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7 and INSTITUTE FOR FISHERIES RESOURCES

8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

9 HEARING REGARDING PETITION FILED BY ) **JOINDER BY THE PACIFIC COAST**  
THE DEPARTMENT OF WATER ) **FEDERATION OF FISHERMEN’S**  
10 RESOURCES AND U.S. BUREAU OF ) **ASSOCIATIONS AND INSTITUTE FOR**  
RECLAMATION REQUESTING CHANGES IN ) **FISHERIES RESOURCES IN THE**  
11 WATER RIGHTS FOR THE CALIFORNIA ) **MOTIONS OF SAVE THE CALIFORNIA**  
WATERFIX PROJECT ) **DELTA ALLIANCE, ET AL. AND**  
12 \_\_\_\_\_ ) **COUNTY OF SACRAMENTO, ET AL. TO**  
13 **STAY OR CONTINUE WATERFIX PART 2**  
**HEARING**

14 The Pacific Coast Federation of Fishermen’s Associations and Institute for Fisheries Resources  
15 (collectively, “PCFFA”) join Protestants Save the California Delta Alliance, et al. and the County of  
16 Sacramento, et al. in moving this Board for a stay of this Board’s hearing of Part 2 of Petitioners’ Petition  
17 for Change. This stay is necessary to afford the Protestants an opportunity to conduct discovery to  
18 ascertain the full extent of the improper ex parte communications between members of the Hearing Team  
19 and Petitioner Department of Water Resources (“DWR”). Unless and until each and every one of those  
20 unlawful ex parte communications is fully exposed and examined – and an appropriate remedy based  
21 thereon is secured – this Board may not continue – let alone make further procedural or substantive  
22 decisions – with this proceeding.

23 The ex parte communications that have already been disclosed in response to Public Records Act  
24 (“PRA”) requests demonstrate that this proceeding is irretrievably tainted by misconduct by members of  
25 the Hearing Team and representatives of DWR. The admission by this Board’s attorney Nicole L. Kuenzi  
26 on January 8, 2018 that DWR secretly distributed evidentiary materials to Hearing Team members at  
27 private meetings to gain this Board’s approval of DWR’s Petition is sufficient in itself to justify dismissal  
28 of the Petition to redress DWR’s misconduct. Ms. Kuenzi’s further disclosure that DWR personnel

1 collected all these materials at the conclusion of each secret meeting with Hearing Team members  
2 confirms the illicit motive underlying these meetings. DWR not only understood that its ex parte  
3 communications were unlawful, but far worse, it sought to prevent Protestants and the public from ever  
4 uncovering the extent of those communications. DWR's willful attempt to prevent disclosure of the fact  
5 and extent of its ex parte communications warrants dismissal of its Petition and compensation for the  
6 time and resources needlessly expended by Protestants in this irrevocably tainted proceeding.

7         The Hearing Team's secret meetings with DWR reflect not only a systematic subversion of the  
8 public hearing process, but also reveal actual bias by this Board against the interests of the Protestants  
9 and in derogation of this Board's statutory duties to fairly apply and enforce the laws that govern this  
10 proceeding, including the California Environmental Quality Act ("CEQA"). For at least two years,  
11 Protestants including PCFFA have urged this Board to rectify the profound deficiencies in the draft and  
12 final environmental impact reports prepared for DWR's "California WaterFix" Project. At each turn, this  
13 Board has denigrated and dismissed the public's attempts to secure this Board's compliance with CEQA.  
14 For example, in this Board's Pre-Hearing Conference Notice dated January 15, 2016, the Hearing Team  
15 asserted that, notwithstanding the Board's duties as a "responsible agency" under CEQA, "the adequacy  
16 of DWR's EIR for the WaterFix Project for purposes of *CEQA compliance is not a key hearing issue, and*  
17 *the parties should not submit evidence or argument on this issue.*" (*Id.*, emphasis added.)

18         Significantly, this Notice directing the public and Protestants *not* to "submit evidence or  
19 argument" on the issue of EIR adequacy followed a secret meeting on January 4, 2016 between Water  
20 Board Hearing Team members Samatha Olson, Dana Heinrich, Rich Satkowski and John Gerlach and  
21 DWR hearing counsel Kenneth Bogdan and DWR staffer Cassandra Enos, in which the subject was  
22 "WaterFix EIR Discussion." It is apparent that as a result of that secret meeting with DWR, the Water  
23 Board Hearing Team decided to sidestep its CEQA responsibilities and preemptively foreclose any  
24 objections by the public and Protestants to the EIR's adequacy by excluding "CEQA compliance" from  
25 the list of "key hearing issues."

26         Notwithstanding this corrosive misdirection from the Hearing Team, by letter dated January 22,  
27 2016, PCFFA pointed out that the Board's "position appears to overlook several important duties owed  
28 by responsible agencies under CEQA that impact these hearing procedures." *Id.* at p. 1. PCFFA rightly

1 observed that this Board’s CEQA responsibilities require that it “fully participate in the environmental  
2 review process, independently assess the adequacy of the final environmental impact report, ‘make the  
3 findings required by [CEQA Guidelines] Section 15091 for each significant effect of the project’ and . . .  
4 make the findings in Section 15093 [i.e., a statement of overriding considerations] if necessary.” *Id.* at 2,  
5 quoting CEQA Guidelines section 15096(h). PCFFA pointed out further that this Board’s duties under  
6 CEQA require that it “not approve projects as proposed if there are feasible alternatives or feasible  
7 mitigation measures available which would substantially lessen the significant environmental effects of  
8 such projects.” *Id.* at p. 2, quoting Public Resources Code section 21002. PCFFA cited appellate rulings  
9 requiring responsible agencies such as this Board to take responsibility for the adequacy of EIRs that they  
10 reviewed, and to make findings regarding the feasibility of relevant mitigation measures or project  
11 alternatives that might substantially lessen or avoid significant environmental effects. *Id.* at p. 3. PCFFA  
12 explained that this “Board’s position that ‘a responsible agency must assume that the CEQA document  
13 prepared by the lead agency is adequate’ is in error, and ‘the adequacy of DWR’s EIR for the WaterFix  
14 Project’ is a *key hearing issue* that should be addressed prior to the Water Board’s review of the potential  
15 effects of the water right change petition on legal users of water . . . .” *Id.* at p. 3.

16         Yet at the same time the Water Board’s Hearing Team was telling PCFFA and the other  
17 Protestants that “CEQA compliance is not a key hearing issue, and the parties should not submit evidence  
18 or argument on this issue,” the Hearing Team was secretly meeting with DWR to discuss this very issue.  
19 Just three days later – on January 25, 2016, the Hearing Team held an ex parte meeting between 2:00 p.m.  
20 and 4:00 p.m. at a DWR office in the Bonderson Building. According to the partial disclosures made in  
21 response to Protestant Patrick Porgans’ PRA requests, Hearing Team members Samatha Olson, Dana  
22 Heinrich, Rich Satkowski and John Gerlach met with DWR hearing counsel Kenneth Bogdan, DWR lead  
23 witness Jennifer Pierre, DWR consultant Chandra Chilmakuri and DWR staffer Cassandra Enos to  
24 discuss “preparation of the final EIR/EIS.”

25         Undoubtedly influenced by the Hearing Team’s secret meeting with DWR on January 25, 2016  
26 addressing “preparation of the final EIR/EIS,” two weeks later, on February 11, 2016, the Water Board  
27 Hearing Team issued its Pre-Hearing Conference Ruling. That Ruling ignored PCFFA’s January 22,  
28 2016 request that CEQA compliance be considered a “key hearing issue” on which the parties would be

1 permitted to present testimony on argument. Instead, that Ruling stated:

2 **CEQA Compliance**

3 In our January 15, 2016 [Pre-Hearing Conference Notice] regarding the issues to be  
4 discussed at the pre-hearing conference, we explained that the State Water Board’s role as  
5 a responsible agency under CEQA is limited, and for that reason the adequacy of the  
6 CEQA documentation for the WaterFix for purposes of CEQA [sic] is not a key hearing  
7 issue. Despite this admonition, several parties argued that the draft Environmental Impact  
8 Report [EIR] that DWR has prepared for the project is inadequate, and that an adequate  
9 document must be prepared before the State Water Board may hold a hearing on the  
10 change petition.”

11 *Id.* The Water Board went on to repeat its warning that the public and the Protestants should not present  
12 testimony or argument on the issue of CEQA compliance. This Board reiterated its ruling forbidding  
13 Protestants from raising CEQA issues again on March 4, 2016, when it again “strongly discouraged  
14 follow-up comments on rulings and duplicative motions” on issues including the Board’s CEQA  
15 compliance.

16 On July 12, 2016, PCFFA filed a motion with the Board “to disqualify petitioners’ witnesses and  
17 exclude their testimony and exhibits” on the grounds, among others, that “The WaterFix/BDCP EIR/EIS  
18 Is Preliminary and Inadequate.” Motion of Protestants Pacific Coast Federation of Fishermen’s  
19 Associations and Institute for Fisheries Resources to Disqualify Petitioners’ Witnesses and Exclude Their  
20 Testimony and Exhibits, filed July 12, 2016, at pp. 12-21. Again, on September 2, 2016, in its Part 1  
21 Opening Statement, PCFFA presented extensive argument demonstrating that the WaterFix/BDCP  
22 EIR/EIS was inadequate. *Id.* at pp. 16-24.

23 Yet once again, this Board ignored PCFFA’s argument on this issue. Instead, this Board  
24 continued to issue ruling after ruling in which it reiterated its erroneous position that its CEQA  
25 compliance was not an issue on which the Protestants would be permitted to submit argument and  
26 testimony. Most recently, on January 4, 2018, this Board forbade testimony from Part 2 of the Hearing  
27 that addressed CEQA and the inadequacy of the WaterFix EIR/EIS. *Id.* at pp. 4-5. It specifically  
28 excluded testimony from Protestants challenging the deficient discussions in the WaterFix’s FEIR/EIS.  
*Id.*

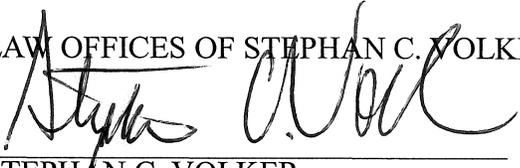
29 In summary, for over two years this Board’s Hearing Team has issued ruling after ruling  
30 precluding Protestants from presenting evidence and argument on the Board’s failure to comply with  
31 CEQA, while at the same time it has been meeting secretly with DWR for the express purpose of

1 discussing that very topic. This Board's bias against Protestants, and favoritism toward DWR, is palpable  
2 and indisputable. It disqualifies the Hearing Team from further participation in this proceeding, and  
3 requires dismissal of DWR's Petition.

4 For these reasons and those explicated in the motions to stay filed by the Save the California Delta  
5 Alliance, et al. and the County of Sacramento, et al., this Board should grant their motions.

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Dated: January 17, 2016

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