

1 Tim O’Laughlin (SBN 116807)  
Valerie C. Kincaid (SBN 231815)  
2 Timothy J. Wasiewski (SBN 302306)  
O’LAUGHLIN & PARIS LLP  
3 2617 K Street, Suite 100  
Sacramento, California 95816  
4 Telephone: (916) 993-3962  
Facsimile: (916) 264-2040  
5 Email: [towater@olaughlinparis.com](mailto:towater@olaughlinparis.com)  
[vkincaid@olaughlinparis.com](mailto:vkincaid@olaughlinparis.com)  
6 [tw@olaughlinparis.com](mailto:tw@olaughlinparis.com)

7 Attorneys for **SAN JOAQUIN**  
**TRIBUTARIES AUTHORITY**

10 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 IN THE MATTER OF

12 CALIFORNIA DEPARTMENT OF WATER ) **SAN JOAQUIN TRIBUTARIES AUTHORITY’S**  
13 RESOURCES AND UNITED STATES ) **MOTION TO STRIKE FROM THE RECORD**  
BUREAU OF RECLAMATION PETITION ) **THE SEPTEMBER 8, 2017 LETTER FILED BY**  
14 FOR WATER RIGHT CHANGE RE: ) **THE CALIFORNIA DEPARTMENT OF WATER**  
15 CALIFORNIA WATERFIX. ) **RESOURCES AND U.S. BUREAU OF**  
 ) **RECLAMATION**  
16 )  
17 )  
18 )

19 The San Joaquin Tributaries Authority (“SJTA”) hereby submits this Motion to Strike the  
20 September 8, 2017 letter from the California Department of Water Resources (“DWR”) and U.S. Bureau of  
21 Reclamation (“USBR” or “Reclamation”) (collectively “Petitioners”) responding to the August 31, 2017  
22 Ruling Regarding Scheduling of Part 2 and Other Procedural Matters (“Operations Letter”). The Board  
23 should strike the Operations Letter because (1) Petitioners’ proposal that the California WaterFix be  
24 conditioned upon the terms contained in D-1641 is unclear; (2) the proposal is contrary to unrefuted evidence  
25 already in the record; and (3) the proposal includes incompatible and contradictory statements regarding flow  
26 objectives for the San Joaquin River (“SJR”) at Vernalis, while failing to describe with specificity which  
27 modeling requirements are controlling.

1 **The State Water Board’s Directive**

2 The Board’s August 31, 2017 Ruling Regarding Scheduling of Part 2 and other Procedural Matters  
3 (“Ruling”) required the following of DWR and USBR:

4 To eliminate any confusion concerning petitioners’ current proposal, we direct the  
5 petitioners to provide an updated summary of operating criteria that makes explicit  
6 whether particular criteria are proposed conditions of operation or are set forth  
7 solely as modeling assumptions. *(8/31/2017 SWB Ruling at p. 7)*

8 This level of clarification from the Petitioners is long overdue given that Part 1 of this proceeding is  
9 already complete (subject to reopening at the Board’s discretion). As the Board noted in its pre-hearing  
10 ruling of February 11, 2016 – approximately 20 months ago – the petition “lacks clarity in several ways,  
11 including whether operational criteria are intended to constrain project operations or are identified for  
12 modeling purposes only.” (California WaterFix Project Pre-hearing Conference Ruling, February 11, 2016,  
13 p. 6.) The Operations Letter fails to comply with the Board’s explicit directive in the Ruling, and it further  
14 exacerbates the problem which has existed since before this proceeding began. Specifically, it contains  
15 incompatible and misleading information, and creates greater confusion concerning proposed operations. For  
16 the reasons set forth below, the Board should strike the Operations Letter from the record as nonresponsive  
17 (Cal. Code of Civ. Proc., §436[a]), and direct the Petitioners to comply with the directive in the Ruling.

18 **1. The Proposal that California WaterFix Be Conditioned Upon the Terms of Water Rights  
19 Decision 1641 is Unclear.**

20 The Petitioners propose that California WaterFix be conditioned upon the terms contained in Water  
21 Rights Decision 1641 (“D-1641”). The Petitioners have repeatedly stated this proposal, but the meaning  
22 remains unclear. The Board is currently in the process of revising the Bay-Delta Water Quality Control Plan  
23 (“Bay-Delta Plan”), which is implemented through D-1641. Given the likelihood that the Bay-Delta Plan will  
24 be revised before the CWF becomes operational, the only reasonable interpretation is that Petitioners are  
25 proposing the requirements of D-1641 remain conditions of their permits, even after the Bay-Delta Plan is  
26 revised. Under this interpretation, any objectives in the revised Bay-Delta Plan that are more stringent than  
27  
28

1 the D-1641 requirements will be satisfied (by Petitioners or other water users) only after the Petitioners  
2 satisfy the D-1641 requirements. The Board should direct the Petitioners to clarify their proposal.

3 **2. The Proposal that California WaterFix Be Conditioned on D-1641 is a Fallacy.**

4 The unrefuted evidence in the current hearing record is that D-1641 flow objectives have never been  
5 met and currently are not being met by Reclamation. (SJTA-101, SJTA-103 [written testimony and analysis  
6 of Dan Steiner showing the history of USBR’s noncompliance with D-1641 flow objectives at Vernalis].)  
7 The SJTA also submitted into evidence two recent letters sent by USBR to the Board indicating that D-1641  
8 flow objectives at Vernalis have not been met, and that Reclamation has no plans to meet those objectives in  
9 the future. (SJTA-201, SJTA-203.)

10 D-1641 states the following for Reclamation’s permits:

- 11 2. Permittee shall, on an interim basis until the Board adopts a decision assigning permanent  
12 responsibility for meeting the water quality objectives:
- 13 a. Ensure that the water quality objective for fish and wildlife beneficial uses for San Joaquin  
14 River flow at Airport Way Bridge, Vernalis set forth in Table 3 is met, with the exception  
15 that during the April-May pulse flow period while the SJRA is in effect, experimental target  
16 flows set forth in (b) below may be provided in lieu of meeting this objective.
  - 17 b. During the April-May pulse flow period while the SJRA is in effect, maintain San Joaquin  
18 River flows at Airport Way Bridge, Vernalis, as follows, in lieu of meeting said river flow  
19 objective:

20 \* \* \*

- 21 3. If the San Joaquin River Agreement (SJRA) is dissolved by the signatory parties before it  
22 expires, then Permittee shall meet the San Joaquin River flow objective set forth in Table 3 until  
23 the Board establishes alternative implementation of the San Joaquin River flow objective. (D-  
24 1641, p. 161-162.)

25 The language is clear and unequivocal. Until the SWB “adopts a decision assigning permanent  
26 responsibility,” Reclamation is required to meet the Vernalis flow objectives. The fact that Reclamation  
27 refuses to meet the Vernalis flow objectives and the SWB continues to turn a blind eye to the single largest  
28

1 water right violation on a yearly basis does not mean that D-1641 is being met. It means the SWB refuses to  
2 enforce its orders, which the SWB asserts is within its prosecutorial discretion.

3 In spite of this unrefuted evidence that USBR has not met - and cannot meet - D-1641 flow  
4 objectives, the Petitioners blatantly mispresent to the Board that “[m]odeling assumptions demonstrate it is  
5 possible to meet the existing regulatory requirements **inclusive** of D-1641.” The modeling presented by  
6 DWR and Reclamation in the CWF proceeding, the CWF EIR-EIS, and anywhere else, never, we repeat,  
7 never, meets the Vernalis flow objectives. The modeling assumptions used by Petitioners presume that  
8 Reclamation will release water as it would have released under the San Joaquin River Agreement, or will  
9 simply meet the Reasonable and Prudent Alternatives set forth in the 2009 Biological Opinion from National  
10 Marine Fisheries Services. (Final EIR/EIS, Appx. 5A-B75, 5A-B81, 5A-B237-5A-239).

11 We challenge the SWB to find in D-1641 the language that supports such an operation. There is  
12 none.

13 The modeling results do not “demonstrate compliance with the existing WQCP.” In fact, the  
14 modeling results presented by the Petitioners show D-1641 flow objectives at Vernalis are routinely violated,  
15 even without TUCP’s.

16  
17 **3. The Operations Table is Contradictory and Fails to Describe Which Modeling Requirements are Controlling.**

18 Intentionally left off the summary of operations chart are the two flow objectives at Vernalis  
19 contained in the 1995 WQCP and implemented through D-1641. Instead, Petitioners present a Table  
20 summarizing Spring Outflow. Spring Outflow consists of three components: inflow, in-delta demand  
21 (including exports), and the remainder, outflow. Nowhere in the Spring Outflow Operation Table is inflow  
22 described.

- 23
- 24 ■ Final EIR/EIS (Spring Outflow):
    - 25 ○ Notice the language in the first bullet discusses “existing facilities,” but there is no  
26 discussion of what the hydrology will be. The EIR/EIS was all modeled using climate  
27 change and not current hydrology.
- 28



1 that the D-1641 flow objectives at Vernalis are being met (baseline), and will be met (project), under both the  
2 climate change model (EIR-EIS criteria) and current climate conditions (Biological Opinion Criteria). The  
3 SJTA also requests that the Board direct the Petitioners to clarify their proposal that California WaterFix be  
4 conditioned upon the terms contained in D-1641. Until such evidence is presented and the proposal clarified,  
5 the SWB should prohibit this charade from continuing any further.

6  
7 DATED: September 19, 2017

**O'LAUGHLIN & PARIS, LLP**

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9  
10 By:



TIM O'LAUGHLIN  
TIMOTHY J. WASIEWSKI  
Attorneys for SAN JOAQUIN  
TRIBUTARIES AUTHORITY

1 **STATEMENT OF SERVICE**

2 **CALIFORNIA WATERFIX PETITION HEARING**

3 **Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**


4  
5 I hereby certify that I have this day submitted to the State Water Resources Control Board  
6 and caused a true and correct copy of the following document(s):

7 **SAN JOAQUIN TRIBUTARIES AUTHORITY'S MOTION TO STRIKE FROM THE RECORD**  
8 **THE SEPTEMBER 8, 2017 LETTER FILED BY THE CALIFORNIA DEPARTMENT OF WATER**  
9 **RESOURCES AND U.S. BUREAU OF RECLAMATION**

10 to be served U.S. Mail or by Electronic Mail (email) upon the parties listed in Table 1 of the Current  
11 Service List for the California WaterFix petition Hearing, dated September 12, 2017, posted by the  
12 State Water Resources Control Board at:

13 [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/do](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2017/20170912_service.pdf)  
14 [cs/2017/20170912\\_service.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2017/20170912_service.pdf)

15  
16 I certify that the foregoing is true and correct and that this document was executed on  
17 September 19, 2017.

18  
19 Signature: 

20 Name: Timothy Wasiewski

21 Title: Attorney

22 Party/Affiliation: San Joaquin Tributaries Authority

23 Address: O'Laughlin & Paris, LLP  
24 2617 K Street, Suite 100  
25 Sacramento, CA 95816