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9 Attorney for Protestants Save the California Delta Alliance, et al.

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

11 **IN RE CALIFORNIA WATERFIX**
12 **CALIFORNIA DEPARTMENT OF**
13 **WATER RESOURCES AND U.S.**
14 **BUREAU OF RECLAMATION**
15 **PETITION FOR CHANGES IN**
16 **WATER RIGHTS, POINTS OF**
17 **DIVERSION/RE-DIVERSION**

18 **PROTESTANT SAVE THE CALIFORNIA**
19 **DELTA ALLIANCE'S REPLY TO DWR'S**
20 **OPPOSITION TO DELTA ALLIANCE'S**
21 **AUGUST 6 MOTION TO COMPEL**

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1 In opposing Delta Alliance's motion to compel, DWR conflates administration of the
2 California Environmental Quality Act ("CEQA") with this Board's authority and duty to protect
3 public trust resources in the administration of water rights wherever feasible. DWR's opposition
4 rests on the contention that the Board has no authority to order it to meet with the owners of Tower
5 Park Resort because the Board has no authority to direct DWR's CEQA process.

6 However, Delta Alliance never asked this Board to intervene in DWR's administration of the
7 CEQA process for the CWF Project. Rather, Delta Alliance pointed out that there is an
8 "environmental commitment" contained in the CWF Final Environmental Impact Report ("FEIR")
9 wherein DWR promises to meet with surrounding landowners to consider "[l]andowner concerns
10 and preferences" in "designating sites for temporary storage [of tunnel muck]" and to consider
11 landowner concerns when it takes steps to "refine the [tunnel muck] storage area footprint" to
12 minimize impacts on surrounding landowners. (SWRCB-102, Appendix 3B, p. 3B-102: 6–8.)

13 Delta Alliance has introduced testimony supporting, and intends to seek permit conditions
14 protective of recreation, including protection of the Tower Park Resort and Marina and its attendant
15 recreational navigational facilities. One of those conditions is relocation of the currently proposed
16 Bouldin Island Tunnel Muck Dump footprint, recently moved to within 350 feet of the Tower Park
17 Resort. (*See* SCDA-308, p.3: 17–19 [testimony of Bill Wells seeking condition moving muck
18 dump]; SCDA-327 [muck dump moved to less than 350 feet from navigational facilities];
19 SCDA-328 [muck dump moved to within 350 of Tower Park children's beach].)

20 There is no doubt that this Board has the authority to impose this permit condition under its
21 water rights and public trust authority.

22 Where the Board has the authority to impose a permit condition, it has the authority to order
23 the parties to meet and consider information provided by the counter-party in connection with the
24 impact on public trust resources and the potential permit conditions needed to address those
25 impacts. The Board has done so before in these CWF hearings, ordering DWR to meet with Clifton
26 Court LP in order to see first-hand the impacts on Clifton Court's property. The fact that DWR has
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1 already made a commitment to hold exactly the meeting that we are now requesting establishes that
2 the request is reasonable and that DWR itself determined that such meetings were necessary in
3 order for it to make informed decisions about the impacts of muck dump footprints on surrounding
4 landowners.

5 DWR has repeatedly asked this Board to rely on the mitigations, "environmental
6 commitments," and its host of "Avoidance and Mitigation Measures" ("AMMs") in testimony and
7 briefing before the Board. (DWR-1022, p.3: 28, p.4: 1–6, p.5: 4–11 [mitigation measures will
8 "minimize potential impacts to navigation"].) In fact, DWR has made sweeping claims about
9 mitigation measures and environmental commitments that it has urged this Board to rely upon in
10 executing its duty to protect public trust resources: "Mitigation measures and environmental
11 commitments included in CWF would reduce the impacts on wildlife, visual setting, transportation,
12 and noise conditions that could otherwise detract from the recreation experience." (DWR-1024, p.6:
13 5–8.) DWR argues that public trust resources are adequately protected by its various measures and
14 therefore the Board need not impose further permit conditions in protection of public trust
15 resources. The Board may discharge its public trust duties, according to DWR, by noting and
16 relying upon DWR's various Avoidance and Mitigation Measures.

17 One of those Avoidance and Mitigation Measures key to the Board executing its duties is
18 AMM6, entitled "Disposal and Reuse of Spoils, Reusable Tunnel Material [Tunnel Muck] and
19 Dredged Material." (SWRCB-102, Appendix 3B, p.3B-101: 1–2.) AMM6 provides that:

20 Landowner concerns and preferences will be considered in designating sites for
21 temporary storage [of tunnel muck]. DWR will consult directly with landowners to
22 refine the storage area footprint to further minimize impacts to surrounding land
uses, including agricultural operations.

23 (SWRCB-102, Appendix 3B, p.3B-102: 6–8.) It is undisputed that Northgate Resorts, owner of
24 Tower Park Resort, is a surrounding landowner. (*See* SCDA-327.) It is also undisputed that DWR
25 "refine[d] the storage area footprint" of the muck dump, moving it a mile closer to Tower Park--
26 now within 350 feet--*without consulting with Tower Park.*

27 DWR's March 28, 2018, letter to the Board introducing the changes in the ADSEIR attaches
28 a sheet entitled "Design Refinements Proposed." The design refinements include re-locating and re-

1 shaping the Bouldin Island tunnel muck dump footprint. The changes to the tunnel muck dump
2 footprint were summarized by DWR as "RTM area on East side of island moved north to avoid
3 wetland impacts." (DWR letter to SWRCB, March 28, 2018, p.2.) DWR consulted with federal
4 resource agencies who forced it to move the muck dump away from wetland areas. However, it
5 failed to consider impacts on Tower Park Resort, erroneously concluding that the dump could not
6 be seen from the resort when it has been proven that it can be seen from the resort. (*See* ADSEIR,
7 p.15-3:32–33; 37–38 [muck dump cannot be seen from Resort because Bouldin Island levee blocks
8 view]; SCDA-322 [photograph from Resort looking over the top of Bouldin Island levee down to
9 floor of Island where muck dump will be located].)

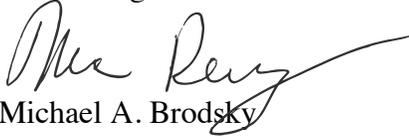
10 Several federal resource agencies have the authority and duty to order DWR to make
11 changes to its project to protect wetlands [United States Army Corps of Engineers], listed species
12 [United States Fish and Wildlife Service; National Marine Fisheries Service], and waters of the
13 United States [United States Army Corps of Engineers, United States Environmental Protection
14 Agency]. Each time one of these agencies orders a change, DWR changes the project to avoid the
15 impact of concern *but does not consider how the change will affect recreation*. We have seen this
16 over and over. The National Marine Fisheries Service Biological Opinion limits barge operations
17 and in-water construction to the period from June 1 to October 31, avoiding some impacts on listed
18 species. But it concentrates these operations in the summer-fall boating season, *increasing* impacts
19 on recreational navigation. Moving the Bouldin Island Muck Dump to avoid wetlands impacts but
20 increasing impacts on the Tower Park Resort is only the latest in this pattern.

21 The federal resource agencies do not have the responsibility or authority to protect
22 recreation. This Board is the only regulatory agency involved in the CWF process with the
23 responsibility to order conditions protective of recreation and to balance protection of recreation
24 with protection of species and other important concerns.

25 Where DWR has put forth an environmental commitment as the measure that the Board
26 should rely upon to protect recreation and other public trust resources, it can hardly complain when
27 the Board takes an interest in the substance of that commitment and takes steps to see that the
28 commitment is actually carried out. Such is the case for AMM6.

1 Delta Alliance respectfully urges the Board to order DWR to comply with AMM6 and meet
2 with Northgate Resorts on or before September 17, 2018, at the Tower Park Resort.
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4 Dated: August 8, 2018

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6 Michael A. Brodsky

7 Attorney for Protestant Save the California Delta Alliance
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27 Northgate Resorts has associational standing as it is a member of Delta Alliance and Delta Alliance
28 has consistently asserted the interests of all recreational facilities in the Delta, expressly including
the Tower Park Resort (and many other resort facilities by name in its filings, including Bullfrog
Marina and Clarksburg Marina). The undersigned is authorized to speak on behalf of Northgate and
reaffirms to the Board that Northgate requests the meeting and will attend.

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):

PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE'S REPLY TO DWR'S OPPOSITION TO DELTA ALLIANCE'S AUGUST 6 MOTION TO COMPEL

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 August 7, 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

I certify that the foregoing is true and correct and that this document was executed on August 9, 2018, at Discovery Bay, California.

Signature: _____

Name: Michael A. Brodsky

Title: Attorney

Party/Affiliation:

Save the California Delta Alliance, et al.

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