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8
9 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

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

**OPPOSITION TO DWR'S MOTION FOR
RECONSIDERATION OF THE SCOPE OF
PHASE 2**

1 The Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute
2 (“NRDC et al”) oppose DWR’s motion for reconsideration of the scope of Phase 2. More than two
3 years after the initial pre-hearing conference, DWR’s motion seeks to fundamentally revise the scope
4 of this hearing to be limited “only on the changes the California WaterFix project may have as
5 compared to a No Action Alternative.” Motion at 4. However, this proposed scope is expressly
6 contrary to numerous prior Rulings from 2016 and 2017, ignores the State Water Resources Control
7 Board’s obligations under the Public Trust Doctrine, and eviscerates the requirements of the Delta
8 Reform Act. The Hearing Officers’ rulings have been consistent regarding the scope of this hearing,
9 repeatedly rejecting the more narrow and unlawful approach espoused in DWR’s motion for
10 reconsideration. The Hearing Officers should deny the motion for reconsideration.
11

12 First, since the prehearing conference ruling in 2016, the Hearing Officers have made clear
13 that the scope of this Hearing is broader than merely comparing WaterFix to the status quo, contrary
14 to DWR’s motion for reconsideration. DWR’s original water rights change petition sought to
15 narrow the scope of the hearing and asserted that compliance with D-1641 constituted reasonable
16 protection of fish and wildlife and appropriate flow criteria under the Delta Reform Act. *See* Petition
17 at 10-12. However, the Hearing Officers explicitly rejected DWR’s interpretation of the scope of this
18 hearing. The pre-hearing conference Ruling stated that, “We do not interpret ‘appropriate Delta flow
19 criteria’ to mean the same thing as either existing or revised water quality objectives.” February 11,
20 2016 Ruling at 4. In addition, this Ruling stated that,
21

22 In determining appropriate Delta flow criteria, the State Water Board intends to rely
23 on the best available science, including the 2010 Delta flow criteria and the Scientific
24 Basis Report for revisions to the Bay-Delta Plan that is being developed to support
25 Phase 2 of the Bay-Delta Plan update. A complete Bay-Delta Plan update is not
required, however, prior to processing the change petition.

26 February 11, 2016 Ruling at 5. Similarly, the March 4, 2016 Ruling acknowledged that several
27 parties had objected to the statement in the February 11 Ruling that “The appropriate Delta flow
28

1 criteria will be more stringent than petitioners' current obligations and may well be more stringent
2 than the petitioners' preferred project," and agreed that this statement in the February 11 Ruling
3 should not be considered a final determination. March 4, 2016 Ruling at 4-5. However, the Ruling
4 also emphasized that,

5
6 State Water Board's periodic review of the Water Quality Control Plan for the San
7 Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan), which was
8 conducted in 2009, indicated that changes to existing water quality objectives,
9 including Delta outflow objectives, are needed to prevent the continued decline of
10 numerous fish species. Moreover, petitioners themselves appear to have recognized
11 that existing flow requirements may be inadequate, and have included as part of their
12 proposed project additional criteria for spring Delta outflow, to protect longfin smelt,
13 and new minimum flow criteria at Rio Vista on the Sacramento River. (Bay-Delta
14 Conservation Plan/California WaterFix Partially Recirculated Draft Environmental
15 Impact Report/Supplemental Draft Environmental Impact Statement, pp. 4.1-5-4.1-2.)
16 **The point of the statement was to make clear that there would be consideration
17 of flows in addition to existing Decision 1641 requirements per the Delta Reform
18 Act that would not require the completion of the Bay-Delta Plan prior to that
19 decision.**

20 March 4, 2016 Ruling at 5.

21
22 Contrary to DWR's motion for reconsideration, nothing in August 31, 2017 or November 8,
23 2017 Rulings would limit the scope of this proceeding to "changes the California WaterFix project
24 may have as compared to a No Action Alternative." See Motion at 4. For instance, in the November
25 7, 2017 Ruling, the Hearing Officers stated that,

26
27 In Part 1, protestants had the opportunity to cross-examine petitioners' witnesses and
28 present rebuttal evidence concerning the range of operational scenarios evaluated by
petitioners. In Part 2, parties may propose flow criteria outside the range of
operational scenarios evaluated by petitioners, and the other parties will have an
opportunity to conduct cross-examination and present rebuttal evidence concerning
those proposals as well.

November 7, 2017 Ruling at 2.

These rulings make clear that for more than 2 years, the scope of Phase 2 of this Hearing was
not limited to evaluating WaterFix against current regulatory standards or existing flows, as DWR's
current motion for reconsideration would require. DWR never filed a motion for reconsideration of

NRDC opposition to DWR's motion for reconsideration of the scope of phase 2

1 these rulings, and the current motion is untimely. Instead, the scope of the Hearing appropriately
2 considers not just any incremental effects of WaterFix, but is focused on whether the proposed
3 project would provide reasonable protection of fish and wildlife and to determine “appropriate flow
4 criteria” pursuant to the Delta Reform Act. Nothing in these prior rulings suggested that this
5 proceeding would be limited to comparing WaterFix to the No Action Alternative.
6

7 Second, as discussed at length in NRDC et al’s Statement of Facts filed in support of our
8 Protest in 2016, it would be unlawful for the Board to limit the scope of this hearing to the
9 incremental effects of WaterFix on fish and wildlife, while ignoring whether existing regulatory
10 requirements and existing flow conditions provide reasonable protection of fish and wildlife. That
11 Statement of Facts cited numerous SWRCB precedents and existing legal standards, including the
12 Public Trust doctrine, that require the scope of this Hearing to be broader than the incremental effect
13 of the project, and it is hereby incorporated as Exhibit A to this opposition. DWR cites no prior
14 precedents supporting its cramped interpretation of the scope of this hearing, while in Exhibit A
15 NRDC et al have identified numerous prior SWRCB decisions rejecting this narrow approach.
16

17 Third, DWR has been on notice that NRDC et al would be addressing the inadequacy of
18 existing regulatory requirements and existing flow conditions to provide reasonable protection for
19 fish and wildlife. NRDC et al’s statement of facts that accompanied our Protest explicitly stated
20 that,

21 As discussed in more detail below, the Board is required to consider the full range of
22 impacts of the proposed operations of the CVP and SWP with the change in point of
23 diversion, in light of the Board’s obligations under the Public Trust doctrine, section
24 85086(c)(2) of the Water Code, and other requirements of law. The scope of the
25 Board’s review lawfully cannot be limited to the incremental, additional harm caused
26 by the additional point of diversion or incremental changes to project operations.
27 Instead, the Board must consider the full range of impacts on fish and wildlife and
28 other beneficial uses from the operations of the State Water Project and Central
Valley Project as proposed in the Petition and environmental documents, in order to
determine if the proposed operations would result in unreasonable impacts on fish and
wildlife. This includes both impacts from upstream operations as well as impacts in
and downstream of the Delta from the new point of diversion.

1
2 NRDC et al Statement of Facts in support of Protest, January 5, 2016, at 1.

3 In addition, NRDC et al's opening statement and the testimony of Dr. Jon Rosenfield both
4 addressed the inadequacy of existing regulatory requirements and existing flows to provide
5 reasonable protection for fish and wildlife. DWR has been on notice for years that the scope of the
6 hearing must be broader than the incremental effects of the project, and that NRDC et al would be
7 providing testimony to this effect. DWR had opportunities to object to NRDC et al's testimony as
8 being outside the scope of the hearing, and never did so. That DWR chose to avoid presenting any
9 testimony in their case in chief regarding the adequacy of existing regulatory requirements and
10 existing flow conditions to provide reasonable protection for fish and wildlife (and/or to instruct
11 their witnesses to not answer such questions on cross-examination), was their choice. But that choice
12 was not based on any reasonable interpretation of the prior rulings in this Hearing.
13

14 In addition, direct testimony and cross-examination regarding whether existing regulatory
15 requirements and current flow conditions provide reasonable protection for fish and wildlife does not
16 conflate this proceeding with the update of the Bay-Delta Water Quality Control Plan, as the Hearing
17 Officers previously ruled more than 2 years ago. *See, e.g.*, February 11, 2016 Ruling at 4. Indeed,
18 DWR has opposed efforts to appropriately delay this proceeding to allow for the completion of the
19 Water Quality Control Plan, despite numerous letters and statements from the State Water Resources
20 Control Board that this hearing would not be completed prior to the update of the Bay-Delta Water
21 Quality Control Plan. *See* NRDC letter to the SWRCB dated September 29, 2015, attached hereto as
22 Exhibit B.
23

24 Finally, NRDC's due process rights would be violated if the Hearing Officers excluded
25 cross-examination regarding the adequacy of existing regulatory requirements and/or current flow
26 conditions to provide reasonable protection of fish and wildlife and appropriate flow criteria. DWR
27 opened the door to this testimony by asserting that the project provides reasonable protection in
28 NRDC opposition to DWR's motion for reconsideration of the scope of phase 2

1 comparison to existing regulatory requirements, and in several instances DWR provided direct
2 testimony that existing standards and/or conditions provide reasonable protection for fish and
3 wildlife. *See, e.g.*, DWR 1013 at 3, footnote 2; *id.* at 36 (“there is the potential for listed salmonid
4 and Green sturgeon entrainment risk to be reduced from, or at least maintained no more than, **the**
5 **existing levels, which I believe currently provide reasonable protection.**”) (emphasis added); *id.*
6 at 61; *id.* at 73 (“Implementing dual conveyance under CWF H3+ **will maintain or potentially**
7 **increase existing reasonable protection of Delta Smelt and Longfin Smelt from entrainment**
8 **risk at the south Delta export facilities... CWF H3+ will maintain existing reasonable**
9 **protection of Delta Smelt fall rearing habitat**”) (emphasis added).

11 The Hearing Officer’s prior rulings regarding the scope of this Hearing are consistent with
12 the SWRCB’s legal obligations and precedents under the Public Trust doctrine and Delta Reform
13 Act, and NRDC’s cross-examination of DWR’s witnesses regarding whether existing regulatory
14 requirements and current flow conditions provide reasonable protection for fish and wildlife was
15 appropriate. More than 2 years into this proceeding, DWR’s motion improperly seeks to drastically
16 narrow the scope of this hearing. DWR’s approach would plainly be unlawful by requiring the
17 SWRCB to ignore its obligations under the Public Trust doctrine and the Delta Reform Act. The
18 Hearing Officers should therefore reject DWR’s motion for reconsideration.
19

20
21 Dated: March 28, 2018

Natural Resources Defense Council

22 

23 _____
24 Doug Obegi

25 On behalf of the Natural Resources Defense Council,
26 Defenders of Wildlife, and the Bay Institute
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EXHIBIT A

Information and Statement of Facts in Support of Protest of WaterFix Petition
Submitted by the Natural Resources Defense Council, The Bay Institute, and Defenders of Wildlife

I. Introduction:

Our organizations hereby protest the August 25, 2015 Petition by the Department of Water Resources and U.S. Bureau of Reclamation to change the point of diversion for the federal Central Valley Project (CVP) and State Water Project (SWP) as part of the California WaterFix Project (“Petition”), because the best available scientific data and information demonstrates that granting the Petition would cause unreasonable impacts on fish and wildlife, would be contrary to various state policies and laws, and is not in the public interest. Consistent with our Notice of Intent to Appear, our organizations intend to provide witness testimony on the unreasonable impacts to fish and wildlife and other beneficial uses of the waters of the San Francisco Bay-Delta estuary and upstream areas that would be caused by granting the Petition, as well as testimony on the availability of water supply from alternative projects.

This document and exhibits provide initial information in support of our protest. However, our testimony and subsequent submissions in this proceeding may raise additional issues that are not addressed in this statement of facts because the State Water Resources Control Board (“Board”) has explicitly stated in the Notice of Petition Requesting Changes in Water Rights of the Department of Water Resources and U.S. Bureau of Reclamation for the California WaterFix Project (“Notice”) that, “Persons wishing to participate in the hearing do not need to submit a protest against the Petition.” See Notice at 3.

The Board must deny the Petition because it would cause unreasonable impacts on fish and wildlife, is contrary to law, and is not in the public interest.

II. Scope of the Board’s Review of the Petition:

As discussed in more detail below, the Board is required to consider the full range of impacts of the proposed operations of the CVP and SWP with the change in point of diversion, in light of the Board’s obligations under the Public Trust doctrine, section 85086(c)(2) of the Water Code, and other requirements of law.¹ The scope of the Board’s review lawfully cannot be limited to the incremental, additional harm caused by the additional point of diversion or incremental changes to project operations. Instead, the Board must consider the full range of impacts on fish and wildlife and other beneficial uses from the operations of the State Water Project and Central Valley Project as proposed in the Petition and environmental documents, in order to determine if the proposed operations would result in unreasonable impacts on fish and wildlife. This includes both impacts from upstream operations as well as impacts in and downstream of the Delta from the new point of diversion. In order

¹ Our prior comments to the Board regarding the duty to complete Phase 2 of the periodic review and update of the Bay-Delta Water Quality Control Plan prior to completing this proceeding are attached hereto as Exhibit A.

to grant the Petition, the Board must include conditions that are sufficient to ensure that: (a) existing water quality standards are achieved (including the narrative objective for salmon protection); and, (b) cumulative effects of the operations of the CVP and SWP will not cause unreasonable impacts to fish, wildlife, and water quality or jeopardize the continued existence or recovery of species, including upstream impacts from reservoir operations and/or impacts that are not limited to the incremental effect of the change in point of diversion.

A. The Board's Review Cannot be Limited to the Incremental Additional Harm Caused by the Change in Point of Diversion

Numerous decisions of the Board on petitions to change the point of diversion indicate that such a decision implicates the Board's obligations under the Public Trust doctrine, and as such, that review of the Petition is not limited to the incremental harm caused by the change petition. For instance, in 2015, the Board concluded that,

"A change petition must also be in the public interest and not unreasonably harm fish, wildlife and other instream beneficial uses. . . . [T]he State Water Board has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible."

In the Matter of Permit 10477, 2015 WL 4517569, at *9, 22 (March 30, 2015). In that order the Board noted that,

The State Water Board is obligated to place into water rights "such terms and conditions as in its judgment will best develop, conserve and utilize in the public interest the water sought to be appropriated." (Wat. Code, § 1253; see also Wat. Code, § 1257.) The Board's ability to condition permits and enforce those terms authority is integral to the State Water Board's ability to fulfill its public trust obligations, and it is state policy that the State Water Board enforce permit terms and conditions "vigorously." (Wat. Code, § 1253, 1825.)... If the flows necessary to protect the public trust are higher than the flows required by the permit, the State Water Board would lose permit enforcement authority as a tool to ensure that the public trust is protected at the appropriate level.

Id. at *13.

Under the Public Trust doctrine, the Board is compelled to consider the full range of impacts of CVP and SWP operations as proposed with the change in point of diversion, even if that requires reconsideration of the Board's prior decisions. As the Board wrote in its 2010 report on Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem:

The State Water Board has continuing authority over water right permits and licenses it issues. In the exercise of that authority and duty, the State Water Board may, if appropriate, amend terms and conditions of water right permits and licenses to impose further limitations on the diversion and use of water by the water right holder to protect public trust uses or to meet water quality and flow objectives in Water Quality Control Plans it has adopted. The State Water Board must provide notice to the water permit or license holder and an opportunity for hearing before it may amend a water right permit or license.

If the DWR and/or the USBR in the future request the State Water Board to amend the water right permits for the State Water Project (SWP) and/or the Central Valley Project (CVP) to move the authorized points of diversion for the projects from the southern Delta to the Sacramento River, Water Code section 85086 directs the State Water Board to include in any order approving a change in the point of the diversion of the projects appropriate Delta flow criteria. At that time, the State Water Board will determine appropriate permit terms and conditions. That decision will be informed by the analysis in this report, but will also take many other factors into consideration, including any newly developed scientific information, habitat conditions at the time, and other policies of the State, including the relative benefit to be derived from all beneficial uses of water. The flow criteria in this report are not pre-decisional in regard to any State Water Board action. (See e.g., Wat. Code, § 85086, subd. (c)(1).)

SWRCB, Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem (August 3, 2010) at 3-4.

Pursuant to the Board's obligations under the Public Trust, in acting on other change petitions the Board has imposed new conditions to protect fish and wildlife that were not limited to the incremental effects of a change in point of diversion. For instance, in Water Rights Order 95-03, the Board approved a change in point of diversion permit, but only after including a new condition on the permit to reserve the Board's continued authority under the Public Trust. Even though the Board found that flows below the dam would not be diminished as a result of granting the change petition, and therefore that there would not be any additional, incremental harm from granting the change petition, the Board exercised its responsibilities under the Public Trust to impose this new condition to potentially reduce diversions in the future to protect salmon on the Merced River.

Similarly, in Water Rights Order 2009-0015, the Board approved a petition to change the place of use, purpose of use, and points of rediversion, but only after adding a new condition (Condition 8) establishing minimum streamflows to prevent unreasonable harm to fish and wildlife and to protect public trust resources. There is no indication from this order that Condition 8 related solely to the incremental harm from the change in point of diversion.

In other contexts, the Board has concluded that “The State Water Board has an obligation to consider the public trust when conditioning or approving any diversion of water.” In the Matter of License 7979 (Application 20301) of Irv Leen, SWRCB Feb. 3, 2013 (2013 WL 596457) (citations omitted). Similarly, in Water Rights Order 2009-0033, the Board referenced its “continuing duty to consider the impacts of water diversions on public trust resources, including fish and wildlife habitat” and cited D-1641 for the conclusion that “when reviewing a proposed change to a permit or license, the Board should consider the same factors that were considered when reviewing the underlying water right application, and therefore the Board should consider the public interest and effects on fish and wildlife.” Because DWR and the Bureau of Reclamation have petitioned the Board for the change in point of diversion, they have necessarily triggered the Board’s obligations under the Public Trust doctrine, and the Board must consider the full range of impacts of CVP/SWP operations as proposed with the change in point of diversion. The Board’s review cannot be limited to the incremental effects of the change in point of diversion without violating its obligations under the Public Trust doctrine.

B. The Board’s Review of the Impacts on Fish and Wildlife Cannot be Limited to Consistency with Existing Water Quality Standards

In addition, the Board’s review of impacts cannot be limited to compliance with existing water quality standards. As the Board itself has indicated, the existing standards in the Bay-Delta Water Quality Control Plan fail to protect public trust resources including fish and wildlife. For instance, the Board has previously determined that “[t]he best available science suggests that current flows are insufficient to protect public trust resources.” SWRCB, Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem (August 3, 2010) at 2; *id.* at 5 (acknowledging that “[r]ecent Delta flows are insufficient to support native Delta fishes for today’s habitats”); see SWRCB Resolution 2010-0039 (“In accordance with the Delta Reform Act, the State Water Board approves the report determining new flow criteria for the Delta ecosystem that are necessary to protect public trust resources.”). In addition, by adopting Resolution 2009-0065, the Board approved the staff report on periodic review of the Bay-Delta Water Quality Control Plan, which recommends numerous changes to existing flow and water quality standards, recognizing that existing standards fail to adequately protect fish and wildlife. See Staff Report, Periodic Review of the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary at 19 (“The available information indicates that further review and change of Delta outflow objectives may be required. Changes to Delta outflow patterns have likely contributed to the POD and are likely having an impact on the abundance of other species of concern. Actions taken under the federal ESA are already changing outflow requirements for the SWP and CVP and additional species protection actions are imminent.”); *id.* at 21 (“The available information indicates that new or changed export limits may be necessary to adequately protect beneficial uses in the Delta. Recent analyses of the impact of export pumping on Delta fish species of concern show that more restrictive limits may be required.”); *id.* at 26 (“The continued decline in the populations of several Delta fish species, as indicated by reductions in survey indices (Armor et al. 2007), also suggests that the export limits in the Bay-Delta Plan are not sufficient to protect aquatic species.”).

Other agencies have also concluded that existing water quality standards are inadequate to protect native fish species and other Public Trust resources, including preventing the extinction of native fish species. *See, e.g.*, CDFW 2010 flow objectives report; CDFW May 2, 2012 comment letter to SWRCB regarding Phase II; Environmental Protection Agency 2012 Bay Delta Action Plan at 7 (stating that “Despite much ongoing activity, CWA programs are not adequately protecting Bay Delta Estuary aquatic resources, as evidenced by the pelagic organism decline.”); *id.* at 9-11 (stating that many designated uses are currently impaired, and directing the Board to expeditiously modify estuarine habitat protection standards in the Bay Delta Water Quality Control Plan to more fully protect aquatic species); FWS 2008 biological opinion;² NOAA 2009 biological opinion; NOAA April 25, 2012 comments to the SWRCB regarding Phase II; Delta Stewardship Council 2013 Delta Plan at 133, 148. As noted in our prior comments to the SWRCB regarding the update of the Bay-Delta Water Quality Control Plan, which are attached hereto as Exhibit B, existing water quality standards are inadequate to reasonably protect fish and wildlife, and operations of the CVP and SWP that jeopardize the continued existence of native fisheries result in unreasonable impacts on fish and wildlife. *See* Exhibit B (Submission 3 at 7-9). And the cases cited above also demonstrate that the Board can include new conditions to protect fish and wildlife that are not limited to compliance with existing water quality standards. *See* Water Rights Order 95-03; Water Rights Order 2009-0015. Our prior comments to the SWRCB included as Exhibit B provide additional scientific information on the inadequacy of existing water quality standards to protect fish and wildlife, and recommendations regarding changes to water quality standards necessary for reasonable protection of fish and wildlife in the Bay-Delta watershed. *See* Exhibit B (Submissions 1 and 2).

In addition, the Delta Reform Act of 2009 requires that the Board impose “appropriate” flow criteria, which are to be informed by the Board’s 2010 Public Trust Flow report, before approving any petition seeking a change in point of diversion for the CVP and SWP. Water Code § 85086(c)(2). Such review cannot be limited to existing water quality standards. It is unclear from the Notice whether the Board’s adoption of appropriate flow criteria pursuant to section 85086(c)(2), including Sacramento River bypass flows and Delta outflows, will include only those flows that are the responsibility of the CVP and SWP to contribute, or whether it will include flows from other sources. DWR and Reclamation currently bear responsibility for meeting all of the flow objectives in the water quality control plan. The Board must specify whether flow criteria under section 85086(c)(2) includes only flows that are the future responsibility of the CVP and SWP (such that additional outflows and bypass flows may be required from other water rights holders), or whether it includes flows that may be the responsibility of other water rights holders.

² The biological opinions from the U.S. Fish and Wildlife Service and National Marine Fisheries Service concluded that implementation of existing water quality standards under D-1641, without implementation of the Reasonable and Prudent Alternative in each biological opinion, would jeopardize the continued existence and recovery of species listed under the federal Endangered Species Act. This demonstrates that the water quality standards are insufficient even to avoid jeopardy of endangered species, much less to meet the Board’s obligations under the Public Trust doctrine.

C. The Board Must Ensure that the Narrative Objective for Salmon Protection will be met in Order to Avoid Unreasonable Impacts on Fish and Wildlife

The Board must ensure that the Petition is consistent with, and will achieve, the narrative salmon protection objective in the existing Bay-Delta Water Quality Control Plan (“to achieve a doubling of natural production of Chinook salmon from the average production of 1967-1991, consistent with the provisions of State and federal law”). The failure to achieve this objective would constitute an unreasonable injury to fish and wildlife, as the narrative salmon protection objective constitutes a legislative and policy determination of California’s obligations under the Public Trust doctrine. See Exhibit B (Submission 3 at 10-11).

D. The Board Must Ensure Compliance with the California Endangered Species Act and the Prevention of Extinction of Endangered Species in Order to Avoid Unreasonable Impacts on Fish and Wildlife

The Board must ensure that the Petition is consistent with the California Endangered Species Act (“CESA”), including CESA’s requirement to avoid driving native fish and wildlife species to extinction.³ The failure to comply with CESA would constitute an unreasonable injury to fish and wildlife, which is not subject to balancing. See Exhibit B (Submission 3 at 7-9). Because operations as proposed in the Petition would jeopardize the continued existence and recovery of several native fish species, granting the Petition would violate state and federal laws including the ESA and CESA.

E. The Board Must Consider the Impact of Future Waivers of Water Quality Standards on Fish and Wildlife

The durability of protections for fish and wildlife is also a significant issue that the Board must address in this proceeding. Over the past several years the Board has repeatedly waived and failed to enforce existing water quality standards, and state and federal agencies have repeatedly waived requirements of the ESA and CESA. This has caused unreasonable impacts to fish and wildlife species, in some cases driving species to the very brink of extinction. The Board must analyze the potential impacts to fish and wildlife if minimum conditions and standards are waived in future droughts, and must demonstrate how future waivers of these protections will be avoided in order to ensure that granting the petition is not likely to result in unreasonable impacts to fish and wildlife in the future.

F. The Board Must Assess the Availability of Alternative Water Supplies in this Proceeding

Finally, in order to determine the reasonableness of protections for fish and wildlife and other beneficial uses, and other water users, as well as the public interest in the Petition, the Board must consider the availability of alternative water supplies including water recycling, water conservation and efficiency,

³ Petitioners must also demonstrate that operations as proposed in the Petition are consistent with their legal obligations under section 5937 of the Fish and Game Code. See Water Code § 1701.3(b)(2).

stormwater capture, and reservoir re-operation. See Decision 1485 at 16-19; Decision 1631 at 165-168, 176-177; Water Rights Order 2009-0034EXEC; Exhibit B (Submission 3 at 3-7); see also Water Code § 13241(f).

The Board's decision on the Petition also must comply with section 85021 of the Water Code, which requires that agencies reduce reliance on water supplies from the Bay-Delta and invest in regional self-sufficiency. The 2014 report by NRDC and the Pacific Institute entitled Untapped Potential provides initial information regarding the availability of alternative water supplies to reduce reliance on the Delta and improve flows to protect fish and wildlife. It is attached hereto as Exhibit C. We intend to call one or more witnesses to testify regarding alternative water supplies.

III. The Supplemental Draft Environmental Impact Report Fails to Comply with CEQA and Must be Revised and Recirculated:

As a responsible agency, the Board must independently review the adequacy of the Revised Draft Environmental Impact Report (RDEIR) under the California Environmental Quality Act. As noted in our organizations' comments on the CEQA documents (attached hereto as Exhibits D and E), the DEIR and RDEIR fail to comply with CEQA, particularly with respect to the effects of climate change, the range of alternatives that are analyzed, and the analysis of environmental impacts.

Prior to initiating Part II of this water rights proceeding, the Board must ensure that the RDEIR is revised and recirculated, including but not limited to analysis of the potential environmental impacts of the operational provisions included in Appendix B to the CEQA document. In prior proceedings, the Board has concluded that, "The State Water Resources Control Board cannot conduct a hearing on the petitions until the EIR is completed." Water Rights Order 79-20, July 19, 1979, 1979 WL 24780).

IV. The Board Must Ensure Part II of this Proceeding Does Not Begin Until at Least 90 Days Following Completion of all CESA/ESA permits / biological opinions and NEPA/CEQA documents:

The Notice indicates that Part II of this proceeding will commence at least 30 days "following completion of environmental and endangered species act compliance for the project." Notice at 1, 2. We strongly agree that Part II of this proceeding should not commence until the public and protestants have sufficient time to review the environmental and endangered species act compliance for the project. However, 30 days is insufficient time to allow protestants and the public to review and incorporate the information from these complex documents into our testimony and prepare for cross-examination of witnesses. We request that the Board order that Part II of this proceeding will not begin until at least 90 days after all of the following permits and environmental documents are completed and made available for public review:

- The new biological opinions issued by the U.S. Fish and Wildlife Service and National Marine Fisheries Service for the WaterFix Project;
- The new CESA permit issued by the California Department of Fish and Wildlife for take of longfin smelt by the WaterFix Project;
- The revised and recirculated final CEQA and NEPA documents for the WaterFix Project;
- The Clean Water Act section 404 permit issued by the Army Corps of Engineers for the Project; and,
- The Record of Decision for the Project.

In order to allow for orderly administration of this proceeding, and in light of the time needed to complete these processes, the Board should determine that Part II will not start before January 1, 2017, and will not commence until 90 days after completion of all of these permits and reviews.

V. The Best Available Science Demonstrates that Granting the Petition will Cause Unreasonable Impacts to Fish and Wildlife:

As discussed in detail in our comments on the CEQA/NEPA documents, the best available scientific data and information demonstrates that granting the Petition will cause unreasonable impacts on fish and wildlife, including but not limited to continued declines and potential extinction of fish species listed as endangered or threatened under the ESA and CESA and severe degradation and potential loss of environmental water quality, estuarine habitat and fish migration for a broad range of Bay-Delta fish and wildlife species.

A. Granting the Petition Will Cause Unreasonable Impacts to Winter Run Chinook Salmon

As discussed in our comments on the CEQA/NEPA documents, granting the Petition is likely to reduce survival of winter run Chinook salmon through the Delta as compared to the status quo, as a result of operations of the new points of diversion. Exhibit E at 36, 38-39, 72-76; Exhibit D at 176-178. The reduction in sediment supply and turbidity in the lower Sacramento River, Delta, and San Francisco Bay, increases in residence time of water flowing through the Delta, and increases in harmful algal blooms in the Delta and the spread of their toxins to the rest of the estuary, as a result of granting the petition, would also cause significant adverse impacts to winter run Chinook salmon. Exhibit E at 51-59, 72-73. Granting the Petition is also likely to significantly increase predation of winter run Chinook salmon at and downstream of the new points of diversion, reducing survival and abundance. See Exhibit E at 73-75. These incremental effects of the Petition constitute unreasonable impacts on fish and wildlife.

In addition, the CEQA/NEPA documents demonstrate that operations of the CVP and SWP as proposed in the Petition, in combination with the effects of climate change, will significantly increase mortality of winter run Chinook salmon below Shasta Dam, threatening the continued existence of this species. See Exhibit E at 16-18, 36-38, 77-80; Exhibit D at 169-176. Moreover, operations as proposed in the Petition are not likely to achieve the narrative salmon protection objective in the Bay-Delta Water Quality

Control Plan, as it pertains to winter-run Chinook salmon, as the modeling and other information indicates that winter run Chinook salmon populations are likely to continue to decline in abundance. *See* Exhibit E at 16-18, 36-39, 51-59, 72-75, 77-80; Exhibit D at 162-179. These cumulative effects of the Petition and CVP/SWP operations on winter run Chinook salmon, in combination with the effects of climate change, constitute unreasonable effects on fish and wildlife.

B. Granting the Petition Will Cause Unreasonable Impacts to Fall Run Chinook Salmon

As discussed in our comments on the CEQA/NEPA documents, granting the Petition is likely to reduce survival of fall run Chinook salmon through the Delta as compared to the status quo, as a result of operations of the new point of diversion. Exhibit E at 42-43, 72-76; Exhibit D at 214-215. This is also true for fall run Chinook salmon migrating from the San Joaquin River basin, where the CEQA/NEPA documents demonstrate that granting the Petition would significantly reduce survival through the Delta and subsequent abundance. Exhibit E at 76-77. The reduction in sediment supply and turbidity in the lower Sacramento River, Delta, and San Francisco Bay, increases in residence time of water flowing through the Delta, and increases in harmful algal blooms in the Delta and the spread of their toxins to the rest of the estuary, as a result of granting the petition, would also cause significant adverse impacts to fall run Chinook salmon. Exhibit E at 51-59, 72-73. Granting the Petition is also likely to significantly increase predation of fall run Chinook salmon at the new point of diversion, reducing survival and abundance. *See* Exhibit E at 73-75. These incremental effects of the Petition constitute unreasonable impacts on fish and wildlife.

In addition, the CEQA/NEPA documents demonstrate that operations of the CVP and SWP as proposed in the Petition, in combination with the effects of climate change, will significantly increase mortality of fall run Chinook salmon upstream of the Delta. *See* Exhibit E at 16-18, 41, 75-77, 79-80; Exhibit D at 209-215. Moreover, operations as proposed in the Petition are not likely to achieve the narrative salmon protection objective in the Bay-Delta Water Quality Control Plan, as it pertains to fall-run Chinook salmon, based on the modeling and information presented. *See id.* These cumulative effects of the Petition and CVP/SWP operations on fall run Chinook salmon, in combination with the effects of climate change, constitute unreasonable effects on fish and wildlife.

C. Granting the Petition Will Cause Unreasonable Impacts to Spring Run Chinook Salmon

As discussed in our comments on the CEQA/NEPA documents, granting the Petition is likely to reduce survival of spring run Chinook salmon through the Delta as compared to the status quo, as a result of operations of the new points of diversion. Exhibit E at 41, 72-76; *see* Exhibit D at 184-189. The reduction in sediment supply and turbidity in the lower Sacramento River, Delta, and San Francisco Bay, increases in residence time of water flowing through the Delta, and increases in harmful algal blooms in the Delta and the spread of their toxins to the rest of the estuary, as a result of granting the petition, would also cause significant adverse impacts to spring run Chinook salmon. Exhibit E at 51-59, 72-73. Granting the Petition is also likely to significantly increase predation of spring run Chinook salmon at the

new points of diversion, reducing survival and abundance. See Exhibit E at 73-75. These incremental effects of the Petition constitute unreasonable impacts on fish and wildlife.

In addition, the CEQA/NEPA documents demonstrate that operations of the CVP and SWP as proposed in the Petition, in combination with the effects of climate change, will significantly increase mortality of spring run Chinook salmon upstream of the Delta. See Exhibit E at 16-18, 39-41, 72-77. Moreover, operations as proposed in the petition are not likely to achieve the salmon doubling objective in the Bay-Delta Water Quality Control Plan. See *id.* These cumulative effects of the Petition and CVP/SWP operations on fall run Chinook salmon, in combination with the effects of climate change, constitute unreasonable effects on fish and wildlife.

D. Granting the Petition Will Cause Unreasonable Impacts to Steelhead

As discussed in our comments on the CEQA/NEPA documents, granting the Petition is likely to reduce migratory survival through the Delta, reduce sediment supply and turbidity, increase residence time, and increase harmful algal blooms, which would also cause significant adverse impacts to steelhead. Exhibit E at 44, 51-59, 72-73. These incremental effects of the Petition as compared to the status quo constitute unreasonable impacts on fish and wildlife. In addition, operations as proposed in the Petition, in combination with the effects of climate change, will significantly increase mortality and reduce survival of steelhead upstream of the Delta. Exhibit E at 16-18, 43-44, 75-76. These cumulative effects of the Petition constitute an unreasonable effect on fish and wildlife.

E. Granting the Petition Will Cause Unreasonable Impacts to Green and White Sturgeon

As discussed in our comments on the CEQA/NEPA documents, granting the Petition is likely to reduce survival and abundance of Green and White Sturgeon as compared to the status quo, as a result of the reduction in critical flows due to the new intakes, as well as from increased predation, reduced turbidity, and increased harmful algal blooms. Exhibit E at 45-47, 51-59. Granting the Petition also is likely to result in substantial adverse effects on White and Green Sturgeon through increased exposure to selenium and other contaminants. Exhibit E at 49-50. These incremental effects of the Petition constitute unreasonable impacts on fish and wildlife.

In addition, the CEQA/NEPA documents demonstrate that operations of the CVP and SWP as proposed in the Petition, in combination with the effects of climate change, will significantly harm Green and White Sturgeon upstream of the Delta, including reductions in the productivity of both species. See Exhibit E at 16-18, 46-47, 77-78.

F. Granting the Petition Will Cause Unreasonable Impacts to Delta Smelt

As discussed in our comments on the CEQA/NEPA documents, granting the Petition is likely to reduce the abundance of Delta Smelt as compared to the status quo, because granting the Petition will reduce

turbidity, increase the frequency of harmful algal blooms, increase predation pressure, increase invasive aquatic vegetation, reduce Delta outflows in the spring and fall months, and increase entrainment of Delta Smelt in some years. Exhibit E at 51-57, 61-64; Exhibit D at 215-233. These incremental effects constitute unreasonable effects on fish and wildlife. It is clear from the CEQA/NEPA documents that operation of the CVP and SWP as proposed in the Petition is not likely to reverse the decline of Delta Smelt, is likely to impair recovery, and will likely lead to extinction in violation of state and federal laws. These cumulative effects constitute unreasonable effects on fish and wildlife.

G. Granting the Petition Will Cause Unreasonable Impacts to Longfin Smelt

As discussed in our comments on the CEQA/NEPA documents, granting the Petition is likely to reduce the abundance of longfin smelt because of the reduction in winter-spring outflows below currently impaired levels. Exhibit E at 64-71; see Exhibit D at 129-149. As noted in our comments, simply maintaining existing levels of winter to spring Delta outflows is likely to lead to continued declines in abundance of this species and its consequent listing under the federal Endangered Species Act. *Id.* In addition, granting the Petition will also result in significant adverse impacts to longfin smelt because of the reductions in turbidity, increases in the frequency of harmful algal blooms, increases in predation pressure, and increases in invasive aquatic vegetation associated with the new point of diversion. Exhibit E at 51-57. These effects, both incrementally and cumulatively, constitute unreasonable effects on fish and wildlife.

VI. Granting the Petition is Not in the Public Interest:

A. Unreasonable Impacts to Fish and Wildlife

As discussed above and in our comments on the NEPA/CEQA documents, granting the petition will cause unreasonable impacts to fish and wildlife. In addition to CESA/ESA-listed species and fall run Chinook salmon identified above, operations under the proposed project are likely to harm fisheries including those for White Sturgeon and Starry Flounder and the prey base for many native fish and wildlife species, including bay shrimp, opossum shrimp, and copepods. Furthermore, declines in the fish and wildlife species mentioned above (and others) are expected to have a negative impact on wildlife including diving ducks, pelagic piscivorous birds of the San Francisco Estuary, and local marine mammal populations. Moreover, construction of the proposed project may reduce available habitat for birds and other wildlife that utilize Delta islands (e.g., Sandhill Cranes), and project operations may reduce the amount of water available for state, federal, and private wildlife refuges in the Central Valley that support several threatened and endangered species and millions of migratory birds. Finally, the proposed project's impact on sediment supplies to the Delta and estuary is likely to have negative effects on the ability to restore shallow intertidal habitats and the plant and wildlife species that rely on these habitats. As a result of these impacts, including impacts to species listed under CESA and the ESA, granting the Petition is not in the public interest.

B. Unreasonable Impacts to Water Quality

As discussed in detail in our comments on the NEPA/CEQA documents, granting the petition will cause significant and unreasonable impacts to water quality in the Delta, which will impair numerous beneficial uses. In addition, even where such adverse changes may not result in violations of existing water quality standards, the Board must consider whether such impacts violate the antidegradation policy (which is part of the water quality standards of the State).

The RDEIR/SDEIS demonstrates that CVP/SWP operations with the new point of diversion proposed in the Petition will substantially reduce sediment supply to the Delta, San Francisco Bay, and Suisun Marsh. *See* Exhibit E at 52-54, 64, 87-88. This will substantially reduce turbidity in these waterbodies. *Id.* The RDEIR/SDEIS also demonstrates that the new point of diversion will increase residence time in the Delta. *Id.* at 48, 55-58. The combination of increased water temperatures as a result of climate change, increased residence time, and reduced turbidity as a result of granting the petition is likely to cause increased outbreaks of harmful algal blooms, including *Microcystis*, which threaten agricultural beneficial uses, urban beneficial uses, fish and wildlife beneficial uses, and human health and safety. *Id.* at 48, 51-58, 87-89. The reduction in turbidity and sediment from granting the Petition will also cause substantial impacts on fish and wildlife, as discussed above.

In addition, other comments on the RDEIR/SDEIS demonstrate that granting the Petition is likely to substantially increase salinity in the Delta. This is particularly true during future droughts, where the RDEIR/SDEIS indicates that water quality standards and other protections for fish and wildlife cannot be met and are likely to be waived or weakened. *See* Exhibit E at 26-29. This is likely to harm fish and wildlife and other beneficial uses of water in the Bay-Delta.

C. Availability of Alternative Water Supplies

Millions of acre feet of new water supplies are available to CVP and SWP contractors from improved urban and agricultural water use efficiency, urban stormwater capture, wastewater recycling, and other tools. *See* Exhibit C; Exhibit B (Submission 3 at 3-7). The availability of these and other alternative water supplies demonstrate that reduced diversions from the Delta, and increased protections for fish and wildlife, are feasible, reasonable, and in the public interest.

D. Failure to Reduce Reliance on the Delta as Required by the Delta Reform Act

The 2009 Delta Reform Act establishes state policy to reduce reliance on water supplies from the Bay-Delta estuary, and to require investments in regional water supply solutions including water use efficiency, recycling, stormwater capture, and improved groundwater management. Water Code § 85021. The proponents have failed to demonstrate how the Petition reduces reliance on the Delta, and indeed, it appears to increase reliance on the Delta and the costs associated with the California WaterFix are likely to preclude investments in regional water supply solutions. *See* Exhibit E at 2, 7, 10.

E. Economic Benefits of Restoring the Delta Ecosystem and Fisheries

In assessing whether protections for fish and wildlife are reasonable, feasible and in the public interest, the Board must not limit its analysis to economic costs, but must provide equal consideration to the economic benefits of protecting the health of the Delta and its fish and wildlife populations. This includes assessing the economic benefits of sustaining and restoring sport and/or commercial fisheries for salmon, starry flounder, sturgeon and other native species, and the thousands of fishing and related jobs that depend on species that live or migrate through the Delta. It also includes the economic value of recreational activities in the Delta that would be affected by the Petition, such as birdwatching. In addition, the Board must consider the monetary value of a restored Delta ecosystem, including non-use values such as David Sunding's preliminary estimate of a present value of \$12-53 billion. See Exhibit B (Submission 3 at 9-10). Although economic considerations do not trump the responsibility to protect Public Trust resources or comply with other environmental laws, the Board must explicitly consider these economic benefits in assessing the Petition; the magnitude of economic benefits from restoring the Delta support increased protections beyond those proposed in the Petition.

VII. Potential Conditions to Resolve Protest

The Board should analyze the effects of the potential conditions listed below, in order to avoid unreasonable impacts on fish and wildlife, comply with state and federal environmental laws, and act in the public interest. Identification of these potential conditions below is not an indication that they would resolve our protest, because additional modeling and analysis of these potential conditions is necessary to determine their effectiveness in avoiding unreasonable effects on fish and wildlife and meeting existing legal obligations.

- (1) Require river inflows to the Delta and outflows from the Delta to San Francisco Bay at levels consistent with the findings of the 2010 flow criteria report regarding sufficient flows to fully protect public trust fish and wildlife resources, e.g., between 60 and 75% of unimpaired runoff from the Bay-Delta watershed;
- (2) Limit the new point of diversion to 3,000 cfs diversion capacity;
- (3) Mandate additional water conservation, water recycling, urban stormwater capture, and other regional water supply projects by CVP and SWP contractors in order to reduce reliance on the Delta and improve environmental and water supply outcomes;
- (4) Impose revised reservoir operation rules to maintain adequate downstream temperatures during drought conditions, including mandatory minimum carryover storages and maximum annual drawdown limits in key reservoirs.

VIII. Conclusion

The Board should deny the Petition because: (1) the best available science demonstrates that granting the Petition will cause unreasonable impacts to fish and wildlife and worsen water quality in the Delta for multiple beneficial uses; (2) the social and economic benefits of restoring the Delta ecosystem outweigh the social and economic benefits of granting the Petition; (3) alternative water supplies are available and economically feasible, and the law requires project proponents to reduce reliance on water from the Delta and invest in regional water supplies including conservation and efficiency, stormwater capture, wastewater recycling, and improved groundwater management; and (4) existing documentation is incomplete and inadequate to completely evaluate the Petition.

EXHIBIT B



September 29, 2015

Tom Howard
Executive Director, State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

RE: Preliminary Comments Regarding the Notice, Fact Sheet and Petition for Change in Point of Diversion for the California WaterFix

Dear Mr. Howard:

On behalf of the Natural Resources Defense Council, Defenders of Wildlife, Golden Gate Salmon Association, Friends of San Francisco Estuary, and The Bay Institute, we are writing to provide preliminary comments regarding the State Water Resources Control Board's (SWRCB) notice relating to the California WaterFix. The notice and fact sheet indicate that the SWRCB will complete review of the change in point of diversion petition prior to the completion of phase 2 of the update of the Bay-Delta Water Quality Control Plan, and DWR's Petition states on pages 10-11 that the Board's review of the change petition will be limited to the existing Water Quality Control Plan and D-1641. As discussed below, this approach is unlawful, and the SWRCB must ensure completion of the update of the Bay-Delta Water Quality Control Plan with adequate flow and water quality objectives to protect fish and wildlife beneficial uses and public trust resources, prior to issuing any order approving a change in point of diversion.

Contrary to the statements in DWR's petition,¹ the Board cannot lawfully rely on the existing Bay-Delta Water Quality Control Plan and D-1641 in assessing injury to fish and wildlife beneficial uses and public

¹ DWR's petition states that, "Thus the WQCP and the water rights decisions stemming from implementation of the WQCP and earlier water quality plans, including D-1641, are protective of beneficial uses until replaced through

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trust resources under the Water Code. The 2009 Delta Reform Act compels the SWRCB to adopt updated flow criteria in assessing whether the change petition would cause unreasonable injury to fish and wildlife, and the SWRCB has previously acknowledged that the water quality standards must be updated in order to review the change petition. In addition, numerous agencies – including the SWRCB – have concluded that existing flows under D-1641 and the existing water quality control plan fail to reasonably protect fish and wildlife beneficial uses and public trust resources.

First, the 2009 Delta Reform Act requires that the SWRCB adopt “appropriate” flow criteria for any change in point of diversion, rather than simply limiting review to D-1641 and the existing Water Quality Control Plan. The Act specifically requires the SWRCB to include, in any order approving a change in point of diversion, “appropriate Delta flow criteria” that shall be informed by the Public Trust Flow Report mandated by section 85086(b)(1) and which shall be subject to adaptive management. Cal. Water Code § 85086(b)(2). The legislative analysis of the bill supports this conclusion:

This bill's "flow criteria" reflect a landmark concept of the state exercising its public trust authority to ask - FIRST - what the Delta needs, before completing plans for fundamental change to the nature of the Delta, as envisioned by the Bay Delta Conservation Plan....

Paragraph (c)(2) specifies that certain water right change orders, involving specified changes in the points of diversion for the Central Valley Project or the State Water Project, must include "appropriate" Delta flow criteria. While the analysis used in developing flow criteria under paragraph (c)(1) will be considered in setting flow criteria under paragraph (c)(2), neither the analysis nor the criteria themselves predetermine the outcome of the later proceeding to determine what criteria are "appropriate" for inclusion in the water right change order. In addition, while the flow criteria developed under paragraph (c)(1) do not have regulatory effect - they serve instead as recommendations for consideration in the Delta Plan and the Bay Delta Conservation Plan - the flow criteria set under paragraph (c)(2) are included in the water right change order, and have the effect of terms and conditions of that order.

This requirement for flow criteria should also be read in the context of the savings clauses in Water Code Sections 85031-32, which ensure protection for all water rights holders as the Bay Delta Conservation Plan and the Delta Plan develop. Several upstream parties have raised concerns about these flow criteria, suggesting that they will be held responsible for complying with these flow criteria. The combination of the focus on use of flow criteria early in Delta planning efforts, specified process for developing flow criteria, and the savings clauses ensure consistent legal protection for

the update process and constitute the standard for determining injury to those beneficial uses when considering this Petition.”

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upstream water users without rewriting water law to focus protections on specific concerns.

Assembly Floor Analysis, SB 7X 1, November 4, 2009.

Second, the SWRCB has already concluded that it must update the water quality control plan in order to assess impacts to beneficial uses from a change in point of diversion permit. In a January 25, 2012 letter,² the Executive Director of the Board denied requests by some stakeholders to delay issuance of a Notice of Preparation for review of Delta objectives, stating:

There are three reasons I believe the State Water Board needs to issue the Supplemental NOP now. First, restoration of the Delta is an essential goal of the State. Numerous scientific documents have identified flow as a major factor affecting fisheries and other public trust uses of water in the Delta. The State Water Board is the State agency responsible for establishing water quality and flow objectives for the Bay-Delta to protect these uses. Second, the Delta Stewardship Council's draft Delta Plan includes direction to the State Water Board to adopt and implement flow objectives for the Delta by June of 2014. The Council is charged with pulling together all Delta activities into an integrated, coherent process. While the June 2014 target date will be very difficult to meet, the accelerated timeline is critical because flows are fundamental to Delta decision making. **Third, the Delta Reform Act specifies that no construction of Bay-Delta Conservation Plan (BDCP) facilities is allowed until the State Water Board approves any necessary changes in the point of diversion. A change in the point of diversion will require updated Delta flow objectives.** Because the State Water Board's flow-setting process can take several years, it must be conducted in parallel, rather than sequentially, to the BDCP process so as not to interfere with BDCP implementation.

(emphasis added).

Third, the SWRCB, California Department of Fish and Wildlife, Delta Stewardship Council, and other agencies and stakeholders have concluded that D-1641 and the existing water quality control plan fail to reasonably protect fish and wildlife beneficial uses and public trust resources in the Bay-Delta. For instance, the SWRCB's 2010 Public Trust Flows report explicitly states that, "The best available science suggests that current flows are insufficient to protect public trust resources."³ Similarly, testimony and presentations to the SWRCB during Phase 1 and Phase 2 of the periodic review of the water quality control plan have demonstrated that existing flow and water quality standards are inadequate to

² This letter is available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/environmental_review/docs/cmp_rvw_cmmnt/swrcb_water_power_response_120125.pdf.

³ Available online at:

http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf

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reasonably protect native fish and wildlife species, their habitats, and the underlying conditions that support them. For instance, the May 12, 2012 comments from the California Department of Fish and Wildlife stated that, “Fish population declines coupled with these hydrologic and physical changes suggest that current Delta water flows for environmental resources are not adequate to maintain, recover, or restore the functions and processes that support native Delta fish,”⁴ and the Department’s presentation to the SWRCB explicitly states that the “Bay-Delta Plan [is] insufficiently protective of smelt species,” including longfin smelt and delta smelt.⁵

Moreover, the issuance in recent years of new biological opinions under the federal Endangered Species Act, and consistency determinations and permits under the California Endangered Species Act, *per se* demonstrates that D-1641 and the existing water quality control plan fail to reasonably protect fish and wildlife. Indeed, although the CEQA/NEPA document for the California WaterFix is substantially flawed and legally defective, even it admits that the No Action Alternative will result in significant adverse impacts on native fish and wildlife including winter run Chinook salmon. See Bay Delta Conservation Plan/California WaterFix Partially Recirculated Draft EIR/ Supplemental Draft EIS, at ES-48 (identifying significant impacts of water operations on rearing habitat for covered fish species and significant and unavoidable impacts on spawning and egg incubation habitat for winter run Chinook salmon and green sturgeon).

Therefore, an assessment of the impact of the proposed California Water Fix on the standards and requirements described in the current Water Quality Control Plan and D-1641 fails to adequately assess the project’s impact on protected fish and wildlife beneficial uses and public trust resources.

In addition, ensuring reasonable protection of fish and wildlife requires far more than meeting minimum ESA and CESA standards, and the SWRCB must also protect public trust resources to the extent feasible.⁶ Similarly, the existing flow and water quality standards have proven inadequate to achieve the salmon doubling objective in the existing water quality control plan, and the Board must ensure that the “appropriate flows” required pursuant to section 85086(b)(2) will be sufficient to achieve this objective of the water quality control plan.⁷ Alternative 4A in the California WaterFix fundamentally fails to meet

⁴ Available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/comments_042512/scott_cantrell.pdf. In addition, the Department’s 2010 report on biological objectives for the Delta reached an identical conclusion.

⁵ Available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/wrkshp1/fishagencies.pdf

⁶ For more information, please review the comments of the Natural Resources Defense Council and The Bay Institute to the SWRCB dated October 26, 2012, available online at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/comments111312/doug_obegi.pdf.

⁷ DWR’s petition also inappropriately asserts that the “appropriate flow criteria” required by the Delta Reform Act should likewise be limited to D-1641 and the existing water quality control plan, as well as the flows presented by Alternative 4A: “Consideration of this Petition under Water Code §85086(c)(2) should occur within the existing

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the requirements of the ESA, CESA, and the salmon doubling objective of the existing Bay-Delta Water Quality Control Plan. The SWRCB must ensure that, should it eventually approve a change in point of diversion, it includes conditions sufficient to ensure achievement of the salmon doubling objective of the existing Bay-Delta Water Quality Control Plan.

In conclusion, the SWRCB must complete its periodic review of the Bay-Delta Water Quality Control Plan prior to approving any change in point of diversion, and the SWRCB cannot use D-1641 and the existing plan as the measure of determining whether the change in point of diversion would unreasonably harm fish and wildlife beneficial uses and public trust resources. We respectfully request that the SWRCB revise its notice and fact sheet to state that the SWRCB shall complete the periodic review of the Bay Delta Water Quality Control Plan before it issues any order authorizing a change in point of diversion, and make clear that the standards for review of whether the change in point of diversion causes unreasonable impacts on fish and wildlife shall not be limited to D-1641 and the existing water quality control plan.

Sincerely,



Doug Obegi
Natural Resources Defense Council



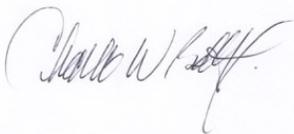
Rachel Zwillinger
Defenders of Wildlife



John McManus
Golden Gate Salmon Association



Tim Sloane
Pacific Coast Federation of Fishermen's Associations



Charles Batts
Friends of San Francisco Estuary



Gary Bobker
The Bay Institute

regulatory framework for the Delta provided by the WQCP and D-1641. Flows presented by Alternative 4A, beyond those required by D-1641, satisfy the appropriate Delta flow criteria to be considered by the Board under 85086(c)(2).” This is incorrect, as flows under Alternative 4A are likely to lead to continued population declines of longfin smelt, delta smelt, and numerous salmon and steelhead runs, are likely to violate requirements of the state and federal endangered species acts, and are insufficient to achieve the salmon doubling objective of the water quality control plan.