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

**CALIFORNIA DEPARTMENT OF
WATER RESOURCES' RESPONSE
TO PROTESTANT SAVE THE
CALIFORNIA DELTA ALLIANCE'S
RENEWED MOTION TO AMEND
PROTEST**

15 California Department of Water Resources ("DWR") provides this response to
16 Protestants Save the California Delta Alliance, Janet McCleery, Michael McCleery, Frank
17 Morgan, and Captain Morgan's Delta Adventures, LLC's ("SCDA's") second motion to
18 amend their protest to submit a case in chief during Part 1 as well as Part 2 in the matter
19 of DWR and U.S. Bureau of Reclamation's ("Reclamation's") Request for a Change in
20 Point of Diversion for California Water Fix ("CPOD Hearing"). For the reasons explained
21 below, DWR requests that the Board deny this duplicative motion, which is based issues
22 upon which the Board has already ruled.¹

23 In this response, DWR also provides clarification of these issues raised in SCDA's
24 motion: new claims of injury based on watering plants with buckets in Discovery Bay;
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26 ¹ As provided in the July 22, 2016 Ruling, "While the other parties still have specific and various
27 criticisms of petitioners' evidence and testimony, we disagree with those parties who contend that
petitioners' case-in-chief is insufficient to allow parties to meaningful participate in Part 1 of the hearing."
28 Also, the Board's March 4, 2016 ruling notes that "duplicative motions are strongly discouraged" at page 3.

1 and arguments that Petitioners are changing D-1641's Delta export/inflow ("E/I") ratio
2 objective.

3 BACKGROUND

4 DWR and Reclamation filed their petition for a change in point of diversion for
5 their water rights on August 25, 2015 and listed the following information in the section
6 entitled, "Description of Proposed Changes or Work Remaining to be Completed":

7 The intent of the Petition for Change is to add points of diversion and
8 rediversion contained in water rights permits held by DWR and
9 Reclamation to allow SWP and CVP water to move through the intakes
10 identified by Alternative 4A (California WaterFix) of the Bay Delta
11 Conservation Plan/California Water Fix Partially Recirculated Draft
12 Environmental Impact Report / Supplemental Draft Environmental Impact
13 Statement, if ultimately constructed.

14 Alternative 4A includes the construction of three fish-screened intakes on
15 the east bank of the Sacramento River between Clarksburg and
16 Courtland, each with a capacity of 3,000 cfs. Each intake would be from
17 1,259 to 1,667 feet in length along the river bank, depending on location,
18 and would consist of a reinforced concrete structure subdivided into
19 individual bays that can be isolated and managed separately.

20 Specific discussions of the components of Alternative 4A most relevant to
21 the attached water rights change petition can be found within the Partially
22 Recirculated Draft EIR / Supplemental Draft EIS at sections 1.1; 1.1.4; 4.1;
23 4.1.2.2; 4.1.2.3; 4.1.2.4; 4.3.7; 4.3.8; 11.1.5.2; Appendix A; Appendix 3B

24 See Partially Recirculated Draft EIR / Supplemental Draft EIS for
25 additional Information available at
26 http://baydeltaconservationplan.com/2015PublicReview/PublicReviewRDEIRSDEIS/PublicReviewRDEIRSDEIS_Links.aspx.

27 Links to sections:

28 http://baydeltaconservationplan.com/RDEIRS/4_New_Alternatives.pdf
(Section 4);

http://baydeltaconservationplan.com/RDEIRS/Ap_A_Rev_DEIR-S/11_Fish.pdf (Chapter 11 in Appendix A);

http://baydeltaconservationplan.com/RDEIRS/1_Introduction.pdf (Section 1); http://baydeltaconservationplan.com/RDEIRS/Ap_A_Rev_DEIR-S/App_3B_EnvCommit.pdf (Appendix 3B in Appendix A)

More than four months after this information was provided and by the deadline set
by the Board in its October 30, 2015 Hearing Notice, SCDA's January 5, 2016 protest
raised public trust, flow, and water quality issues, but did not base its protest on injury to

1 legal users of water. SCDA indicated that although its members retain their riparian legal
2 rights to put Delta waters to beneficial use by individually diverting small quantities of
3 water for irrigation of gardens and other domestic uses, its protest was based on public
4 interest considerations. SCDA's original Notice of Intent to Appear ("NOI") filed January
5 5, 2016 indicated that SCDA intended to participate in Part 1 of the hearing by
6 presenting a policy statement, and to participate in Part 2 as a party by calling witnesses.

7 The Board's March 4, 2016 ruling allowed parties participating in Part 2 of the
8 hearing to submit a revised NOI by March 16, 2016 if they wished to present testimony
9 on impacts to human uses, such as flood control or environmental justice issues, during
10 Part 1 of the hearing instead of Part 2. The ruling did not authorize parties to add new
11 witnesses or to expand the scope of proposed testimony to address the issue of injury to
12 other legal users of water.

13 On March 16, 2016, SCDA requested to amend its protest to allege injury to legal
14 users of water as additional grounds for its protest. In support of its request, SCDA noted
15 that the Metropolitan Water District of Southern California ("MWD") had made a similar
16 request to become a party, and SCDA argued that granting its request would not delay
17 the hearing or prejudice any other party. In its April 25, 2016 ruling, the Board denied
18 MWD's request and pointed out that if MWD's request were granted, other people or
19 entities were likely to seek to participate as parties or add witnesses, which could delay
20 the hearing significantly.

21 Similarly, the Board's June 10, 2016 ruling denied SCDA's request to amend its
22 protest to allege injury to legal users of water and to expand the scope of its participation
23 in the hearing. The Board decided that SCDA did not show adequate justification for its
24 failure to indicate on its original NOI that it plans to participate in Part 1 by calling
25 witnesses to testify on the issue of injury to legal users of water.

26 SCDA filed its second motion to amend its protest on July 19, 2016 on the
27 following grounds: (1) there will be no delay or prejudice to any other party; (2) the
28 petition did not contain enough information; (3) the project description has changed; and

1 (4) the Board should follow the policy in civil litigation of favoring amendments to
2 pleadings. Note that attached to the second motion to amend is an Initial Statement of
3 Diversion and Use dated June 29, 2016 stating that one of its members waters their
4 garden and potted plants with buckets of water taken directly from Delta channels.²

5 On July 22, 2016, the Board ruled that the staggered submittal structure would
6 allow petitioners to describe the proposed project in a more succinct and accessible
7 format to the extent possible, and gave the other parties additional time to review and
8 prepare their own submittals. They disagreed with those parties who contended that
9 petitioners' case-in-chief is insufficient to allow parties to meaningfully participate in Part
10 1 of the hearing. As described in the Ruling, petitioners bear the burden of establishing
11 that the proposed changes will not injure other legal users of water and reiterated the
12 point from their February 11, 2016 ruling that not all uncertainties can or need to be
13 resolved before beginning the hearing.

14 ARGUMENT

15 **A. Allowing SCDA to present a case in chief during Part 1B will encourage other**
16 **parties to seek to participate as parties or add witnesses, which could delay**
17 **the hearing significantly and be largely duplicative.**

18 SCDA's second motion to change its level of participation is similar to MWD's
19 request that the Board denied on April 25, 2016 and SCDA's first motion that the Board
20 denied on June 10, 2016. MWD sought to present six witnesses during Part 1B of the
21 hearing. SCDA is already participating in Part 1A, having already presented a policy
22 statement and vigorously cross examining witnesses. It has also indicated it will present
23 witnesses during Part 2 of the hearing. Now it seeks to present seven witnesses during
24 Part 1B as well. The Board's reasoning for denying the first motion still applies, which is
25 that if SCDA's request were granted, other entities are likely to seek to participate as

26 ² Note that the Board's Division of Water Rights' website for the Statement Program indicates that
27 "[a] Statement is not a confirmed water right; it is simply a statement made by the person or organization
28 who diverted and used the water." Available at:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/diversion_use/.

1 parties or add witnesses, which could delay the hearing significantly. For each witness or
2 panel of witnesses added, there are potentially 74 hours of cross examination. Parties
3 should not now, almost a year after the petition was originally filed and more than seven
4 months after the NOIs were due, be allowed to add witnesses.

5 **B. The petition contained enough information for SCDA to file an accurate NOI**
6 **by the deadline.**

7 Delta Alliance has not shown adequate justification for its failure to indicate on its
8 original NOI that it plans to participate in Part 1 of the hearing by calling witnesses to
9 testify on the issue of injury to legal users of water. DWR and Reclamation filed their
10 petition nearly a year ago, and it was based on documents available to the public since
11 2013.³ As noted in written testimony and discussed exhaustively during cross
12 examination already during the hearing, the operational range will depend on the
13 outcome of the consultation process under the federal and state endangered species
14 acts, including adaptive management. (Pierre testimony, DWR-51, at 10:3-10:11.)

15 DWR and Reclamation's petition is one piece of the overall regulatory framework,
16 as explained in the 2013 Draft Environmental Impact Report ("DEIR") / Draft
17 Environmental Impact Statement ("DEIS"), 2015 Partially Recirculated DEIR ("RDEIR") /
18 Supplemental DEIS ("SDEIS"), and the Board's rulings on February 11, 2016 and July
19 22, 2016. Parties had enough information to determine their appropriate level of
20 participation by the January 5, 2016 deadline for NOIs. SCDA has attached a new Initial
21 Statement of Diversion and Use dated June 29, 2016 to its second motion, presumably
22 to support its assertion that it should be able to present Part 1 evidence. However,
23 Statements of Diversion and Use are not proof of a water right and it does nothing to
24 cure the defect in the proposed amended NOI to add seven witnesses.

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26 ³ The 2013 Bay Delta Conservation Plan ("BDCP") that preceded the 2013 DEIR/DEIS and 2015
27 RDEIR/SDEIS included a range of alternatives with associated modeling results that were publicly
28 available. The 2015 RDEIR/SDEIS included additional alternatives and associated modeling results that
were also available to the public.

1 **C. The Board does not need to apply civil procedure rules in its water rights**
2 **hearings.**

3 Here, SCDA argues that a protest in a water rights hearing serves the same
4 purpose as a complaint in a lawsuit in court. It also points out that in California courts, a
5 plaintiff can amend his complaint without leave of court at any time before the
6 defendant's answer is filed. However, DWR and Reclamation have applied to the Board
7 for a change in the terms of their water right permits. They are not defendants in court.
8 This is not a civil or criminal trial, nor even a formal adjudicative hearing under Chapter 5
9 of the Administrative Procedures Act, and the Board is not required to conduct
10 adjudicative hearings according to the technical rules relating to motions and pleadings
11 in trial court. (Cal. Code Regs., tit. 23, § 648.4.)

12 The Board's regulations provide that, "[t]he hearing notice may require that all
13 parties intending to present evidence at a hearing shall submit . . . information to the
14 Board prior to the hearing . . . and [t]he required information shall be submitted in
15 accordance with the procedure specified in the hearing notice." (Cal. Code Regs., tit. 23,
16 § 648.4, subd. (b).) The October 30, 2015 hearing notice states, "[p]ersons and entities
17 who seek to participate as parties in this hearing must file a Notice of Intent to Appear,
18 which must be **received** by the State Water Board no later than **the deadline**
19 **prescribed in the Hearing Notice.**" (October 30, 2015 Notice at p. 32, emphasis in
20 original.) The ruling states the deadline for protests and NOIs was January 5, 2016.
21 (October 30, 2015 Notice at p. 14.) There is no reason to deviate from the procedures in
22 the Board's regulations or the hearing notice.

23 **D. SCDA's second motion appears to be based, at least in part, on a new**
24 **Statement of Diverison and Use.**

25 SCDA's members live in Discovery Bay, most if not all, of which is a set of
26 artificial riparians, i.e., riparians as a result of human improvements. Ordinarily riparian
27 rights attach only to a natural watercourse, and not to an artificial channel. (*Tusher v.*
28 *Gabrielsen* (1998) 68 Cal.App.4th 131, 147.) Further, the town of Discovery Bay
 provides water to the community through a series of 6 wells that draw from an aquifer

1 approximately 300 feet below the surface, so they may not have a need to exercise
2 riparian rights even if they could. (See The Town of Discovery Bay's website, available
3 at: <http://www.todb.ca.gov/water-services>.) Thus, it is a question of fact whether SCDA's
4 members actually have riparian water rights, but one that does not need to be resolved
5 during this proceeding.

6 **E. The motion mischaracterizes calculation of the Delta E/I ratio.**

7 SCDA argues in its motion that excluding water diverted at the proposed new
8 intakes from the Delta E/I ratio "radically alters the requirements of D-1641,"
9 "downstream flows[,] and impacts on downstream legal users of water." (SCDA Motion at
10 8:22-8:24.) However, this is not accurate.

11 To clarify the issue, DWR provides the following information. The Delta E/I ratio
12 objective in D-1641 is meant to protect fish in the south Delta.⁴ Since this is the intent of
13 the objective, modeling of it needs to represent hydrodynamics there. Inflow and exports
14 are as defined in D-1641,⁵ and the proposed new intakes do not change these
15 definitions. Since any water diverted at the proposed new intakes will not reach the
16 south Delta channels, it should not be included in the calculation of the objective meant
17 to protect fish there. This method best represents conditions in the south Delta and
18 therefore is the best way to achieve the goal of the objective.

19 **CONCLUSION**

20 DWR requests that the Board deny SCDA's motion because it could encourage
21 other parties to seek to participate as parties or add witnesses, which could delay the
22 hearing significantly and be largely duplicative; the petition contained enough information
23 for SCDA to file an accurate NOI by the deadline set by the Board; and the Board need
24 not apply the formal rules of civil procedure in its water rights hearings.

25 ⁴ Revised Water Right Decision 1641, March 15, 2000, see Section 14.3.1 at pages 138-140,
26 available at
http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641.pdf
27 f.

28 ⁵ Revised Water Right Decision 1641, *supra*, see Table 3 and Figure 3 and referenced footnotes,
at pages 184-187 & 190.

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Dated: August 5, 2016

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



Robin McGinnis
Office of the Chief Counsel

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):

DWR'S Response to North Delta CARES' Objections to Written Testimony and Exhibits and Joinder in Objections Filed by other Protestants; DWR's Response to Protestant Save the Delta Alliance's Renewed Motion to Amend Protest

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 August 2, 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. Postal</u>
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I certify that the foregoing is true and correct and that this document was executed on August 5, 2016
Date

Signature: 

Name: Valentina German

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