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

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

**RESTORE THE DELTA'S STATEMENT,
BY AND THROUGH TIM STROSHANE, IN
RESPONSE TO QUESTIONS FROM THE
HEARING OFFICERS AND DWR'S
CONSOLIDATED OPPOSITION TO NRDC
ET AL.'S MOTION FOR STAY**

Introduction

Restore the Delta ("RTD") submits its response to California Department of Water Resources' ("DWR") Consolidated Opposition to the Motion of Natural Resources Defense Council, Defenders of Wildlife, and the Bay Institute (collectively "NRDC") for Stay of Part 2 of the WaterFix Hearing Due to Anticipated Changes in the Proposed Project ("Motion") and joinders thereto.¹ Additionally, RTD submits brief answers to questions posed by Hearing Officers in their February 8, 2018 email to the WaterFix Hearing service list.

RTD responds first to DWR's opposition to the motion to stay by restating our opposition to the change petition and previous Part 1 recommendation for its dismissal based on the need to find the existing State Water Project (SWP) and Central Valley Project (CVP) facilities as complete, and to make instead the Petition Facilities of California WaterFix the subject of a new water rights application; and second to questions posed by the State Water Resources Control Board ("SWRCB"). These questions invite speculation that RTD is not willing to engage with as to the impacts of Petitioner DWR's changes to Petition Facilities' construction. In sum, we respectfully request that the SWRCB continue the WaterFix Hearing until Petitioner DWR's supplemental EIR ("SEIR") on changes to construction of Petition Facilities is completed and allow time afterward for all parties to prepare new or revised testimony based on the SEIR, rescheduling the evidentiary proceedings after such period.

¹ Joinders to the NRDC motion were listed in DWR's footnote 1 in its Consolidated Opposition and are not repeated here.

I. RTD’s Response to Petitioner DWR’s Opposition to NRDC Motion to Stay

Petitioner DWR went beyond the pale of decorum in this proceeding by asserting that “NRDC requests that DWR be punished for providing . . . transparency and facilitating parallel consideration and development of an additional construction option.” We remind Petitioner DWR that the two-tunnels configuration was first announced as Conservation Measure 1 in the Bay Delta Conservation Plan (“BDCP”) in late 2013, modified in late 2014 based on Draft BDCP EIR/EIS comments Petitioner DWR received, then stripped of habitat conservation plan features in April 2015 before the change petition prepared and submitted by Petitioner DWR was finally submitted to the SWRCB in October 2015. Further, Petitioner DWR requested an expedited hearing process from the SWRCB before requesting in the early months of 2016 a 60-day delay of the proceeding to facilitate completion of *its own Part 1 case in chief*. Now, Petitioner DWR has indicated to SWRCB that it will phase project construction. On its face such a change is directly related to water right permit terms, which must be appropriately specified by evaluating written and oral sworn testimony. Moreover, this change is a direct result of extra-hearing activities undertaken by Petitioner DWR during 2017 to obtain participation and financial commitments to Petition Facilities.

On the other hand, SWRCB has repeatedly denied requests by Protestants for continuance, stay, delay, or other postponement of evidentiary proceeding activities based on changes, alleged inadequacies, or lingering ambiguities in the nature of the project’s description—as Petitioner DWR is aware in its consolidated opposition. Petitioner DWR’s characterization of NRDC protestants and their joinders as seeking punishment for “transparency” highlights instead an institutional disregard for the public interest in water issues, and fails to acknowledge Protestants’ due process rights to evaluate the findings of Petitioner

DWR's promised SEIR adequately to ensure fair and equitable participation. Petitioner DWR is an agency of the state of California, while many protestants, including RTD, are private citizens and non-governmental organizations that do not have at their disposal the capital, expertise, and resources available to the Petitioners as sovereign state and nation possessed of taxing powers. SWRCB has shown considerable deference to Petitioners DWR and US Bureau of Reclamation ("Bureau" and collectively "Petitioners") in support of the change petition moving forward. We respectfully ask SWRCB for a delay to ensure fair and equitable participation in this proceeding, given the official changes announced by Petitioner DWR as to how the Petition Facilities would be constructed.

Petitioner DWR fully intends to build out the Petition Facilities—someday. But this project is not like any other water project. It is different because:

- The proposed screened diversions of this project are on an architectural par with state and interstate highway sound walls in size and length, would be larger than any previous such diversion facility, and are still largely untested;
- The project would consist of up to two large-scale tunnels 35 miles long, bored under the largest estuary on the west coast of North America;
- The project would add new means to export large amounts of fresh water at key times of the year from the northern estuary to urban and agricultural water contractors and their customers; and
- The project would be integrated into coordinated operations of the SWP and CVP.

Most other water projects not undertaken by these Petitioners lack such large-scale characteristics.

These and other significant features of this project distinguish it from simpler stand-alone reservoir projects, small canals, pumped diversions, or hydropower facilities that transform the head of falling water into electricity. However long Petition Facilities may take to build, and in whatever order and timing its components are put into service, their effects on flows into and through the Delta are on a scale with existing pumped diversions in the south Delta, which are well known to cause severe problems for fish and farmers in the Delta. Petition Facilities are not just a small agricultural or municipal diversion like the few thousand that operate today in the Delta by individuals, small companies, and cities and special districts. They are two and often three orders of magnitude larger.

RTD understands Petitioners' need all too well for regulatory certainty so that California WaterFix might move forward. Petitioners, however, gave up on the considerable regulatory certainty offered by the BDCP—a habitat conservation plan enabled by Section 10 of the federal Endangered Species Act, and a natural community conservation plan under the California Endangered Species Act—apparently because the water project at the heart of BDCP could not comply with basic requirements of the ESAs to protect and foster recovery of listed species. No Protestant in this hearing forced Petitioners to decide not to rely on the habitat conservation plan framework and its certainty-enhancing “no surprises” rules and “changed circumstances” definitions for implementing then-Conservation Measure 1. Instead, Petitioners moved ahead with California WaterFix as primarily a north Delta diversion tunnels project absent these project-friendly provisions.

Petitioners seek modifications to their water rights permits that would give them certainty by imposing on the Protestants the *uncertainties* of adaptive management in project construction, and in Petition Facilities' real-time operations. Protestants simply assert a due

process right to be fully informed through a properly paced proceeding that allows full consideration by all parties of the effects of Petitioner DWR's announced project modifications from February 8, 2018. It is the Petitioners' burden to prove under California water law that imposition of these uncertainties on all Delta beneficial uses of water is a reasonable use and method of diversion of water.

Due process requires that the SWRCB delay the proceeding to enable Petitioner DWR to complete the SEIR and so that Protestants have adequate time to review, interpret, and apply its contents to Part 1 and Part 2 issues in the course of re-presenting their cases and cross-examining Petitioners' witnesses. In the absence of such a SEIR, neither Petitioners nor Protestants can state with any certainty what new or altered impacts, and their associated mitigation measures, may result from its preparation and dissemination.

The public interest must also be served in the context of water rights law applied to the Petition Facilities. Water rights permits provide a diversion and/or storage "envelope" within which the permittee is allowed to draw water for beneficial use. That "envelope" covers (among other things) diversion volume and rate, season of diversion and/or storage, purpose of use, and a target completion date by which the facilities to be constructed are putting water to beneficial use in accord with the water right conferred.

Prior appropriation doctrine specifies that the right to divert depends upon the date of application for the permit(s) and that the diversion to beneficial use itself be diligently applied. The latter principle of due diligent use is highly relevant to SWRCB's duty to serve the public interest in its water rights permit decisions, and specifically to SWRCB's due process duties in its quasi-judicial role in this proceeding.

RTD has previously submitted testimony that has been accepted into the record to date for this proceeding (RTD-10rev2) that addresses due diligence issues involved with Petition Facilities. RTD reminded the SWRCB that Petitioner DWR saw its most recent petition for time extension for completion of the SWP expire at the close of 2015. (RTD-10rev2, pp. 13-20.) We testified that the SWRCB should find both the SWP and CVP facilities as complete and that Petitioners' Delta water rights permits should be licensed. The Change Petition is, in our testimony to SWRCB, improperly moving forward as a proposed modification to Petitioners' Delta water rights permits and should be dismissed by the SWRCB; a new water right application for the Petition Facilities should be submitted by Petitioners with a new priority date; a water availability analysis should be prepared for the Petition Facilities; and as part of any water rights permits issued for said Facilities, there should be a new completion date for the Petition Facilities.

RTD in our Part 1 testimony also reminded the SWRCB and Petitioners that the SWRCB in 2008 revoked water rights permits for the Auburn Dam project for lack of due diligence by the Bureau. Despite the Bureau having initial authorization from Congress, the project lacked funding appropriations and the Bureau failed to secure funds diligently to place the project into construction and operation. Rather than allow the water rights for a project lacking needed funding to continue in "cold storage," the SWRCB found it would not be in the public interest to continue permitting water rights to Auburn Dam and so revoked the permits. Our Part 2 testimony, timely submitted on November 30, 2017, recounts the record of insufficient funding commitments to date in support of Petition Facilities. While we understand that negotiations for SWP contract amendments relating to the Petition Facilities begin February 13, there is no

certainty that these negotiations will result in adequate funding commitments for the first, second, or both phases of construction for Petition Facilities.

Currently, the same funding commitments made in 2017 for California WaterFix fall short of Phase I project costs announced by Petitioner DWR. While RTD has recommended denial of the Change Petition, it was certainly not to “punish” Petitioners, but simply to have them comply with long-established prior appropriation doctrine principles concerning diligent application of water to beneficial use based on completed water diversion and storage facilities. This is the SWRCB’s jurisdiction and so should be central to any decision the SWRCB makes in this immediate procedural question of delay and when issuing its ultimate order concerning the Change Petition. RTD continues contending that Petition Facilities would be a new project and should be subject to a new water rights application, whatever its size, timing, and scope.

The phasing of Petition Facilities is a substantive change to their description in the Change Petition because it would likely result in a different permit term recommended by any parties to the hearing and applied by the SWRCB concerning project construction dates as well as dates by which Petition Facilities would have to put water to beneficial use. Petitioners’ modification of construction phasing and the scope of its first phase raises the question of whether it is in the public interest for the SWRCB to approve such modifications to Petitioners’ Delta water rights permits by limiting any water right permit change or new water right application (the latter of which RTD recommends) to just the Phase I facilities so as to avoid long-term cold storage of Delta water rights, contrary to the public interest. To evaluate the public interest in this project modification, SWRCB should continue the proceeding to permit all Parties to take account of this question and provide new or revised testimony accordingly.

II. RTD's Answers to the SWRCB's Questions

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

No, the certified final EIR/EIS for California WaterFix does not address all potential impacts adequately if the proposed project is constructed and operated in stages. That is why Petitioner DWR has acknowledged that it will prepare a SEIR to address the effects of altering the construction schedule. For instance, early indications are that Intakes 2 and 3 will be constructed first. No party can know for certain without further specification the effects of their operation during later construction of Intake 5 on fish and water quality concerns without careful analysis hopefully supplied in the SEIR.

All parties to the Change Petition hearing would be well served by delay of further evidentiary proceedings so that the SEIR can be prepared and distributed for review and incorporation (if Parties desire) into Part 2 testimony and for revisiting Part 1 issues as may arise. (Petitioners' haste has previously caused themselves difficulty and delay as described above.) This question invites speculation by all parties as to what the SEIR will say, and delay would reduce if not eliminate the need for such speculation.

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

RTD looks forward to the Bureau's response to this question. Their largest south-of-Delta contractor (Westlands Water District) remains on record at this time not supporting project participation, by an 8 to 1 vote of its Board. District management stated their interest in the outcome of this proceeding. District officials have made clear that the marginal cost of Tunnels water is at this time unaffordable, as RTD documented in its Part 2 testimony. Westlands' participation as the largest south-of-Delta water contractor is central to the Bureau's ability and willingness to continue participating in the project as long as the U.S. Congress continues unwilling to appropriate funds for a Bureau role in the project.

Petition Facilities would likely be constructed and operated differently if the Bureau does not participate in the project. The cost of the full project at the outset was apparently too high for water contractors to accept as affordable, even for key State Water Contractors like Kern County Water Agency (which committed only 50 percent of its funding share based on its share of annual average SWP deliveries), as we state in our Part 2 testimony.

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

RTD's stance continues to be that Petition Facilities are properly considered as a new water right application, not a change petition. The SWRCB should dismiss the change petition and require Petitioners to submit a new water right application. This is for reasons prior to and different from Petitioner DWR's February 8 announcement of phased construction for Petition Facilities, which we summarize above and provided evidence for in our Part 1 testimony. If anything, Petitioner DWR's February 8 announcement of phased construction for Petition

Facilities further highlights and confirms their misinterpretation of their questionable Delta water rights.

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

Yes, there are potential impacts to legal users of water, fish and wildlife, the public interest, and consideration of appropriate Delta flow criteria. Parties to the proceeding should be allowed to revisit these and other related Part 1 and Part 2 issues subsequent to completion and release of the SEIR. Environmental justice issues, issues of cold storage of water rights, water quality—all of which could be impacted by a phased-in approach—should be within the scope of these issues, but without the SEIR it would be speculative to be more specific.

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?

RTD recommends that the SWRCB stay the proceeding until the SEIR is completed, then set 60-day deadlines for parties to submit supplemental testimony whose scope may address Part 1 and/or Part 2 issues, and then have the evidentiary proceeding resume after the SWRCB has processed all parties' supplemental testimony.

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?

Yes, and detailed answers to these questions now without completing an SEIR would be speculative at best, and should be deferred perhaps as questions the Board wishes answered by all parties in their supplemental Part 1 and/or Part 2 testimony later this year. Without such detailed information from a SEIR, however, detailed, accurate answers would be speculative.

DATED: February 13, 2018



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