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7 Principal, California Water Research

8 **BEFORE THE**
9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10 HEARING REGARDING PETITION
11 FILED BY THE DEPARTMENT OF
12 WATER RESOURCES AND U.S. BUREAU
13 OF RECLAMATION REQUESTING
14 CHANGES IN WATER RIGHTS FOR THE
15 CALIFORNIA WATERFIX PROJECT

MOTION TO FORMALLY CONSIDER
ADDITIONAL INFORMATION
SUBMITTED IN SUPPORT OF PETITION

16 I. INTRODUCTION

17 One of the most contentious issues in the WaterFix Water Right Change Petition hearing
18 is whether the Petitioners have complied with section 794(a) of Title 23 of the California Code of
19 Regulations, and the lack of definition of proposed project operations.

20 The February 11, 2016 Pre-hearing Conference Ruling states that the protest resolution
21 phase of the Hearing, which would have required the information required under section 794(a)
22 to be submitted prior to Part 1 of the Hearing, was skipped at the request of the Petitioners, as
23 discussed below. Deirdre Des Jardins, principal at California Water Research (“California
24 Water Research”) can find no record of this request by the Petitioners, either in the letter
25 submitting the Petition, or in the Addendum to the Petition, or in the letter submitted by the
26

1 Petitioners prior to the Pre-hearing conference. Both the request and the decision to approve the
2 request appear to have been made with Ex Parte communication.

3 If the ruling to skip the protest resolution phase was indeed based on Ex Parte
4 communications, California Water Research moves the Ex Parte request should be put into
5 record when it is disclosed, and protestants should have 10 days to comment on it, consistent
6 with Government Code section 11430.50, subdivisions (c)(1) and (c) (2.)

7 The Hearing Officers ruled on August 31, 2017, that the information submitted by the
8 petitioners in their case in chief in Part 1 was “adequate to allow the parties to participate
9 meaningfully” in the hearing. However, the statutory requirements for a change petition
10 application (Wat. Code 1701.2) and associated regulations (Cal Code Regs tit 23 § 794(a)) are
11 *not* “adequate to allow the parties to participate meaningfully” in the hearing. The requirements
12 of section 794(a) are very clear and specific, and the information is required to be *in the petition*
13 *at the time of filing*. (Cal Code Regs tit 23 § 794(d.)) The Board’s regulations are consistent with
14 due process requirements for legal users of water (*United States v. State Water Resources*
15 *Control Board* (1986) 182 Cal.App.3d 82, 101), in that they provide sufficient notice for legal
16 users of water to assess the impacts on their water rights. The court has held that notice issues
17 are not cured by information learned by participation in an administrative hearing (*Tafti v.*
18 *County of Tulare* (2011) 198 Cal.App. 4th 891, 900.)

19 The Hearing Officers must address the bias introduced in the hearing by skipping the
20 protest resolution phase at the request of the Petitioners. California Water Research therefor
21 moves that the Hearing Officers formally consider the adequacy of the information submitted by
22 Petitioners in their Part 1 case in chief meet the requirements of section 794(a) of Title 23 of the
23 California Code of Regulations. The Hearing Officers must do so before Part 2 of the Hearing
24 starts, as argued on points and authorities below. The Hearing Officers should allow protestants
25 the opportunity to fully brief the adequacy of the information submitted in Petitioners’ case in
26 chief in Part 1, prior to the ruling, and the consideration of the adequacy should include the

1 changes to the project between the WaterFix Partially Recirculated Draft and Final EIR/EIS, and
2 the currently proposed changes requiring a Subsequent EIR.

3 To the extent that the Hearing Officers determine that the information submitted by the
4 Petitioners for Part 1 did not fully meet the requirements of section 794(a), or no longer
5 accurately represent the proposed project, the Hearing Officers should formally require the
6 Department of Water Resources to submit the information needed to correct the Petition, under
7 Water Code section 1701.3, before Part 2 of the WaterFix hearing. California Water Research
8 also argues that the Hearing Officers must formally consider and address objections to the
9 adequacy and accuracy of any new information submitted under Water Code section 1701.3,
10 under Water Code section 1701.4, before Part 2 of the WaterFix Hearing. To do so during or
11 after Part 2 of the hearing would be contrary to the Administrative Procedures Act Bill of Rights,
12 which requires notice and an opportunity to be heard, and the opportunity to present and rebut
13 evidence (Govt Code § 11425.10 (a)(1.))

14 15 II. BACKGROUND

16 The issues with the adequacy of the Petition were raised prior to and during the Part 1
17 pre-hearing conference. The February 11, 2016 pre-hearing conference ruling clearly referred to
18 the issues arising from skipping the protest resolution phase, stating:

19 The available information lacks clarity in several ways, including whether operational
20 criteria are intended to constrain project operations or are identified for modeling
21 purposes only, areas where a specific operational component or mitigation measure is not
22 yet chosen or identified, operational parameters that are not defined and deferred to an
adaptive management process, and lack of clarity concerning some mitigation measures.

23 We recognize that not all of these uncertainties need to be resolved for a satisfactory
24 project description. Indeed, precisely what mitigation measures should be required and
25 what flow criteria are appropriate, should the State Water Board approve the petition, are
26 issues that will comprise a significant portion of the issues to be decided on the hearing
record. At a minimum, however, petitioners should provide the information required by
section 794, subdivision (a) of our regulations.

1 The lack of information concerning project operations and potential effects is due in part
2 to the fact that, at the petitioners' request, the State Water Board skipped the protest
3 resolution process that would normally precede a hearing on a water right change
4 petition. The petition process under Water Code sections 1701 et seq. includes various
5 procedures designed to supply supporting information and narrow issues prior to any
6 Board hearing or decision. A petition for change must include detailed information and
7 the State Water Board may request additional information reasonably necessary to
8 clarify, amplify, correct, or otherwise supplement the information submitted by a
9 petitioner. Similarly, any protests to the petition must include specific information and
10 the State Water Board may request additional information reasonably necessary to
11 supplement the information submitted by protestants. The State Board may request
12 additional information from petitioners or protestants to attempt to resolve a protest. The
13 State Board may cancel a petition or a protest if requested information is not provided.
14 (Wat. Code, §§ 1701.4; 1703.6.) This type of information exchange would have served to
15 fill information gaps, narrow the focus of hearing issues, and increase the efficiency of
16 the hearing.

17 To address the issues with inadequate information, the February 11, 2016 pre-hearing
18 conference ruling directed the Petitioners to provide the information required under Title 23
19 794(a) during Part 1 of the hearing:

20 The petitioners' cases in chief must, to the extent possible, contain the information required
21 by section 794 of our regulations in a succinct and easily identifiable format. The other
22 parties will then be able to more accurately assess whether the proposed changes would
23 cause injury. (ruling, p. 7.)

24 The Department of Water Resources submitted Exhibit DWR-324 to meet the requirements
25 of section 794, subdivision (a) of the Board's regulations. The Sacramento Valley Water Users
26 and the City of Stockton objected to DWR-324 on the grounds that it failed to satisfy those
27 requirements. The Hearing ruling on these objections on February 21, 2017 stated:

28 As stated above, arguments concerning the merits of a witness' testimony or the contents
of an exhibit are more properly addressed through cross-examination of the witness,
presentation of a party's own case-in-chief, rebuttal, or legal briefs. (p. 6.)

But the Hearing Officers and Hearing Team counsel never provided the opportunity for
protestants to submit briefs on whether Petitioners had met the requirements in Title 23,
California Code of Regulations, section 794(a), although it was requested by California Water

1 Research on January 31, 2017, before the rebuttal phase in Part 1. California Water Research's
2 filing stated,

3 Many protestants have presented evidence in their cases in chief that the Petitioners did
4 not provide sufficient information in their cases in chief to assess whether the proposed
5 changes would cause injury. California Water Research respectfully notes that the
6 Hearing Officers' deadline for Petitioners to provide information required under Title 23
7 § 794 has lapsed. The issue of completeness of information required under Title 23 § 794
8 should therefore be considered before rebuttal, and if a time extension is given for
9 Petitioners to present the information on rebuttal, briefs on the adequacy of the
10 information provided in support of the Petition should be allowed at the conclusion of
11 rebuttal and sur-rebuttal.

12 This formal assessment of the information submitted to clarify the Petition would have
13 been required if the Hearing Officers had formally required the Petitioners to provide the
14 information under Water Code section 1701.3. Water Code section 1701.4 requires the
15 following:

16 If, within the period provided, the petitioner does not provide the information requested
17 pursuant to Section 1701.3, the board shall cancel the petition, unless, for good cause
18 shown, the board allows additional time to submit the requested information. (emphasis
19 added.)

20 III. PROJECT REVISIONS

21 When the Petitioners publicly released revisions to the Draft Biological Assessment on
22 May 5, 2017, the Sacramento Valley Water Users subpoenaed modeling of the changed
23 operations, and moved that the Hearing Officers hold open Part 1 of the hearing, citing the
24 requirements in section 794(a) of the Board's regulations. In the ruling denying the motion, the
25 Hearing Officers ruled:

26 ...we disagree with SVWU that it would be more efficient to hold open Part 1 to evaluate
27 whether to revisit Part 1 issues at this time. Rather than addressing this issue piecemeal as
28 new information becomes available, it would be more efficient to address this issue based
29 on all of the information that is presented in Part 2. (p. 2.)

1 This Hearing ruling implicitly held that the information required under Title 23 794(a)
2 did not need to be presented in Part 1 and could be presented by the Petitioners during Part 2.
3 However, the Nov 8, 2017 Part 2 pre-hearing conference ruling limited the ways in which
4 protestants could revisit Part 2 issues, stating:

5 ... these parties may cross-examine witnesses on Part 1 issues so long as the line of
6 questioning directly relates to the witnesses' direct testimony in Part 2. In addition, these
7 parties may present rebuttal evidence within the scope of Part 1 if it is in direct response to
8 another party's Part 2 case-in-chief. (p. 3.)

9 These provisions are not sufficient to address the changes to the project description in the
10 WaterFix Final EIR/EIS. The project described in the Final EIR/EIS is not the same as Alt 4A
11 in the Partially Recirculated Draft EIR/EIS, which is the project description in the noticed
12 change petition. Alt 4A in the Final EIR/EIS has been changed in many ways, both large and
13 small. Thus, to limit Part 2 rebuttal on the Final EIR/EIS to issues addressed by the direct
14 testimony of the Petitioners witnesses is a fundamental violation of the right to rebut evidence.
15 The noticed Petition should need to be formally corrected with the information in the Final
16 EIR/EIS, under the statutory procedures in Water Code section 1701.3. The noticed Petition
17 will also need to be formally corrected with the information in the supplemental EIR/EIS. All
18 corrections to the noticed Petition trigger the due process right to fully examine and rebut
19 evidence.

20 IV. Protest answers

21 California Water Research also notes that it is fundamentally biased and unfair to allow the
22 Petitioners to repeatedly provide new information in support of their petition, but not to follow
23 the Board's regulations regarding protest answers. The Board's regulations provide as follows:

24 § 751. Answers to Protests.

25 The applicant should file an answer to each protest. To facilitate resolution
26 of protests, answers shall be filed not later than 15 days following notification of
27 acceptance of the protest, unless additional time is allowed by the board. A copy
28 of the answer shall be served on the protestant. A statement that protestant has

1 **STATEMENT OF SERVICE**

2
3 **CALIFORNIA WATERFIX PETITION HEARING**
4 **Department of Water Resources and U.S. Bureau of Reclamation**
5 **(Petitioners)**

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

8 **California Water Research's Motion to Formally Consider**
9 **Additional Information Submitted in Support of Petition**

10 to be served by Electronic Mail (email) upon the parties listed in the Current Service List
11 for the California Water Fix Petition Hearing, dated January 24, 2018, posted by the
12 State Water Resources Control Board at
13 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

14 *Note: In the event that any emails to any parties on the Current Service List are
15 undeliverable, you must attempt to effectuate service using another method of service, if
16 necessary, and submit another statement of service that describes any changes to the
17 date and method of service for those parties.*

18 I certify that the foregoing is true and correct and that this document was executed on
19 February 13, 2018.

20 Signature:



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22 Title: Principal, California Water Research

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