

1 Petition for its new and different Project, the public including PCFFA should not be asked to
2 waste further time engaged in a process that is irretrievably tainted by the Hearing Team's
3 misconduct, and, in any event, rendered a nullity by DWR's decision to propose a new and
4 different Project for which CEQA review has not even been started.

5 This Board's attempt to gloss over the need to terminate this proceeding by propounding
6 six questions for protestants to answer even before DWR conducts the supplemental CEQA
7 review that it openly concedes is required does not change the fact that this proceeding must
8 be terminated now.

9 **II. THIS BOARD'S SIX QUESTIONS ARE TOO LITTLE, TOO LATE.**

10 On Thursday February 8, 2018, at nearly midnight, the Hearing Officers asked six
11 questions of DWR and other parties, with a deadline of 5 pm on Friday February 9, 2018 for
12 DWR and noon on the following Tuesday February 13, 2018, for other parties. The Hearing
13 Officers set an impossibly short deadline – just over two business days – for protestants to
14 answer fundamental foundational questions regarding the as yet unstudied impacts of DWR's
15 new and different project to legal users of water, fish and wildlife, public trust resources. The
16 Hearing Officers even asked the parties to comment on the appropriate delta flow criteria that
17 the Legislature directed this State Water Board to adopt in 2010, nearly 8 years ago.
18 Incredibly, DWR even purported to promulgate new and improved modeling to accompany its
19 new project on the morning that the hearing was scheduled to begin – February 8 – long after
20 DWR began planning for this approach with its contractors. By imposing such a foreshortened
21 deadline for protestants to address DWR's fundamental change in its WaterFix Project, the
22 Hearing Officers have prevented the careful consideration and review necessary to provide
23 appropriate answers to the questions raised.¹

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25 ¹ The Hearing Officers asked:

- 26 1. Does the certified final Environmental Impact Report (EIR) address all
27 potential impacts if the WaterFix Project is constructed and operated in stages?
28 In the supplement to the EIR, what additional analyses will be performed and
what specific environmental issues will be evaluated?
2. If DWR constructs and operates the WaterFix Project in stages, to what

1 DWR admits that a final Supplemental Environmental Impact Report for WaterFix,
2 based on its new, phased approach, will not be available for at least 8 months – October 2018.
3 Yet DWR asks this Board to move forward with a hearing to determine whether the petition will
4 “not injure any other legal user of water” and to established “the extent, if any, to which fish and
5 wildlife would be affected” and proposals to protect fish and wildlife. Water Code § 1701.2.
6 The public and public interest representatives such as PCFFA are entitled to this Board’s
7 compliance with applicable law, including the prohibition against ex parte communications, the
8 requirement that the Water Board adopt an adequate Bay-Delta Water Quality Control Plan,
9 the requirement that the Board adopt appropriate Delta flow criteria sufficient to protect fish and
10 wildlife and other public trust resources, and the required preparation of an Environmental
11 Impact Report and Environment Impact Statement that fully and fairly address DWR’s new
12 project, its impacts, and alternatives and mitigation measures that would avoid or reduce those
13 impacts to insignificance where feasible to do so.

14 Unless and until this Board complies with the law and provides for a proper, objective,
15 transparent and fully informed process that complies with all applicable environmental laws, no
16 further proceedings should be held because they needlessly waste precious time and

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18 extent would Reclamation participate during the first stage? Would the WaterFix
19 Project be operated differently if Reclamation does not participate?

20 3. If the WaterFix Project is intended to be constructed and operated in stages,
21 is an amendment to the change petition or any additional supporting information
22 under Water Code sections 1701.1, 1701.2, and 1701.3 necessary? Why or
23 why not?

24 4. If the WaterFix Project is constructed and operated in stages, are there
25 potential impacts to legal users of water, fish and wildlife, the public interest, or
26 consideration of appropriate Delta flow criteria that would warrant revisiting any
27 Part 1 or Part 2 key hearing issues? Which issues?

28 5. If a supplement to the EIR is entered into the administrative record, what is
the most efficient way to address any new information included in the
supplement?

6. Would any conditions necessary to adequately protect the rights of legal
users, fish and wildlife, or the public interest be different if the WaterFix Project
were constructed in stages? Would appropriate Delta flow criteria be different?
Why or why not?

1 resources. Accordingly, this Board must terminate the hearing and provide protestants with
2 sufficient opportunity to study and address DWR's new plans and new environmental analysis,
3 if and when they are complete. Protestants must then be afforded an opportunity to prepare
4 direct testimony once this analysis is complete.

5 **III. PRELIMINARY RESPONSE TO SIX QUESTIONS, SUBMITTED UNDER**
6 **PROTEST.**

7 In an abundance of caution, PCFFA submits the following preliminary responses to this
8 Board's six questions. It does so without prejudice to its continuing objection to the Board's
9 continuation of this hearing in the face of the Hearing Team's unethical misconduct, this
10 Board's failure to comply with applicable statutory duties, and DWR's abrupt abandonment of
11 its original project and purported substitution of a new and different project. PCFFA responds
12 preliminarily to this Board's six questions as follows:

13 QUESTION 1. Does the certified final Environmental Impact Report (EIR) address all
14 potential impacts if the WaterFix Project is constructed and operated in stages? In the
15 supplement to the EIR, what additional analyses will be performed and what specific
16 environmental issues will be evaluated?

17 PRELIMINARY RESPONSE: No, the EIR fails to address the original WaterFix Project's
18 impacts, let alone the new and different impacts from DWR's new and different Project.
19 PCFFA does not know what "additional analyses will be performed" by DWR should it prepare
20 a Supplement to the EIR.

21 QUESTION 2. If DWR constructs and operates the WaterFix Project in stages, to what
22 extent would Reclamation participate during the first stage? Would the WaterFix Project be
23 operated differently if Reclamation does not participate?

24 PRELIMINARY RESPONSE: PCFFA does not know "to what extent would Reclamation
25 participate" in DWR's new and different proposed Project. Nor does PCFFA know what
26 operational differences would occur should Reclamation not participate. These are questions
27 that DWR and Reclamation must answer before the public is asked to speculate on these
28 matters.

1 QUESTION 3. If the WaterFix Project is intended to be constructed and operated in
2 stages, is an amendment to the change petition or any additional supporting information under
3 Water Code sections 1701.1, 1701.2, and 1701.3 necessary? Why or why not?

4 PRELIMINARY RESPONSE: Of course an amendment to the Change Petition is
5 required for DWR's new and different Project, because DWR has previously claimed – falsely,
6 apparently – that proceeding with a single tunnel rather than the twin tunnels proposed was
7 infeasible because such a new and different Project would pose substantially new and different
8 water quality and water supply costs and benefits. For example, in DWR's July 17, 2017,
9 Finding of Facts and Statement of Overriding Considerations, DWR stated that isolated
10 conveyance alternatives were "*infeasible*" because they "would cause greater water quality
11 impacts because of reduced freshwater flows from the Sacramento River into the central and
12 south Delta," which "would result in water quality impairments in the central and south Delta
13 due to the fact that there will be less influence from the Sacramento River and more from the
14 San Joaquin River," and this "would likely cause additional effects to aquatic species through
15 contaminant bioaccumulation," DWR California Waterfix CEQA Findings of Fact and
16 Statement of Overriding Considerations ("Findings"), p. 64 (emphasis in original). DWR also
17 found that "isolated conveyance would cause decreases in surface water deliveries to export
18 users," and "reduce instream flows and create suboptimal conditions for migration." *Id.* DWR
19 found that isolated conveyance would have greater significant and unavoidable impacts as
20 compared to dual conveyance, including harmful impacts on listed species. *Id.*, at 64-67.
21 Likewise, DWR found that alternatives with fewer than three intakes were "*infeasible*."
22 Findings, p. 70 (emphasis in original). DWR found that under these alternatives, capacity
23 would be insufficient to address reverse flows in the south Delta, would allow "fish losses in the
24 south Delta [to] continue," and would fail to meet the project objectives. Findings, p, 71 (quote),
25 70-72. Thus, while DWR claims that its new and different project would have fewer impacts
26 than the WaterFix as approved, DWR's previous Findings indicate otherwise. DWR Opposition
27 4, 14-15.

28 QUESTION 4. If the WaterFix Project is constructed and operated in stages, are there

1 potential impacts to legal users of water, fish and wildlife, the public interest, or consideration of
2 appropriate Delta flow criteria that would warrant revisiting any Part 1 or Part 2 key hearing
3 issues? Which issues?

4 PRELIMINARY RESPONSE: Of course there are massive impacts to legal users of
5 water, fish and wildlife, and to the public interest which require that the key hearing issues in
6 both Part 1 and Part 2 be "revisited." The reason DWR has decided to prepare a Supplemental
7 EIR is because it concedes, openly, that the statutory criteria for preparation of a supplemental
8 CEQA review pursuant to Public Resources Code section 21166 have been triggered. That
9 section directs that supplemental environmental review is required if (a) "[s]ubstantial changes
10 are proposed in the project which will require major revisions of the environmental impact
11 report," (b) "[s]ubstantial changes occur with respect to the circumstances under which the
12 project is being undertaken which will require major revisions in the environmental impact
13 report," or (c) "[n]ew information, which was not known and could not have been known at the
14 time the environmental impact report was certified as complete, [has] become[] available." *Id.*
15 PCFFA will not know what "issues" must be addressed until DWR provides the supplemental
16 environmental review that CEQA requires for DWR's new and different project.

17 QUESTION 5. If a supplement to the EIR is entered into the administrative record, what
18 is the most efficient way to address any new information included in the supplement?

19 PRELIMINARY RESPONSE: When and if DWR prepares a supplement to the AR, and
20 when and if DWR may ask this Board to reinitiate review of DWR's new and different project,
21 then and only then would PCFFA be in a position to comment on "the most efficient way to
22 address any new information included in the supplement."

23 QUESTION 6. Would any conditions necessary to adequately protect the rights of legal
24 users, fish and wildlife, or the public interest be different if the WaterFix Project were
25 constructed in stages? Would appropriate Delta flow criteria be different? Why or why not?

26 PRELIMINARY RESPONSE: Of course new and different conditions will be required to
27 address the new and different impacts from DWR's new and different project. But the public
28 and PCFFA will not be in a position to address those new and different impacts, through

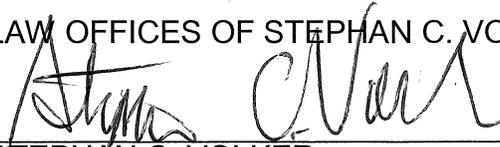
1 imposition of new and different conditions, unless and until DWR provides the public and this
2 Board with the supplemental environmental review required by CEQA.

3 **CONCLUSION**

4 For the foregoing reasons, this Board must terminate this proceeding forthwith.

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LAW OFFICES OF STEPHAN C. VOLKER

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8 STEPHAN C. VOLKER
9 Attorney for Protestants
10 PACIFIC COAST FEDERATION OF FISHERMEN'S
11 ASSOCIATIONS and INSTITUTE FOR FISHERIES
12 RESOURCES
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