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

12 HEARING IN THE MATTER OF
13 CALIFORNIA DEPARTMENT OF
14 WATER RESOURCES AND UNITED
15 STATES BUREAU OF RECLAMATION
16 REQUEST FOR A CHANGE IN POINT
17 OF DIVERSION FOR CALIFORNIA
18 WATER FIX

19 CITY OF ANTIOCH'S OPPOSITION TO
20 DWR MOTION FOR RE-
21 CONSIDERATION RE: HEARING
22 OFFICERS RULING ON SCOPE OF
23 THE PART 2 HEARING – ***with***
24 ***particular emphasis with respect to***
25 ***the scope of flow criteria for Part 2***

26 **INTRODUCTION**

27 The City of Antioch supports the prior ruling(s) of the State Water Resources Control
28 Board Hearing Officers with respect to the Department of Water Resources (“DWR”) motion
on the scope of Part 2 of these proceedings. With respect to DWR’s present motion for
Reconsideration (“DWR Motion”), the City will focus this Opposition on the scope of the Part
2 hearing proceeding addressing “Flow Criteria.” This issue was raised by DWR during
Antioch’s Part 2 case-in-chief and is again raised in DWR’s Motion for Reconsideration.
DWR alleges that based on the Board’s August 31, 2017 and November 8, 2017 Part 2
Rulings that “Flow Criteria” is to be narrowly construed and is limited to Phase 2 impacts on

1 fish, wildlife, and recreation **only**. DWR's assertion is not correct and contrary to prior
2 rulings by this Board

3 **DWR'S MOTION AS TO SCOPE OF FLOW CRITERIA FOR PART 2**

4 DWR's Motion at p. 4 contends that the scope of flow criteria for the purpose of Part 2
5 is narrow:

6 Nor do the requirements of the Delta Reform Act codified in California
7 Water Code section 85086 support this expansion. This was succinctly
8 stated by the Hearing Officers in the August 31, 2017 Ruling on Part 2
9 Scheduling and Other Procedural Matters. "Part 2 of the hearing will focus
10 on the potential effects *of the petition* on fish and wildlife and recreational
11 uses ... including consideration of appropriate Delta flow criteria for the
12 Waterfix Project as required by the Sacramento-San Joaquin Delta Reform
13 Act of 2009." (p.12, emphasis added.) The scope and focus of this
14 proceeding is narrow (November 8, 2017 Ruling, p.2), and focuses only on
15 the changes the California WaterFix project may have as compared to a
16 No Action Alternative.

17 The City of Antioch does not seek to expand the scope beyond what the Board has
18 already ruled on. However, with respect to the scope of flow criteria, Antioch relies on the
19 Board's rulings at the Part 2 Pre-Hearing held on October 19, 2017.

20 Those pre-trial hearing rulings resulted in three major determinations as to Flow Criteria
21 for Part 2: first, all parties were welcomed to introduce what they believed would be
22 appropriate flow criterion; second, that such flow criteria proposals could address Phase 1
23 issues either in connection with Phase 2 issues or solely as to Phase 1 issues; and finally,
24 that such a proposal relating to flow criteria could include proposals for permit terms.
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13 in chief relate to protecting or responding to concerns
14 that a party has raised in Part 1? Injury to legal user
15 of water, for example.

16 CO-HEARING OFFICER DODUC: Will it also address
17 potential injury -- well -- to fisheries and other
18 resources? Or is it specific to just addressing injury
19 to water user?

20 MR. SALMON: *Would it be permissible to propose*
21 *Delta flow criteria for the WaterFix Project* and support
22 that with evidence *as to why those flow criteria are*
23 *needed to protect against a Part 1 impact?*

24 CO-HEARING OFFICER DODUC: YES.

25 MR. SALMON: *Would it be permissible to*
1 *introduce new evidence regarding those impacts to legal*
2 *users of water if it directly relates to supporting the*
3 *proposed Delta criteria?*

4 CO-HEARING OFFICER DODUC: Is there a legal
5 concern with that, Miss Heinrich?

6 As you can attest, during the course of this
7 hearing *we've been very open to the introduction of*
8 *potential terms, conditions, criteria, so I at this point*
9 *don't see an issue with that.*

22 The foregoing is what Antioch understood, and still understands, to be the scope of
23 the Part 2 proceeding with respect to Flow Criteria. It is exactly what Antioch did in
24 preparing and presenting its case-in-chief for Part 2 – by following the Board's clear
25 directives during the pre-hearing for Part 2. And yet, during Antioch's direct testimony of
26 Dr Susan Paulsen, DWR objected attempting to inappropriately narrow testimony on Flow
27

1 Criteria in direct contradiction to the directives of the Board during the October 19, 2017
2 pre-hearing on Part 2.

3 **CONCLUSION**

4 It continues to be Antioch's position that its case-in-chief met all the directives of the
5 Board and was within the scope of flow criteria for Part 2 because: a) it validly established
6 a base line as to what constitutes historic natural flow and water quality at Antioch (including
7 for public trust flows) prior to the projects and major upstream development (no other party
8 has attempted to do this yet in Part 2); b) it validly attempted to provide flow criteria
9 proposals using existing regulatory "tools" such as D-1641¹ and X2 that may be helpful to
10 approximate the historic natural flow (keeping mind that natural conditions likely cannot be
11 ever fully restored); and c) it validly proposed certain permit conditions. ALL of which are
12 within the scope of Part 2 flow criteria as established by the Board at the October 19, 2017
13 pre-hearing. Both DWR's Motion and their objection to Antioch's case-in-chief seek to
14 have this Board inappropriately narrow the scope of flow criteria for Part 2 in direct
15 contradiction to the Board's prior determinations on this issue.
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18 **Dated:** MARCH 28, 2018
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20
21 /s/ *MATTHEW EMRICK*
22 Matthew Emrick
23 Attorney for Protestant
24 City of Antioch
25

26 _____
27 ¹ D-1641 allows the Board to direct that M&I Flows be met at Antioch. M&I flows are used by the Board to
28 determine impacts on recreational uses.