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On behalf of Interested Party,  
PARTNERSHIP FOR SOUND SCIENCE IN  
ENVIRONMENTAL POLICY

BEFORE THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

HEARING ON THE MATTER OF  
CALIFORNIA DEPARTMENT OF WATER  
RESOURCES AND UNITED STATES  
BUREAU OF RECLAMATION REQUEST  
FOR A CHANGE IN POINT OF DIVERSION  
FOR CALIFORNIA WATER FIX.  

(1) RESPONSE TO CALIFORNIA DEPARTMENT OF WATER RESOURCES’ OBJECTION TO POLICY STATEMENT SUBMITTED BY THE PARTNERSHIP FOR SOUND SCIENCE IN ENVIRONMENTAL POLICY;

(2) PARTNERSHIP FOR SOUND SCIENCE IN ENVIRONMENTAL POLICY REQUEST THAT DECEMBER 6, 2017 SUBMITTAL BE ACCEPTED AS PUBLIC COMMENT ON THE ASSOCIATED 401 CERTIFICATION APPLICATION.

I. INTRODUCTION

The Partnership for Sound Science in Environmental Policy (“PSSEP”) is an “Interested Party” in the above-captioned matter and has presented two Policy Statements pursuant to the Hearing Rules in order to provide input on the implications of the WaterFix proceedings. The most recent Policy Statement was submitted by PSSEP on December 6, 2017, and focuses solely on the issue of monitoring for increased...
selenium loading to San Francisco Bay associated with the construction and future operation of the WaterFix. On January 11, 2018 – and without notice to PSSEP, DWR filed its “Objection to Policy Statement Submitted by Partnership for Sound Science in Environmental Policy” (“DWR Objection”). In what would appear to be an unprecedented step, DWR seeks to have PSSEP’s December 6, 2017 Policy Statement excluded from consideration in these matters, claiming that the Policy Statement was offered as “evidence for the Board’s consideration as a proposed permit condition.” (DWR Objection at p. 2, lines 10-11.)

For the reasons set forth below, PSSEP respectfully requests that the Hearing Officers: (1) deny with prejudice DWR’s request to exclude PSSEP’s December 6 Policy Statement; and (2) accept PSSEP’s December 6 submittal as a proper and timely “public comment” on the WaterFix Project for purposes of the associated 401 Water Quality Certification application filed by DWR on September 24, 2015.

1  PSSEP only learned of DWR’s Objection by happenstance, and after receiving an email from a third party at midday on January 11. In fact, the “Statement of Service” for the DWR Objection clearly states that email service was transmitted only “upon the parties listed in Table 1 of the Current Service List for the California WaterFix Petition hearing, dated January 2, 2018.” Because PSSEP is not a “Designated Party,” it is not a Table 1 entity to which Notice of the DWR Objection was provided. Nevertheless, DWR had access to PSSEP’s email address as it is listed as a Table 2 entity of “Interested Parties” who have filed an NOI to present Policy Statements. PSSEP does not know, nor will it speculate as to DWR’s intent in failing to provide PSSEP notice of the DWR Objection, but we note that the Part II Hearings commence in less than three business days from the date of this Response and Request.

2 Based on a thorough review of the publicly available administrative record compiled in this WaterFix Change Petition Hearing process to date (https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/water_right_petition.shtml), it appears there has been only one Objection and request to exclude an Interested Party’s Policy Statement. That would be the present DWR Objection to PSSEP’s December 6 Policy Statement, which is the subject of this Response and associated Request.

3 PSSEP notes for the record that neither DWR, nor any other Designated Party, filed an Objection or request to exclude PSSEP’s July 26, 2016 Policy Statement, which addressed the same issues of increased selenium loading to the Delta and San Francisco Bay that are expected to occur from the WaterFix Project.
II. ARGUMENT

A. PSSEP’s December 6 Policy Statement Was Not Offered As Evidence, But Rather, to Provide Input on the Implications of the WaterFix Proceedings.

The “State Water Resources Control Board’s (State Water Board) practice is to allow policy statements during evidentiary hearings as a courtesy so that members of the public have the opportunity to participate and provide input on the policy implications of a proceeding.” (State Water Board Hearing Officers’ Ruling on Policy Statements, Format of Petitioners’ Case-In-Chief and Clarification Regarding Motions for California WaterFix Hearing, July 13, 2016 at p. 1.) That is precisely what PSSEP has done in presenting its two Policy Statements in these proceedings.

There are grave policy implications associated with the potential construction and operation of the WaterFix Project, not the least of which relate to potentially huge increases of selenium loading to the Delta and San Francisco Bay. These increased selenium loads have the potential of upsetting the carefully developed North San Francisco Bay Selenium TMDL, adopted by the San Francisco Regional Board on November 18, 2015 and approved by the State Water Board on March 15, 2016.

As the WaterFix Project co-proponent, DWR itself raised the issue of environmental impacts associated with increased selenium loading to the Delta and San Francisco Bay. According to the Final EIR/EIS for the WaterFix Project:

“Changes in source water fraction and net Delta outflow under [the Preferred Alternative], relative to Existing Conditions, are projected to

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5 SWRCB Res. No. 2016-0017.
cause the total selenium load to the North Bay to increase by 6-11%...”6

Unfortunately, the Final EIR/EIS - - certified by DWR as the lead agency under CEQA - - concludes that:

“The estimated changes in selenium loads in Delta exports to San Francisco Bay due to [the Preferred Alternative] are not expected to result in adverse effects to beneficial uses or substantially degrade the water quality with regard to selenium, or make the existing CWA Section 303(d) impairment [for selenium] measurably worse.”7

As a result, the Final EIR/EIS calls for no mitigation measures to address the projected increase of selenium loading to the Delta and San Francisco Bay, and worse, no monitoring to determine if the Final EIR/EIS preparers’ modeling estimates will be proven accurate. PSSEP believes, as a matter of policy, that if the State Water Board were to approve the WaterFix Change Petition, it should also require – at a minimum – that the project proponents undertake appropriate selenium monitoring in the Delta so the public (and future State Water Board Members) can know what the real impacts of the WaterFix Project are on Delta and San Francisco Bay water quality. Since DWR and the other WaterFix Project proponents have failed to offer any kind of selenium monitoring plan for the Delta - let alone a reasonable one - PSSEP has presented one for the Hearing Officers’ consideration. This is hardly “evidence” of anything, contrary to what DWR would have the Hearing Officers believe.

As such, DWR’s Objection should be overruled and its request to have PSSEP’s December 6 Policy Statement excluded should be denied.

B. PSSEP’s Policy Statement Submitted in the Water Right Change Petition Hearing Should Also Be Considered “Public Comments” on the Associated 401 Water Certification Application and Accepted by the Hearing Officers.

In addition to the present water right Change Petition filed by DWR and its co-applicants, DWR filed an application for 401 Water Quality Certification (“401 Certification”) of the WaterFix Project on September 24, 2015. There was some question at the beginning of the water right Change Petition Hearing process whether that 401 Certification process would follow or be processed simultaneously with the Change Petition. Ultimately, the Hearing Officers ruled that the 401 Certification process would follow the Change Petition process. (See, State Water Board Hearing Officers’ Ruling on Pre-Hearing Conference Procedural Issues, February 11, 2016 at pp. 7-8; hereafter, “February 11 Ruling”.)

The State Water Board Hearing Officers also ruled that the hearing record for the current water right proceedings “and any other information that may be appropriate for consideration in the 401 [certification] Application decision” will be available to the State Water Board’s Executive Director following the present Hearing. (February 11 Ruling at p. 8.) In effect, and to promote efficiency, the Hearing Officers determined that the present Hearing shall serve to inform both the WaterFix water right Change Petition and the WaterFix 401 water quality certification application. (Id. “In order to ensure that parties do not have to duplicate their participation in two proceedings with overlapping issues, and to allow the decision on the 401 Application to be informed by the significant information that will be produced in the hearing process, the Executive Director will not issue a decision on the 401 Application until after the hearing record for the water right petition closes.”)
Finally, the Hearing Officers ruled, “All of the information that the Executive Director relies upon and any comments received in the 401 Application process will be posted on the State Water Board’s website, ensuring that all of the interested parties have access to the information. There is no close to the comment period on the 401 Application, which will allow the Executive Director to consider information that may be developed after parts of the hearing are complete, ensuring the most up to date information may be relied upon. The standard 401 Application process also allows for informal collaboration with agencies and interested persons, including those that may not participate in the water right petition evidentiary hearing process.” (February 11 Ruling at p. 8; emphasis added.)

Because the public comment period on the 401 Certification application filed by DWR remains open, PSSEP – as any other individual or entity - is entitled to submit public comments on that 401 Certification application. As such, PSSEP hereby requests that its December 6 Policy Statement be accepted by the Hearing Officers as proper and timely comments on the 401 Certification, in addition to a Policy Statement related to the water right Change Petition. PSSEP has found no prohibition in the State Water Board regulations governing water rights applications, change petitions, or 401 Certification proceedings that would preclude the Hearing Officers from granting PSSEP’s request.

Respectfully submitted,

PARTNERSHIP FOR SOUND SCIENCE IN ENVIRONMENTAL POLICY, Interested Party

Date: January 12, 2018

By: Craig S.J. Johns
Program Manager
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):

(1) RESPONSE TO CALIFORNIA DEPARTMENT OF WATER RESOURCES’ OBJECTION TO POLICY STATEMENT SUBMITTED BY THE PARTNERSHIP FOR SOUND SCIENCE IN ENVIRONMENTAL POLICY;

(2) PARTNERSHIP FOR SOUND SCIENCE IN ENVIRONMENTAL POLICY REQUEST THAT DECEMBER 6, 2017 SUBMITTAL BE ACCEPTED AS PUBLIC COMMENT ON THE AFFILIATED 401 CERTIFICATION APPLICATION.

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 January 12, 2018 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.

I certify that the foregoing is true and correct and that this document was executed on January 12, 2018.

Signature: _______________________________
Name: Craig S.J. Johns
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Sacramento, CA 95814