanitation District
County of San Joaquin, et al.
San Joaquin Tributaries Authority, et al.
Save the California Delta Alliance
South Delta Water Agency, et al.
California Water Research