Deirdre Des Jardins, principal at California Water Research ("California Water Research"), hereby joins in and incorporates in full the February 7, 2018 renewed motion by the Natural Resources Defense Council et. al. ("NRDC") to stay or continue Part 2 of the WaterFix Hearing. California Water Research provides further points and authorities in support of the motion to stay or continue Part 2, as argued below.

While the Hearing Officers have ruled that they must act on the Petition that is before the Board, as discussed in the attached affidavit, the sworn Petition that is before the Board (Exhibit SWRCB-1) refers to information in the Partially Recirculated Draft EIR/EIS, and has never been amended. If the Hearing Officers allow the Petitioners to correct the Petition by submission of new evidence and testimony (Cal. Code Regs., tit. 23, 683(a)), the Hearing Officers must ensure
that the information is accurate and fully responsive to any request to correct the information in the Change Petition.

The Department of Water Resources has announced changes to a phased implementation of the WaterFix project, and is now claiming:

Preliminary modeling indicates that there are no new water quality or aquatic issues related to staging the implementation. DWR expects no changes in impact determinations and no changes to mitigation.  
(February 7, 2018 letter from Karla Nemeth, To: Public Water Agencies Participating in WaterFix, p. 2.)

As explained in the attached affidavit, there is prima facie evidence that DWR knew that the project was changing to a staged implementation at the time DWR submitted testimony and evidence for Part 2. DWR’s actions in knowingly submitting obsolete, misleading, and inaccurate testimony and evidence for the Hearing are egregious. To proceed with Part 2, given this announcement, is to deprive Protestants of the right under due process to fully examine and rebut DWR’s assertions that there are no new water quality or aquatic issues related to staging the implementation, including the right to fully examine and rebut DWR’s preliminary modeling. This has been settled law for over a century (Int. Com. Comm. v. Louis. & Nash. R.R., (1913) 227 U.S. 88, 93.)

More recent cases were cited by the Pacific Coast Federation of Fishermen’s Associations, ““[I]n civil proceedings a party has a due process right under the Fifth and Fourteenth Amendments to the Federal Constitution to cross-examine and confront witnesses.”” Seering v. Department of Social Services (1987) 194 Cal.App.3d 298 at 304, quoting In re Mary S. (1986) 186 Cal.App.3d 414, 419. ““[In] a civil proceeding the constitutional right involves general notions of procedural due process.”” Id. DWR cannot simply provide hand-waving arguments, relying on facts not in evidence, that there are no differences in project impacts. Dee v. PCS Property Management, Inc. (2009) 174 Cal.App.4th 390, 404 (an opinion based on
assumed facts, without adequate foundation for concluding that those facts exist, is unreliable and therefore should be excluded.)

There is also evidence that the withdrawal of Westlands Water District from the project has affected the planned operations of the Central Valley Project. As explained in the attached affidavit by Deirdre Des Jardins, the U.S. Bureau of Reclamation appears to not be proposing to issue a Record of Decision on the WaterFix Environmental Impact Statement, and has instead started a concurrent NEPA process to determine coordinated operations of the Central Valley Project and State Water Project. This has not been disclosed to the WaterFix hearing parties or the Hearing Officers.

California Water Research hereby submits the attached Affidavit of Obsolete, Misleading, and Inaccurate Information Submitted in Support of the Waterfix Water Right Change Petition by Deirdre Des Jardins. While there is no clear precedent for this situation in case law on decisions by the Water Board, courts have held that county planning department employees have a personal duty, as public employees, to not sign off on building permits with inaccurate information about compliance with building codes (Cooper v. Jevne (1976) 56 Cal.App.3d 860.) The WaterFix facilities are not a building, but they could also cause massive injury to fish and wildlife and legal users of water. California Water Research argues that State Water Resources Control Board members also have a duty to not knowingly consider or approve a water right change petition with obsolete, misleading, or inaccurate information about injury to fish and wildlife or legal users of water, required by statute and regulation.

In conclusion, both due process and duty as State Water Resources Control Board members requires the Hearing Officers to continue the hearing and require Petitioners to provide complete and accurate information about the actual project they are proposing to build and operate, so that there is complete and accurate information available for the hearing about injury to fish and wildlife or legal users of water.

California Water Research Joinder in NRDC et. al.’s Renewed Motion for Stay or Continuation
Dated Feb 7, 2018

Respectfully submitted,

[Signature]

Deirdre Des Jardins
Principal, California Water Research
AFFIDAVIT OF OBsolete, MISLeADING, AND INACCURATE INFORMATION
SUBMITTED IN SUPPORT OF WATERFIX WATER RIGHT CHANGE PETITION

I, Deirdre Des Jardins, do hereby declare as follows:

Based on information and belief, the California Department of Water Resources and the
United States Bureau of Reclamation are knowingly and willfully pursuing a change Petition
application with obsolete (currently false), misleading, and inaccurate information on the
WaterFix project, submitted to meet statutory and regulatory requirements. Petitioners also
knowingly and willfully submitted misleading and inaccurate statements regarding current
proposed operations on September 8, 2017. In addition, the California Department of Water
Resources has submitted extensive witness testimony which states, for example,

For purposes of Part 2 of the hearing, including this testimony, the California WaterFix
(CWF) project is described by Alternative 4A under an operational scenario described as
H3+ that is set forth in the Final Environmental Impact Report/Environmental Impact
Statement and supplemental information adopted by DWR through the issuance of a
Notice of Determination in July 2017 (2017 Certified FEIR)
(Exhibit DWR-1011, Testimony of Aaron Miller p. 2.)

As explained below, there is prima facie evidence that the statement “For the purposes of
Part 2 of this hearing … the California WaterFix (CWF) project is described by Alternative 4A
…. adopted by DWR through the issuance of a Notice of Determination” is deliberately
misleading and inaccurate, and designed to conceal the fact that the project adopted by DWR in
the Notice of Determination is changing to a phased implementation, due to withdrawal of the
largest Central Valley Project partner, Westlands Water District, from the project.

The Bureau of Reclamation has not issued a Record of Decision for the WaterFix
Environmental Impact Statement in over a year, and is currently in the middle of a new NEPA
process to determine long-term coordinated operations of the State Water Project and Central
Valley Project, including the WaterFix project. Reclamation is providing no witness testimony
on Reclamation’s operational plans for the CVP, and Reclamation’s counsel has filed a statement

California Water Research Joinder in NRDC et. al.’s Renewed Motion for Stay or Continuation
in the hearing that the Department of Interior is not required to respond to any subpoenas for witnesses or records from Hearing parties. The Department of Fish and Wildlife, which is reported to be reviewing environmental compliance, DWR’s new phased project, and is also participating in Reclamation’s new NEPA process as a coordinating agency, has withdrawn as a party from the hearing.

In sum, there is prima facie evidence that Petitioners have knowingly and willfully submitted obsolete, inaccurate, and misleading information to the Board, that is required by statute and regulation for change petitions.

I. The Change Petition is Sworn Under Penalty of Perjury

Section 711 of Title 23 of the California Code of Regulations, requires that applications for Change Petitions be certified as true under penalty of perjury:

Applications and accompanying statements, including information required by Section 731, reports required of permittees and licensees and petitions for extension of time and for changes, shall be certified as true under penalty of perjury in accordance with Section 2015.5 of the Code of Civil Procedure. (underlining added.)

The Board’s standard Petition application form, “Environmental Information for Petitions,” requests the information required by statute and the Board’s regulation, and requires a signature on the following statement:

I (we) hereby certify that the statements I (we) have furnished above and in the attachments are complete to the best of my (our) ability and that the facts, statements, and information presented are true and correct to the best of my (our) knowledge. (Exhibit SWRCB-1, p. 9.)

The application form for the WaterFix Water Right Change Petition was sworn by Nancy Quan, Supervising Engineer at the Department of Water Resources’ State Water Project Analysis Office as an authorized agent for the Department of Water Resources, and by Richard J. Woodley as an authorized agent for the Bureau of Reclamation (Exhibit SWRCB-1, p. 9.)
The Board’s standard Petition application form also requires the following:

**DESCRIPTION OF PROPOSED CHANGES OR WORK REMAINING TO BE COMPLETED** For a petition for change, provide a description of the proposed changes to your project including, but not limited to, type of construction activity, structures existing or to be built, area to be graded or excavated, increase in water diversion and use (up to the amount authorized by the permit), changes in land use, and project operational changes, including changes in how the water will be used. (Exhibit SWRCB-1, p. 6.)

This information is required by statute (Wat Code § 1701.2(c), Wat. Code § 1701.2(e)) and regulation (Tit 23 Cal Code Regs § 794(a.)) The response by the Petitioners’ agents referred to Alternative 4A in the Draft EIR/EIS in the response to this form, stating in part:

It is the intent of the Petitioners to Alternative 4A includes the construction of three fish-screened intakes on the east bank of the Sacramento River between Clarksburg and Courtland, each with a capacity of 3,000 cfs. [...] Specific discussions of the components of Alternative 4A most relevant to the attached water rights change petition can be found within the Partially Recirculated Draft EIR / Supplemental Draft EIS at sections 1.1; 1.1.4; 4.1; 4.1.2.2; 4.1.2.3; 4.1.2.4; 4.3.7; 4.3.8; 11.15.2; Appendix A; Appendix 3B (Exhibit SWRCB-1, p. 6.)

The letter submitting the Petition also stated,

The California WaterFix described in this Petition is described as Alternative 4A, the preferred alternative, in the Draft EIR/EIS. (Exhibit SWRCB-1, p. 17.)

The rest of the responses on the Board’s application form referred to the Partially Recirculated Draft EIR / Supplemental Draft EIS. The Petitioners are attempting to amend this information, submitted with the signed, Petition, with the WaterFix Final EIR/EIS, published on December 22, 2016, and the Notice of Determination on July 21, 2017.

However, there is substantial evidence that the proposed project has changed since the Notice of Determination was filed. Petitioners appear to be simply submitting the Final EIR/EIS to avoid having to produce new analyses of impacts on fish and wildlife and legal users of water for this proceeding. In this respect, the September 8, 2017 statement by the Petitioners appears to be intentionally misleading:
The attached tables describe a summary of the operating criteria for the project that was approved by DWR on July 21, 2017 and is described in the Final Environmental Impact Report and additional information made available to the public at that time. The tables also describe the operating criteria for the projects permitted by the National Marine Fisheries Service, U.S. Fish and Wildlife Service, and the California Department of Fish and Wildlife. (p. 2.)

The September 8, 2017 statement by the Petitioners only refers to “the operating criteria for the project that was approved by DWR,” and does not state that the tables describe how DWR intends to operate the project. DWR has also provided no witnesses for Part 2 who testify that DWR intends to operate the project according to the CWF H3+ scenario. Aaron Miller, DWR’s witness for Part 2, only states that “it is possible to operationalize” the CWF H3+ operational scenario presented for the project. (Exhibit DWR-1011, p. x.)

II. Evidence of a Changing WaterFix Project

The WaterFix Partially Recirculated Draft EIR/EIS, which is the project in the signed, sworn WaterFix Change Petition application, assumed full participation by the United States Bureau of Reclamation in the project, which is simply no longer the case. A February 7, 2018 letter from Karla Nemeth, Director of the California Department of Water Resources announces that the project is changing. The letter states,

DWR will fully evaluate the potential environmental impacts of the staged implementation option and expects to issue a draft supplemental Environmental Impact Report in June of 2018, with a final in October 2018. The additional information developed for CEQA will also be used to supplement the Endangered Species Act, Section 7 and California Endangered Species Act, Section 2081 record. DWR does not expect substantial change to the Biological Opinions or Section 2081 Incidental Take Permit issued in 2017.

(February 7, 2018 letter from Karla Nemeth, To: Public Water Agencies Participating in WaterFix, p. 2.)

There is prima facie evidence that this information has been known for some time.

Westlands Water District voted not to participate in the WaterFix project on September 19, 2017, less than three weeks after the Petitioners submitted their summary of operating criteria to the
WaterFix hearing. Santa Clara Valley Water District voted unanimously on October 17, 2017 for a resolution supporting a scaled-down and staged project:

Given that Westlands Water District and certain other agriculture districts have declined to participate in the WaterFix project, we are supportive of a lower-cost, scaled-down, and staged project that is consistent with the existing environmental impact reports and other administrative proceedings. We support considering an approach that incorporates the following in the first stage of the project:

a) One tunnel instead of the two tunnels;
b) A reduced intake volume from the original 9,000 cubic feet per second;
c) A reduced number of intakes on the Sacramento River …

(SCVWD Resolution 17-68, p. x.)

In sum, there is prima facie evidence that the Department of Water Resources knowingly and willfully submitted obsolete, misleading, and inaccurate testimony and evidence in support of the Change Petition for Part 2.

### III. Reclamation’s Separate NEPA Process

As described below, the Bureau of Reclamation has not signed a Record of Decision for the WaterFix project and has instead embarked on a separate NEPA process with the Department of Water Resources to determine long-term operations of the Central Valley Project and State Water Project, including potential operations of the WaterFix. The WaterFix Final EIR/EIS was published by the California Department of Water Resources (“DWR”) on December 22, 2016. Reclamation signed a Memorandum of Understanding (“MOU”) regarding Reinitiation of Consultation on Long Term Operations on December 19, 2016. The California Department of Water Resources signed the MOU on December 29, 2016.

On December 29, 2017, Reclamation issued a Notice of Intent to Prepare an EIS, stating that Reclamation would be considering the following:
Modified operations of the CVP and SWP with and without new or proposed facilities including possible requests to modify environmental and regulatory requirements, and sharing of water and responsibilities in the Delta.

Meeting notes from Reclamation’s February 14, 2017 stakeholder meeting on Reclamation’s Reinitiation of Consultation stated,

Q: How does the scope of this ROC fit with the on-going ESA consultation for California Water Fix?

R: Reclamation has not defined the exact approach to this ROC, however there is a basic assumption that if the project period extends to 2070, then Water Fix may be operable and this project would have to consider/model according to Water Fix impacts on CVP/SWP. (p. 2.)

The screen on the next page, from Reclamation’s poster for Reclamation’s February 14, 2017 stakeholder meeting on Reclamation’s Reinitiation of Consultation, shows the proposed process.

There is no indication that Reclamation is planning to rely on the WaterFix Final EIR/EIS. Instead the poster refers the WIIN act and enabling “Reclamation and DWR to satisfy their contractual obligations to the fullest extent possible.”

The February 14, 2017 meeting notes also state:

Q: Is Reclamation planning to incorporate a CEQA process?

R: CEQA compliance is required to support CDFW permit issuance as it relates to the SWP, but it’s an open question as to how it will be addressed

Thus there is a federal NEPA process to determine long-term operations of the Central Valley Project and State Water Project with no CEQA process, and a CEQA process for the WaterFix, with what appears to be an abandoned NEPA process.

Reclamation has provided no witnesses to testify on Reclamation’s planned operations, and the California Department of Fish and Wildlife, which is in consultation with Reclamation on Reclamation’s new NEPA process, has withdrawn as a party for Part 2.
IV. Department of Fish and Wildlife

With regard to the relationship to CDFW’s CESA permits, Meeting notes from Reclamation’s February 14, 2017 stakeholder meeting on Reclamation’s Reinitiation of Consultation stated that the NEPA and CESA processes would be concurrent, and “should have meaningful interplay.”

Q: CDFW is developing permits for SWP CESA operations; the current consistency determination is satisfied by complying with the existing BOs, but the existing permit expires in 2018. DFW will evaluate re-doing species’ authorizations as well as issuing a permit for delta smelt, winterrun, and spring-run Chinook salmon versus doing another consistency determination. CESA requires full mitigation of negative effects. The CESA process will consider Water Fix, address adaptive management, and rely on peer review.
NEPA and CESA should have meaningful interplay, and the processes will be concurrent.

Since the Department of Fish and Wildlife is not presenting any witnesses for the Hearing, there is no testimony on what “meaningful interplay” means.

V. Concealment from Discovery

The Natural Resources Defense Council sought to subpoena witnesses from the National Marine Fisheries Services (NMFS) and the United States Geological Survey as part of NRDC’s Case in Chief in Part 1. The Department of Interior (“DOI”) asserted on November 14, 2017 that under the Department’s “Touhy” act regulations at 43 C.F.R. section 2.280 et. seq., none of the agencies in the Department of Interior are required to comply with a subpoena for witnesses or for records in the WaterFix hearing, unless approved by DOI under DOI’s “Touhy” act regulations. The California Department of Fish and Wildlife withdrew as a party to the hearing and objected to a subpoena for DFW witnesses.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Deirdre Des Jardins
Principal, California Water Research
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):

JOINDER IN MOTION OF NATURAL RESOURCES DEFENSE COUNCIL ET. AL. TO CONTINUE HEARING

to be served by Electronic Mail (email) upon the parties listed in the Current Service List
for the California Water Fix Petition Hearing, dated January 24, 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
February 7, 2018.

Signature:

Name: Deirdre Des Jardins
Title: Principal, California Water Research

Party/Affiliation:
Deirdre Des Jardins

Address:
145 Beel Dr
Santa Cruz, California  95060

California Water Research Joinder in NRDC et. al.’s Renewed Motion for Stay or Continuation