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September 21, 2017

Via Email

Felicia Marcus, Co-Hearing Officer
Tam M. Doduc, Co-Hearing Officer
State Water Resources Control Board
CWFhearing@waterboards.ca.gov

**Re: Prehearing Conference Agenda Topics Requested by Pacific Coast
Federation of Fishermen's Associations and the Institute for Fisheries
Resources**

Hearing Officers:

Pursuant to the August 31, 2017 Ruling on Part 2 Scheduling of WaterFix Petition Hearing and Other Procedural Matters ("August 31, 2017 Ruling"), we present the following prehearing conference agenda topics on behalf of the Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources (collectively "PCFFA").

1. Before this Board may determine "appropriate Delta flow criteria" as necessary to evaluate the Change Petition under Water Code section 1701.2(d), this "Board is obligated to adopt a water quality control plan consistent with the overall statewide interest in water quality . . . which will insure 'the reasonable protection of *beneficial uses*'" *United States v. State Water Resources Control Board* ("U.S. v. S.W.R.C.B.") (1986) 182 Cal.App.3d 82, 116.

2. Before this Board may evaluate the Change Petition's impacts on beneficial uses, it must give particular attention to protecting "[t]he use of water for recreation and preservation and enhancement of fish and wildlife resources." Water Code §§ 1243, 1243.5. In doing so, this Board must "take into account whenever it is in the public interest, the amounts of water needed to *remain in the source* for protection of beneficial uses" including the preservation and enhancement of fish and wildlife. Water Code § 1243.5 (emphasis added).

3. The legal premises on which the WaterFix Change Petition is based are contrary to law in that the Petitioners incorrectly assume that they need only show no change to existing conditions. However, it is settled law that this Board may not rely on the "without project" (i.e., existing) conditions under the 1995 Water Quality Control Plan for the San Francisco Bay/San Joaquin-Sacramento Delta Estuary (as amended without substantive change in 2006) ("WQCP") "as the measure of water flows necessary to protect" legal users of water under Water Code section 1701.2(b). *U.S. v. S.W.R.C.B.*, 182 Cal.App.3d at 116.

4. Pursuant to Water Code section 85086(c)(1), this Board has previously determined that the “best available science suggests that current [Delta] flows are insufficient to protect public trust resources.” SWRCB-25 at p. 2 (excerpted in PCFFA-4 at p. 1). This finding was compelled because, as this Board specifically determined, “[r]ecent Delta flows are *insufficient* to support native Delta fishes for today’s habitats.” *Id.* at p. 5 (excerpted in PCFFA-4 at p. 4) (emphasis added).

5. As noted, the WQCP was adopted over two decades ago, in 1995, and amended without substantive change in 2006, and is obsolete. As this Board recognized in its February 11, 2016 Ruling in this proceeding, “the appropriate Delta flow criteria will be more stringent than petitioners’ current obligations and may well be *more stringent* than petitioners’ preferred project. *Id.* at 4 (emphasis added). Accordingly, as this Board further acknowledged, “it would be preferable to have Phase 2 [of the Plan update] completed *prior to* acting on the [C]hange [P]etition.” *Id.* at 4-5 (emphasis added). Actually, as noted above, this “preference” is a requirement of law.

6. There is currently no valid Delta Plan as required under the Delta Reform Act, Water Code section 85001 et seq. On May 18, 2016, the Sacramento Superior Court issued its 73-page ruling in Judicial Council Coordinated Proceeding No. 4758 setting aside the Delta Plan and ordering the Delta Stewardship Council to revise that invalid plan to “[i]nclude quantified or otherwise measurable targets associated with achieving *reduced Delta reliance, reduced environmental harm* from invasive species, *restoring more natural flows*, and increased water supply reliability, in accordance with the Delta Reform Act.” *Id.* at 26, 38. An adequate Delta Plan must be adopted before this Board may further consider the pending Change Petition.

7. The Biological Opinions prepared by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service are incomplete, inconsistent and inadequate, and provide no basis for this Board to determine the adverse impacts of the WaterFix’s construction and operation on threatened and endangered species.

8. The WaterFix is premised on incomplete, inconsistent and unreliable water flow modeling that fails to protect fish and wildlife in the Bay-Delta hydrologic system, including all of its tributary rivers and waters such as the Trinity River that have been diverted into the Bay-Delta system.

9. The Record of Decision for the WaterFix has not been prepared and approved by co-petitioner Bureau of Reclamation. Unless and until that occurs, this Board must hold any further review of the Change Petition in abeyance.

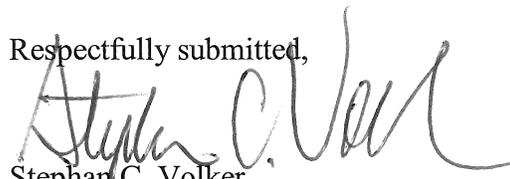
10. The Hearing Officers have indicated that “consideration of appropriate Delta flow criteria [is] a key issue to be addressed in Part 2,” and that Delta flow criteria developed in this hearing “would not be a rule of general application” as it would apply “only to the exercise of the water rights at issue in this proceeding.” August 31, 2017 Ruling, p. 15. As raised by numerous parties in the prior prehearing conference, the interplay and discrepancies between flow

requirements contained in the required updated Water Quality Control Plan, and flow criteria incorporated in any permit conditions, create uncertainty and the potential for harm to all beneficial uses.

11. PCFFA asks the Hearing Officers to consider PCFFA's January 22, 2016 prehearing conference comments regarding the timing and order of the Board's WaterFix proceedings. PCFFA incorporates these comments by reference, as they remain relevant.¹ PCFFA reiterates that the Board must exercise its independent judgment in resolving the issues before it, including the impacts of the Change Petition on fish and wildlife, recreational uses of water, and other public trust resources, and the appropriate Delta flow criteria. For this reason, the Board must accept testimony addressing the adequacy and accuracy of DWR's Final WaterFix EIR.²

Please include the foregoing topics in the agenda for Part 2, and provide an opportunity for the parties to address each of them.

Respectfully submitted,



Stephan C. Volker
Attorney for PCFFA and IFR

cc: California WaterFix Hearing Revised Service List (as of September 12, 2017)

¹ See

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/comments/docs/pcffa_irf_commentltr.pdf

² The DWR's certification of the WaterFix EIR and approval of the Project has been challenged in nearly twenty separate lawsuits.