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7
8 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

9 **HEARING IN THE MATTER OF CALIFORNIA**
10 **DEPARTMENT OF WATER RESOURCES**
11 **AND UNITED STATES BUREAU OF**
12 **RECLAMATION REQUEST FOR A CHANGE**
13 **IN POINT OF DIVERSION FOR CALIFORNIA**
14 **WATERFIX**

DEPARTMENT OF WATER
RESOURCES' MOTION FOR
RECONSIDERATION OF RULINGS
ON HEARING SCOPE

15 Department of Water Resources ("DWR") submits this motion for reconsideration of
16 the oral ruling on objections raised during the cross-examination conducted by Mr. Doug
17 Obegi of the Natural Resources Defense Council ("NRDC") on February 28, 2018, on the
18 grounds that Mr. Obegi's line of questioning is beyond the scope of the California WaterFix
19 proceeding. DWR also moves for reconsideration of the related written ruling on March 16,
20 2018, rejecting a relevance objection raised by the California Department of Fish and
21 Wildlife ("CDFW") in its March 6, 2018 Motion for Protective Order from Pacific Coast
22 Federation of Fishermen's Association and Institute for Fisheries Resources ("CDFW
23 Motion"). Both rulings determined that testimony and evidence on adequacy of existing
24 regulatory requirements for current operations of the State Water Project ("SWP") and
25 Central Valley Project ("CVP") are relevant to and within the scope of Part 2 of these
26 proceedings.
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1 **I. STATEMENT OF FACTS**

2 The State Water Resources Control Board (“State Water Board”) and Hearing
3 Officers previously have clearly and repeatedly indicated that the scope of Part 2 of the
4 California WaterFix proceeding is narrow and limited to (1) the impacts the proposed
5 change in diversion points will have on fish and wildlife; and (2) a reasonable showing of
6 compliance with the Delta Reform Act requirement that the change petition include
7 “appropriate Delta flow criteria,” sufficient to protect the Delta ecosystem.

8 However, despite this clear and narrow scope, Mr. Obegi questioned DWR witness
9 Marin Greenwood on the protectiveness of existing conditions and current operational
10 requirements on the SWP and the CVP fish and wildlife, and in relation to the potential of a
11 cumulative effect of the California WaterFix. (Rough Transcript February 28, 2018 at pp.
12 111-120.) In response to objections by DWR, Hearing Officer Doduc stated that
13 comparisons to the existing conditions allow for a questioning of the reasonable protection
14 under current regulatory requirements and such questions are relevant to this hearing.
15 (Rough Transcript February 28, 2018 at 192-3.)

16 Thereafter, on March 6, 2018, CDFW moved for a protective order limiting the scope
17 of a subpoena to CDFW because the subpoena sought documents pertaining to historic
18 compliance with state and federal endangered species law by the existing SWP and CVP
19 generally rather than to proposed changes associated with the California WaterFix. The
20 Hearing Officers’ written ruling disagreed, stating that “[t]he SWP’s and CVP’s compliance
21 with CESA and ESA under existing conditions is indeed relevant to establishing a baseline
22 to inform the State Water Board’s determination of whether incremental changes from the
23 WaterFix Project will unreasonably affect fish, wildlife, or recreation uses. . . Additionally . . .
24 as Natural Resources Defense Council’s joinder points out, Petitioners opened the door to
25 this type of evidence when they framed claims that the WaterFix Project would be
26 reasonably protective of certain public trust resources in terms of incremental impacts as
27 compared to existing conditions.” (Written Ruling March 16, 2018 at p. 2.)

1 However, NRDC's referenced assertion did not contend that petitioners opened the
2 door to this line of questioning. To the contrary, it relied on the cross-examination to which
3 DWR objected:

4 "First, contrary to CDFW's assertions, the subjects of the
5 subpoena clearly are relevant to Part 2 of this proceeding. DWR's
6 witnesses testified *under cross-examination* by NRDC on February
7 28, 2018 that the foundation for DWR's testimony regarding the
8 reasonable protection of fish and wildlife was through a comparison
9 of WaterFix to existing ESA and CESA obligations of the Central
10 Valley Project ... and State Water Project In light of DWR's
11 admission, information from CDFW regarding existing ESA and
12 CESA standards applicable to the CVP and SWP, the adequacy of
13 those standards in protecting fish and wildlife, and the SWP and
14 CVP's compliance with those standards is clearly relevant for
15 purposes of Part 2 of this hearing." (NRDC's March 8, 2018,
16 Opposition to the California Department of Fish and Wildlife's
17 Motion for Protective Order for Subpoena Duces Tecum from the
18 Pacific Coast Federation of Fishermen's Associations and Institute
19 for Fisheries Resources, p.2:5-13, emphasis added.)

20 The record does not support the contention by NRDC that Petitioners opened the door to
21 this material.

22 To the contrary, Petitioners' testimony does not discuss the adequacy of the existing
23 regulatory standards. Instead, it relies upon the continued applicability, and existing
24 regulatory effect, of the current Biological Opinions, consistency determinations and
25 incidental take permit under the California Endangered Species Act, Water Quality Control
26 Plan, Water Rights Decision 1641 ("D-1641") and current permit conditions. Reliance upon
27 these requirements does not extend to questioning or discussing their adequacy, as
28 opposed to using them as a baseline. At no point have Petitioners put into issue the

1 existing protectiveness of these regulatory requirements. In fact, DWR objected multiple
2 times to the cross-examination now relied upon by NRDC and the Hearing Officers to
3 support the conclusion that “Petitioners opened the door to this type of evidence.” (Rough
4 transcript, February 28, 2018 at p.192.)

5 DWR seeks reconsideration of whether, based upon these rulings, the Hearing
6 Officers intend to now alter the scope of Part 2 of the California WaterFix water rights
7 change petition hearing.

8 **II. ARGUMENT**

9 The water code sections governing the granting of change petitions and the relevant
10 notices, rulings and statements in the record by the Hearing Officers do not support the
11 Hearing Officers expanding the scope of this hearing to include a discussion of the
12 adequacy of current regulatory requirements in protecting existing conditions or the existing
13 operations of the SWP and CVP, as opposed to the incremental changes associated with
14 the California WaterFix. Nor do the requirements of the Delta Reform Act codified in
15 California Water Code section 85086 support this expansion. This was succinctly stated by
16 the Hearing Officers in the August 31, 2017 Ruling on Part 2 Scheduling and Other
17 Procedural Matters. “Part 2 of the hearing will focus on the potential effects *of the petition*
18 *on fish and wildlife and recreational uses ... including consideration of appropriate Delta*
19 *flow criteria for the Waterfix Project as required by the Sacramento-San Joaquin Delta*
20 *Reform Act of 2009.” (p.12, emphasis added.) The scope and focus of this proceeding is*
21 *narrow (November 8, 2017 Ruling, p.2), and focuses only on the changes the California*
22 *WaterFix project may have as compared to a No Action Alternative.*

23 **A. Water Code Sections 1700 et seq. Requirements for Granting a Change** 24 **Petition do not Support Expanding Scope**

25 Under the Water Code, a petition to change a point of diversion requires a petitioner
26 to demonstrate that (1) the *change* will not injure any other legal user of water, and (2) the
27 *change* will reasonably protect fish and wildlife, including whether *the change* will comply
28 with applicable requirements of the Fish and Game Code or the federal Endangered

1 Species Act. California Water Code sections 1700 et seq. define the scope of the water
2 rights change petition hearing. Section 1701.2 states that “[a] petition for change in a
3 permit or license shall...(c) Include all information reasonably available to the petitioner...
4 concerning the extent, if any, to which fish and wildlife would be affected *by the change...*
5 [and] (d) Include sufficient information to demonstrate a reasonable likelihood that *the*
6 *proposed change* will not injure any other legal user of water.” (emphasis added)
7 Additional information requests by the Board regarding the proposed change are similarly
8 focused on information related to the change. (California Water Code section 1701.3(b)(1)
9 (“[i]nformation needed to demonstrate that *the change* will not injure any other legal user of
10 water”); (b)(2) (same “to demonstrate that *the change* will comply” with the Fish and Game
11 Code and federal Endangered Species Act) (all emphasis added).) This is again restated
12 in section 1702 that the Board shall find, “that *the change* will not operate to the injury of
13 any legal user of the water involved.” (emphasis added)

14 By definition and logically, the impacts of the “change” must be determined by
15 comparing that proposal to the change not happening – the No Action Alternative. And the
16 No Action Alternative must be based on the existing regulatory requirements, unless it can
17 be demonstrated that a definitive alternative set of regulations is more appropriate for the
18 analysis. In this case, the current Biological Opinions, CDFW consistency determinations,
19 Water Quality Control Plan,D-1641 and current permit conditions have not been replaced
20 and there are no definitive pending replacements upon which an analysis could be
21 constructed. Thus, the No Action Alternative appropriately includes existing regulatory
22 requirements.

23 **B. The Board has Previously Distinguished These Proceedings From Other**
24 **Regulatory Processes or CEQA**

25 The speculative nature of the impending Water Quality Control Plan update and
26 reinitiation of consultation for reconsideration of the Biological Opinions for the SWP and
27 CVP, and the appropriateness of prejudging those future decisions, has been repeatedly
28 discussed in this hearing. The State Water Board has repeatedly indicated, “the purpose of

1 this proceeding is for the State Water Board to gather evidence and act upon the petition
2 for changes to petitioners' water right permits *associated with the WaterFix Project.*"
3 (November 8, 2017 Ruling, Updated Part 2 Guidance Document, p. 2, emphasis added.)
4 Comprehensive studies of water quality objectives and evaluations of the effects of other
5 factors, besides the incremental effects of California WaterFix, on the beneficial uses of
6 water in the Bay Delta are properly limited to the Water Quality Control Plan update
7 proceedings, and, where relevant to considerations under the California Environmental
8 Quality Act and National Environmental Policy Act, to the final EIR/EIS.

9 The State Water Board previously determined that "developing any necessary
10 revisions to the water quality objectives contained in the Bay-Delta Plan along with the
11 implementation measures for those water quality objectives will entail a much more
12 comprehensive evaluation of the effects of all diversions and other factors on the beneficial
13 uses of water in the Bay-Delta." (Id.) Unlike the California WaterFix project, the Bay-Delta
14 water quality planning and implementation process is not limited to impacts of the SWP and
15 CVP. (Id.) And the State Water Board discussed this distinction on July 21, 2016. In the
16 California WaterFix Fact Sheet, the State Water Board reasoned why the sequencing of the
17 change petition before the completion of the Water Quality Control Plan update was
18 appropriate. This distinction relies, in part, upon this hearing "ensur[ing] that existing water
19 quality requirements will be met." (pp. 4-5.) In order to maintain the applicability of the
20 existing water quality requirements this hearing should not logically open the debate as to
21 their adequacy. That is the role of the Water Quality Control Plan update. This fact sheet
22 also goes on to discuss how the "responsibility of the SWP and CVP for meeting the
23 objectives may be revised as a result of ... the ongoing Bay-Delta planning efforts." (Id.)
24 Debating the effectiveness and sufficiency of those objectives in these Part 2 proceedings
25 is antithetical to the distinction drawn between the two processes. The purpose of the
26 California WaterFix proceeding is not to conduct a referendum on the existing operations
27 and environmental compliance requirements of the SWP and CVP.

1 Both DWR's objections to NRDC's cross-examination and CDFW's objections to the
2 broad subpoena were grounded in these prior rulings by the Board regarding the scope of
3 Part 2. In accordance with the prescribed scope of Part 2 and Delta Reform Act
4 requirements, Dr. Greenwood's testimony provides a comparative analysis of what
5 constitutes reasonable protection of fish and wildlife in relation to the future impacts of the
6 California WaterFix project compared to a No Action Alternative ("NAA"), which necessarily
7 includes the existing regulatory requirements. (Rough Transcript February 28, 2018 at p.
8 114.) However, Mr. Obegi's line of questioning continually conflated the NAA with existing
9 Delta conditions. (Rough Transcript February 28, 2018, p. 115.)

10 Similarly and in its response to PCFFA, CDFW argues that, "records under CDFW's
11 control that relate to the SWP or CVP's compliance with CESA or the federal ESA, in the
12 absence of CWF infrastructure and operations, are not relevant to the information Mr.
13 Volker seeks to uncover, related to changes to potential engineering design, proposed
14 construction, and proposed operations of the CWF project." (CDFW March 6, 2018, Motion
15 to Quash and for Protective Order.) CDFW's argument is directly in line with previous
16 notices and rulings by the Hearing Officers in this hearing, as discussed above. DWR's
17 clear reading of the hearing notices is that the existing SWP/CVP operations in relation to
18 the adequacy of the existing regulatory requirements is not a hearing issue, nor is it
19 reasonably related to hearing issues. Thus, PCFFA's overbroad request sought
20 information that is indeed irrelevant to this proceeding.

21 Finally, the objectionable evidence is not relevant to this hearing in the context of the
22 CEQA analysis. The State Water Board has repeatedly indicated, the purpose of this
23 proceeding is for the State Water Board to gather evidence and act upon the petition for
24 changes to petitioners' water right permits associated with the WaterFix Project."
25 (November 8, 2017 Ruling, Updated Part 2 Guidance Document, p.2.) For purposes of the
26 California WaterFix water rights change hearing, the State Water Board is not responsible
27 for ruling on the adequacy of CEQA documents, nor is the Board required to hold an
28 evidentiary hearing on issues concerning CEQA compliance. (Id.) "Parties [to the

1 California WaterFix hearing] may not present testimony or other evidence on [issues
2 relating to CEQA compliance].” (Id.)

3 **C. Delta Reform Act Provisions do not Support Expanding Scope; The**
4 **Board has Distinguished this Petition from the Water Quality Plan**
5 **Proceedings**

6 The Board has previously and correctly indicated that this narrow scope is not
7 affected by the requirements in the Delta Reform Act to determine “appropriate Delta flow
8 criteria.” For the purposes of the California WaterFix hearing, a determination of what
9 constitutes “appropriate Delta flow criteria” entails “a balancing of the need for flows to
10 protect water quality in the Bay-Delta and the need for water to meet the demands of the
11 SWP and CVP only. (February 11, 2016 Ruling at 4.) As explained above, the California
12 WaterFix hearing is not the proper forum to delve into a comprehensive analysis of existing
13 water quality conditions, but rather must focus on the California WaterFix proposed change
14 in points of diversion.

15 NRDC’s attempt to expand this hearing to include discussions about the adequacy
16 of the existing regulatory requirements seeks to ignore the distinction that the Hearing
17 Officers have previously drawn between relevant testimony about flow requirements that
18 are procedurally appropriate prior to an updated Water Quality Control Plan and testimony
19 that attempts to convert this change petition hearing into a Water Quality Control Plan
20 update.¹

21 Furthermore, nothing in the notices for this hearing have previously indicated that
22 issues of the adequacy of the existing Water Quality Control Plan are in question. Debating
23 the effectiveness and sufficiency of existing requirements necessarily requires a discussion
24 of the comprehensive plans for the Delta and must include consideration of all parties. This
25 discussion was ruled out in the hearing notice and stated clearly in the fact sheet where the

26 ¹ A similar attempt to NRDC’s approach was made by the San Joaquin River Exchange Contractors
27 Water Authority when it sought to present testimony concerning the need for funding levee maintenance and
28 repair under existing conditions. The Hearing Officers understood that “[t]his is an issue that will exist
regardless of whether the WaterFix change petition is approved.” (December 8, 2016 Ruling, p.2.)

1 State Water Board wrote, “The State Water Board’s decision in the change petition
2 proceeding will not address the responsibilities of third parties.” Essentially debating the
3 sufficiency of the existing regulatory requirements, particularly those of the Water Quality
4 Control Plan, in the absence of interested potential third parties is unworkable.

5 **D. Petitioners’ Testimony has not “Opened the Door”**

6 As explained above, at no point have Petitioners presented testimony that seeks to
7 debate the content, effectiveness or applicability of the existing regulatory requirements.
8 NRDC’s arguments are not supported by the plain language of Petitioners’ submitted
9 materials, which rely upon responses to cross-examination by NRDC. DWR repeatedly
10 objected to this line of cross-examination. DWR’s witnesses presented direct testimony
11 that was a comparison of California WaterFix to the No Action Alternative, which
12 appropriately includes existing ESA and CESA obligations of the SWP and CVP.

13 The No Action Alternative presumes the applicability, purpose, and effectiveness of
14 the existing regulations. To do otherwise would be beyond the scope of this hearing.
15 Accounting for the existing regulatory requirements in the NAA does not enlarge the scope
16 of this hearing and does not bring within the scope of this hearing the historic SWP and
17 CVP compliance with those standards. Petitioners’ testimony does not discuss the
18 adequacy of the existing regulatory standards. Instead, petitioners’ testimony relies upon
19 the continued applicability, and existing regulatory effect, of the current Biological Opinions,
20 consistency determinations and incidental take permit, Water Quality Control Plan, Water
21 Rights Decision 1641 (D-1641) and current permit conditions.

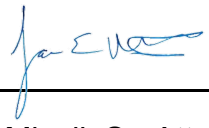
22 **III. CONCLUSION**

23 Here, NRDC’s questioning regarding historic compliance with regulatory
24 requirements and the adequacy of current Delta conditions without any relation to the
25 incremental effects of the California WaterFix, as well as the PCFFA subpoena to DFW
26 seeking sweeping testimony and documents on that issue, is outside of the scope of the
27 hearing. For the reasons stated above, DWR requests reconsideration of the Hearing
28 Officers’ two rulings and objects to any expansion of the scope of this hearing.

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Dated: March 26, 2018

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



Tripp Mizell, Sr. Attorney

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):

DWR'S MOTION FOR RECONSIDERATION OF RULINGS ON HEARING SCOPE

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated March 21, 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:

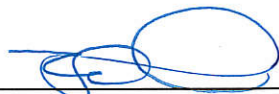
Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

	I caused a true and correct hard copy of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:
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	Method of Service: <u>U.S Postal</u>
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I certify that the foregoing is true and correct and that this document was executed on March 26, 2018
Date

Signature:  _____

Name: Xee Lo

Title: Legal Secretary

Party/Affiliation: DWR

Address: 1416 Ninth Street, 1104
Sacramento, CA 95814