

1 STEPHAN C. VOLKER (CSB #63093)
ALEXIS E. KRIEG (CSB #254548)
2 DANIEL P. GARRETT-STEINMAN(CSB #269146)
950 Gilman Street, Suite 100
3 Berkeley, California 94710
Tel: 510/496-0600
4 Fax: 510/559-9654

11.203.02

5 Attorneys for Protestants
6 PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS and
7 INSTITUTE FOR FISHERIES RESOURCES

8
9 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

10 HEARING REGARDING PETITION FILED BY THE) PACIFIC COAST FEDERATION OF
11 DEPARTMENT OF WATER RESOURCES AND U.S.) FISHERMEN'S ASSOCIATIONS'
BUREAU OF RECLAMATION REQUESTING) AND INSTITUTE FOR FISHERIES
12 CHANGES IN WATER RIGHTS FOR THE) RESOURCES' STATEMENT OF
CALIFORNIA WATERFIX PROJECT) PROPOSED CLOSING BRIEF
13) ISSUES FOR PART 1
14)

15 I. INTRODUCTION

16 Pursuant to the Hearing Officers' December 19, 2016 Ruling, protestants Pacific Coast Federation
17 of Fishermen's Associations ("PCFFA") and Institute for Fisheries Resources ("IFR") submit this
18 statement of the issues they propose to address in a closing brief specific to Part 1, with an explanation of
19 why the close of Part 1 is the appropriate time to brief them.

20 **Issue 1: Have Petitioners Presented Sufficient Evidence to Support Their Change Petition?**

21 In order to resolve whether (1) "the changes proposed in the Petition in effect initiate a new water
22 right," and (2) "the proposed changes in points of diversion alter water flows in a manner that causes
23 injury" to legal users of water, the burden is on Department of Water Resources ("DWR") and the U.S.
24 Bureau of Reclamation ("Reclamation," and together with DWR, "petitioners") to provide sufficient
25 evidence to answer *each* question in the negative. See October 30, 2015 Notice of Public Hearing
26 ("Notice"), p. 11 (quotes); 23 C.C.R. § 791(a); Water Code §§ 1701.1(d), 1701.2(d), 1702. PCFFA and
27 IFR's case-in-chief challenges the relevance, accuracy and trustworthiness of petitioners' evidence
28 regarding harms to legal users, pointing out that petitioners rely upon unsubstantiated and unvalidated

1 modeling results, obsolete projections of sea level rise due to global warming, and other deeply flawed
2 assumptions regarding hydrologic conditions and operational constraints. Because petitioners have failed
3 to provide adequate, validated modeling data, and have relied on untenable premises and dubious
4 evidence to carry their burden, it is more appropriate to brief the two Part 1 issues now, when the
5 evidence and argument are still relatively fresh in the minds of the parties and the Hearing Officers, than
6 at the conclusion of Part 2 many months hence. And, no purpose is served by wasting the Board's and
7 the parties' limited resources on Part 2 if, as protestants contend, petitioners have failed to carry their
8 initial burden to demonstrate that "the proposed change(s) will neither in effect initiate a new right nor
9 injure any other legal users of water." 23 C.C.R. § 791(a); Notice, p.11.

10 **Issue 2: Can Lawful Evaluation of the Petition Occur Absent Adequate Water Quality, Delta**
11 **Plan Compliance, Environmental Review, and Species Protections?**

12 In order to determine whether the petition would "alter water flows in a manner that causes
13 injury" to water users, the Board must use an appropriate standard for determining injury. Petitioners rely
14 upon existing water quality standards, but those out-of-date standards are inadequate to assure that the
15 Change Petition will avoid such injuries. PCFFA and IFR's case-in-chief challenged petitioners'
16 erroneous premise that those existing water quality standards and the flow regimes they allow protect
17 legal users of water. PCFFA and IFR demonstrated that those obsolete standards already fail to prevent
18 harm to these water users since they have proven insufficient to prevent the current collapse of the Delta
19 ecosystem. Moreover, petitioners have failed to show compliance with an adequate Delta Stewardship
20 Council Plan, completion of lawful CEQA and NEPA reviews, and adequate CESA and ESA
21 consultations. Because adequate water quality standards, Delta Plan compliance, complete environmental
22 review and adequate endangered species protection impact the timing and quantities of water available
23 for legal users of water, any determination of whether the Change Petition would harm these users would
24 be incomplete and inaccurate unless and until petitioners demonstrate their compliance with adequate
25 water quality standards, Delta Plan consistency, complete environmental review and adequate species
26 protection. Accordingly, this issue should be briefed at the end of Part 1 rather than Part 2. Notice, pp.
27 11, 12.

28 ///

1 **If Significant New Information Emerges in Part 2 That Is Relevant to Part 1, the Board Should**
2 **Allow Additional Briefing**

3 In addition to allowing closing briefs for Part 1 of this hearing, if the hearing proceeds to Part 2,
4 PCFFA and IFR request that the parties be permitted to submit supplemental closing briefs if relevant
5 new information emerges that pertains to the issues addressed in Part 1 of this proceeding. As discussed
6 in Issue 2 above, the results of as yet incomplete Delta Plan consistency determinations, CEQA and
7 NEPA reviews, consultations regarding endangered species impacts, and updated water quality reviews,
8 along with corresponding alterations to operating criteria, would constitute relevant new information that
9 is properly addressed as part of Part 1.

10 PCFFA and IFR appreciate the Hearing Officers' consideration of our views regarding these
11 issues.

12
13 Dated: January 31, 2017

Respectfully submitted,

14 LAW OFFICES OF STEPHAN C. VOLKER

15 

16 STEPHAN C. VOLKER

Attorney for Protestants

17 PACIFIC COAST FEDERATION OF FISHERMEN'S
18 ASSOCIATIONS and INSTITUTE FOR FISHERIES
RESOURCES

STATEMENT OF SERVICE

CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)

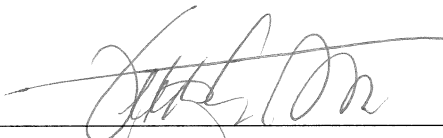
I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

**PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS' AND
INSTITUTE FOR FISHERIES RESOURCES' STATEMENT OF PROPOSED CLOSING
BRIEF ISSUES FOR PART 1**

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 January 13, 2017, 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 January 31, 2017.



Name: Teddy Ann Fuss
Title: Legal Secretary
Party/Affiliation: Pacific Coast Federation of Fishermen's
Associations and Institute for Fisheries
Resources
Address: 950 Gilman Street, Suite 100
Berkeley, CA 94710-1462