The American River Water Agencies (ARWA) oppose the motion by the Department of Water Resources (DWR) to strike proposed terms and conditions of the modified flow management standard (exhibit ARWA-308 (MFMS)) and supporting evidence.

**BACKGROUND**

DWR’s attorney made this motion orally on May 12, 2017. It reflects DWR’s contention that the MFMS was required to be submitted in Part 1B of this hearing. The SWRCB’s hearing officer previously denied, or overruled as an objection, a different motion by DWR’s attorney to strike the MFMS, and supporting testimony, on the grounds that it was not within the scope of this hearing. Other parties, including at least the Bureau of Reclamation, joined DWR’s pending motion. Other than the MFMS, DWR did not identify specific testimony as subject to that motion. DWR’s counsel may have incorporated by
reference a statement by the State Water Contractors’ attorney concerning DWR's prior motion
and the specific portions of ARWA testimony that she considered to be subject to that prior
motion. The pending motion is based on DWR's argument that the MFMS, and supporting
testimony, are not timely as rebuttal.

ARGUMENT

The SWRCB must deny DWR’s motion because it is contrary to the clear rule
established by numerous prior procedural rulings that proposed terms and conditions may be
presented as Part 1 rebuttal in this hearing.

On August 30, 2016, in response to a letter that day from Daniel Kelly, Placer County
Water Agency’s attorney, that sought guidance concerning the timing of the submission of
proposed terms and conditions, the SWRCB’s hearing team sent an e-mail that stated:

We have conferred with the hearing officers and are writing to confirm that a
party participating in Part 1B of the hearing may submit a proposed protest
dismissal package as part of a rebuttal submittal, and that the proposal does not
have to be submitted by the September 1, 2016 deadline for written testimony
and exhibits for Part 1B cases-in-chief.”

In a December 19, 2016 ruling, in response to a December 5, 2016 letter from Downey
Brand LLP concerning the phasing of the presentation of proposed terms and conditions, the
SWRCB’s hearing officers stated the following:

Consistent with our prior direction, parties are encouraged to submit proposed
permit terms and conditions and supporting evidence as part of their rebuttal
testimony or, as appropriate, during Part 2 of the hearing.

(Emphasis added.)

On March 3, 2017, in response to the ARWA group’s February 16, 2017 letter
concerning the presentation of the MFMS, the SWRCB’s hearing team issued an e-mail that
stated:

The hearing team welcomes suggestions to conduct the WaterFix hearing as
efficiently as possible. However, presentation of evidence regarding Part 1
hearing issues during Part 2 would be inconsistent with the hearing officers’
 prior rulings and unfair to parties who have separated their cases-in-chief to
address the separate Part 1 and Part 2 issues. Therefore, ARWA should split
their presentation of evidence in support of their proposed permit terms and
conditions into Part 1 and 2 issues and present their evidence during the
appropriate part of the WaterFix hearing. ARWA should submit its Part 1
related information as part of its rebuttal testimony and exhibits package by
12:00 noon, March 23, 2017 as instructed in the hearing officers’ February 21, 2017 ruling letter.

On March 13, 2017, in response to a March 8, 2017 letter from Downey Brand LLP, the SWRCB sent an e-mail that stated, in part:

In response to concerns that information presented in Part 2 may have a bearing on Part 1 issues, the hearing officers have indicated that it may be necessary to revisit Part 1 issues after Part 2 of the hearing. The hearing officers will not evaluate whether it is necessary to revisit Part 1 issues, however, until Part 2 has been completed, and the parties should not assume that they will have a second opportunity to present evidence relevant to Part 1 issues. **Accordingly, the parties should present any supporting evidence for permit terms that they intend to propose to address Part 1 issues, including potential injury to legal users of water, during the rebuttal phase of Part 1.**

(Emphasis added.)

Both the Sacramento Valley Water Users and the ARWA have presented evidence in this proceeding that the Central Valley Project (CVP) could be operated more aggressively with WaterFix in place, which could result in reduced water storage levels in CVP reservoirs. The MFMS, supported by the related Part 1 portion of ARWA’s rebuttal testimony, would protect storage in Folsom Reservoir from those reduced water storage levels. As such, the MFMS is proper rebuttal evidence and falls squarely within the presentation of terms and supporting evidence contemplated by the Hearing Team’s prior rulings and direction in this proceeding. The SWRCB therefore must deny DWR’s pending motion.

**CONCLUSION**

For the reasons stated above, the American River Water Agencies respectfully request that the SWRCB deny DWR’s pending motion to strike exhibit ARWA-308 and supporting evidence.

Dated: May 15, 2017

Respectfully submitted,

BARTKIEWICZ, KRONICK & SHANAHAN

By: /s/ Ryan S. Bezerra
Ryan S. Bezerra
Attorneys for Cities of Folsom and Roseville, Sacramento Suburban Water District and San Juan Water District

SACRAMENTO COUNTY WATER AGENCY

By: /s/ Sarah Britton
Sarah Britton
Legal Counsel

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ARWA OPPOSITION TO DWR MOTION TO STRIKE MFMS
PLACER COUNTY WATER AGENCY

By: /s/Daniel Kelly
Daniel Kelly
Staff Counsel

STOEL RIVES LLP

By: /s/ Wes Miliband
Wes Miliband
Attorneys for the City of Sacramento
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 WaterFix Hearing – American River Water Agencies’ Opposition To Motion To Strike Modified Flow Management Standard As Terms And Conditions and Related Supporting Evidence

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 March 30, 2017, posted by the State Water Resources Control Board at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

I certify that the foregoing is true and correct and that this document was executed on May 15, 2017.

Signature: [Signature]
Name: Terry M. Olson
Title: Legal Assistant
Party/Affiliation: Cities of Folsom, Roseville, Sacramento Suburban Water District, San Juan Water District
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