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9
10 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

11 HEARING REGARDING PETITION FILED BY THE) **PACIFIC COAST FEDERATION OF**
DEPARTMENT OF WATER RESOURCES AND U.S.) **FISHERMEN’S ASSOCIATIONS’**
12 BUREAU OF RECLAMATION REQUESTING) **AND INSTITUTE FOR FISHERIES**
CHANGES IN WATER RIGHTS FOR THE) **RESOURCES’ MOTION TO**
13 CALIFORNIA WATERFIX PROJECT) **DISMISS WATERFIX PETITION**
14)
_____)

15 **I. INTRODUCTION**

16 The California WaterFix Change Petition (“petition”) submitted by the Department of Water
17 Resources (“DWR”) and the U.S. Bureau of Reclamation (“Reclamation,” and together with DWR,
18 “petitioners”) must be dismissed because the petitioners failed in Part 1A of this proceeding “to
19 demonstrate a reasonable likelihood that the WaterFix will not injure any other legal user of water” as
20 required by Water Code section 1701.2(d). Recognizing that their proposed removal of 9,000 cubic feet
21 per second of water from the Sacramento River over a 40-mile stretch from Clarksburg to Clifton Court
22 Forebay will indeed cause substantial harm to legal users of water, petitioners have not even attempted to
23 make that plainly impossible – but legally required – showing. Accordingly, their petition must be
24 denied.

25 Because petitioners cannot meet the clear statutory standard for their petition – “no[] injur[y] to
26 any other legal user of water” – they have asked this Board to ignore the law and substitute a far less
27 onerous test – compliance with existing water quality standards. But the law doesn’t allow substitution of
28 this different test for approval of their change petition. If petitioners want the law changed, their remedy

1 is to ask the Legislature to amend it, not demand that this Board ignore it. Having failed to change the
2 law, petitioners must comply with it. Because they can't, their petition must be denied.

3 Even assuming this Board were free to ignore the law and substitute the different standard for
4 approval that petitioners presume, their WaterFix proposal must still be rejected. Petitioners have
5 attempted to show that (1) the California WaterFix ("WaterFix") will comply with this Board's Bay-Delta
6 Water Quality Control Plan adopted in 1995, Decision-1641 ("D-1641"), and (2) operation of the
7 WaterFix as hypothetically delimited by "Boundary 1" and "Boundary 2" will not harm existing water
8 quality conditions as represented by the "No Action Alternative." But the petitioners' argument requires
9 this Board to indulge two false premises: First, petitioners ask this Board to assume that D-1641
10 adequately protects legal users of water. Manifestly, it has failed to do so. Second, petitioners ask this
11 Board to assume that the No Action Alternative does not harm legal users of water. Again, it is
12 indisputable that "existing conditions" are harming the Delta's water quality, and all legal users who
13 depend on it. For these reasons, as discussed below, this Board must dismiss the WaterFix Change
14 Petition.

15 II. BACKGROUND

16 The San Francisco Bay-Sacramento/San Joaquin River Delta ("Bay-Delta") ecosystem is
17 collapsing. The National Marine Fisheries Service ("NMFS") and the Fish and Wildlife Service ("FWS")
18 concluded in 2008 and 2009, respectively, that continued operation of the Central Valley Project ("CVP")
19 and the State Water Project ("SWP") would jeopardize the existence of Delta smelt, winter-run Chinook
20 salmon, green sturgeon, and other imperiled fish species. *San Luis & Delta Mendota Water Authority v.*
21 *Jewell*, 747 F.3d 581, 592 (9th Cir. 2014) (quoting FWS' Biological Opinion); *San Luis & Delta Mendota*
22 *Water Authority v. Locke*, 776 F.3d 971, 981 (9th Cir. 2014) (quoting NMFS' Biological Opinion). The
23 Environmental Protection Agency ("EPA") agrees. As EPA stated in its comments on the Recirculated
24 Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement
25 ("RDEIR/SDEIS") for the California WaterFix dated October 30, 2015, "[t]hese species have
26 experienced sharp population declines in the last decade and showed record low abundance over the last
27 five years." PCFFA-5 at 3.

28 Far from protecting those species, the WaterFix will hasten their demise. EPA warned that

1 “[i]nformation presented in the [RDEIR]/SDEIS shows that the WaterFix project could reduce habitat
2 conditions for Delta smelt, winter-run Chinook salmon, green and white sturgeon, striped bass, and
3 American shad, and result in a decline of long fin smelt abundance.” *Id.* EPA cautioned further that the
4 WaterFix will cause a wholesale increase in salinity throughout the Bay-Delta, posing potentially
5 catastrophic impacts on both fish and wildlife and municipal uses. *Id.*

6 It gets worse. Not only is the Bay-Delta ecosystem in free fall, all four safety nets that state and
7 federal law require for protection of this dying estuary either confirm the WaterFix’s harm to legal users
8 of water, or have themselves been ruled inadequate to prevent that harm. First, the Biological
9 Assessment issued by Reclamation on August 2 concludes that the WaterFix is “likely to adversely
10 affect” several fish species protected under the Endangered Species Act, 16 U.S.C. section 1531 et seq.
11 SWRCB-104 at p. 7-36, Table 7-1. Second, EPA has given the RDEIR/SDEIS a failing grade of “‘3’
12 (Inadequate).” PCFFA-5 at 4. Third, the Sacramento Superior Court has set aside the Delta Stewardship
13 Council’s Delta Plan - the very plan that the Legislature mandated to reverse the Delta’s “crisis” –
14 because it fails to prescribe measureable and enforceable targets for restoring the Delta’s natural flows,
15 reducing environmental harms and curtailing diversions of its flows.¹

16 Fourth, and, most important of all, it is indisputable that the Bay-Delta Water Quality Control
17 Plan adopted by this Board in 1995 – D-1641 – is obsolete. As this Board determined in 2010, “current
18 [Delta] flows are *insufficient* to protect public trust resources.” SWRCB-25 at p. 2 (excerpted in
19 PCFFA-4 at p. 1) (emphasis added). Because D-1641 allows reduced Delta flows that “are insufficient to
20 support native Delta fishes,” it has failed to protect the Delta’s fish and wildlife. *Id.* at p. 5 (excerpted in
21 PCFFA-4 at p. 4). That plan must therefore be updated to protect these beneficial uses as required by the
22 Clean Water Act, 33 U.S.C. sections 1313(c) (triennial review), and 1341 (section 401 certification), and
23

24
25 ¹ Ruling on Submitted Matter: Petitions for Writ of Mandate, Bifurcated Proceeding on Statutory
26 Challenges filed May 18, 2016 (“Ruling”), in Delta Stewardship Council Cases (Judicial Council
27 Coordination Proceeding No. 4758) at 26, setting aside the Delta Plan adopted by the Delta Stewardship
28 Council in May, 2013 because it violates the Delta Reform Act, Water Code sections 85001 et seq.
PCFFA and IFR previously submitted this Ruling to this Board on July 12, 2016 as Exhibit 1 to their
Motion to Disqualify Petitioners’ Witnesses and Exclude Their Testimony and Exhibits under 23 C.C.R.,
section 648.2, and official notice is respectfully requested again, consistent with Evidence Code section
451(a) (decisional law of this state must be noticed).

1 Water Code sections 13240 and 13377.

2 Nonetheless, petitioners submitted their joint petition to add three new points of diversion of
3 water to their water rights permits for the SWP and CVP associated with the WaterFix on August 26,
4 2015, with an addendum and errata submitted on September 16, 2015. This Board issued its Notice of
5 Petition and Notice of Public Hearing and Pre-Hearing Conference to Consider the Petition on October
6 30, 2015. In that October 30, 2015 Notice this Board bifurcated the hearing process into Part 1,
7 addressing “the potential effects of the Petition on agricultural, municipal and industrial uses of water and
8 the associated legal users of water and conditions that should be placed on any approval of the Petition to
9 protect those uses,” and Part 2, addressing “the potential effects of the Petition on fish and wildlife and
10 recreational uses and conditions that should be placed on any approval of the Petition to protect those
11 uses, including consideration of appropriate Delta flow criteria for the California WaterFix Project.” *Id.*
12 at 2. The definition for Part 1 was expanded in this Board’s February 11, 2016 Ruling to also “address
13 human uses that extend beyond the strict definition of legal users of water, including flood control issues
14 and environmental justice concerns.” *Id.* at 10. That Ruling also further bifurcated Part 1 of the hearing
15 into Part 1A, the presentation of petitioners’ cases in chief, and Part 1B, the presentation of other parties’
16 cases in chief. *Id.* at 7.

17 Unless and until all four of the fundamental gaps in the Delta’s required protection are rectified,
18 there is no regulatory regime in place to provide an evidentiary basis for the Change Petition’s claim that
19 compliance with D-1641 and maintenance of “no project” conditions will prevent harm to legal users of
20 water. Because there are no updated and valid Delta water quality standards and plans in place, the
21 petitioners’ assurances that the WaterFix’s claimed compliance with them satisfies Water Code sections
22 1701.2(d) and 1702 ring hollow. Accordingly, this Board must dismiss the WaterFix Change Petition.

23 **III. PETITIONERS HAVE PRESENTED INSUFFICIENT EVIDENCE TO**
24 **SUPPORT THEIR PETITION**

25 The testimony and exhibits presented by petitioners do not contain sufficient information to
26 support the conclusion reached by petitioners’ witnesses that the WaterFix will not injure other legal
27 users of water. The Board’s October 30, 2015 Notice provides that evidence will be admitted in
28 accordance with Government Code section 11513. Petitioners’ conclusions regarding legal injury hinge

1 on speculative assumptions in violation of the established rules of evidence governing this proceeding.

2 **A. Petitioners' Application for Change Was Deficient From Its Inception**

3 The WaterFix RDEIR/SDEIS was posted on July 10, 2015 and the comment period ran through
4 October 30, 2015. DWR and USBR submitted the petition *before* the end of that comment period.
5 Therefore their petition could not possibly reflect any consideration of the public's and expert agencies'
6 comments. Consequently, the WaterFix is premised on an unlawful departure from the California
7 Environmental Quality Act, Public Resources Code section 21000 et seq. ("CEQA") and the National
8 Environmental Policy Act, 42 U.S.C. section 4321 et seq. ("NEPA"). Because the WaterFix
9 impermissibly ignores the requirements of these environmental laws, it must be rejected.

10 Equally important, the WaterFix fails to meet the express requirements of the Water Code. Water
11 Code section 1701.2(d) requires that

12 A petition for change in a permit or license shall meet all of the following requirements:

- 13 (a) State the name and address of the petitioner.
- 14 (b) Be signed by the petitioner, or the petitioner's agent or attorney.
- 15 (c) Include all information reasonably available to the petitioner, or that can be
16 obtained from the Department of Fish and Wildlife, concerning the extent, if
17 any, to which fish and wildlife would be affected by the change, and a
18 statement of any measures proposed to be taken for the protection of fish and
19 wildlife in connection with the change.
- 20 (d) Include sufficient information to demonstrate a reasonable likelihood that the
21 proposed change will not injure any other legal user of water.
- 22 (e) Contain other appropriate information and be in the form required by
23 applicable regulations.

19 The WaterFix petition does not even purport to satisfy the requirements of subsections (c) through (e), the
20 substantive portion of the Water Code's requirements for a petition for change.

21 The Board's regulations require that all of the information required by Title 23 C.C.R. section 794
22 be included in the petition:

- 23 (1) The amount(s) of water which would have been diverted, consumptively used,
24 or stored under the water right in the absence of the proposed change(s), (a)
25 during the period for which the change is requested, or (b) in a maximum year
26 if the change is permanent;
- 27 (2) The amount(s) of water proposed for change, transfer or exchange;
- 28 (3) The existing and the proposed purpose(s) of use of water;
- (4) The existing and the proposed point(s) of diversion and rediversion, and the
existing and proposed location(s) of any return flow;
- (5) The existing and the proposed place(s) of use of the water for various purposes
of use;
- (6) The existing and the proposed diversion, release and return flow schedules if
stored water is involved or if the streamflow regime will be changed;

- (7) Any changes in property ownership(s) involved, and the point(s) of diversion and place(s) of use of other known users of water who may be affected by the proposed change(s);
- (8) Information identifying any effects of the proposed change(s) on fish, wildlife, and other instream beneficial uses;
- (9) Information identifying any effects of the proposed change(s) on other known users of water, including identification in quantitative terms of any projected change in water quantity, water quality, timing of diversion or use, consumptive use of the water, reduction in return flows, or reduction in the availability of water within the streams affected by the proposed change(s);
- (10) The parties involved in the proposed change, transfer or exchange;
- (11) Map(s) prepared in accordance with Article 7 which describe the proposed change(s), delineate any additional information required by Items (4), (5), and (7) above, and show the hydrologic basin of origin and the streams which could be affected by the proposed change(s).
- (12) The proposed place(s) of use for irrigation may be listed as net acreage(s) within gross area(s) shown on a map submitted with the petition.

23 C.C.R. § 794. Again, the WaterFix petition does not even attempt to satisfy these requirements.

As the Board noted, the information in the petition lacked “clarity in several ways, including whether operational criteria are intended to constrain project operations or are identified for modeling purposes only, areas where a specific operational component or mitigation measure is not yet chosen or identified, operational parameters that are not defined and deferred to an adaptive management process, and lack of clarity concerning some mitigation measures.” Feb. 11, 2015 Ruling at 6. Instead, the Board allowed DWR and USBR to develop the missing information during their case in chief rather than provide it in their application as the law requires. *Id.*

Petitioners asked this Board to skip the protest resolution period mandated under Water Code sections 1703.4 and 1703.5. This protest resolution period would have allowed petitioners to develop additional information to satisfy the deficiencies identified by the Board, among others. DWR and USBR could also have used a protest resolution period to review the RDEIR/SDEIS comments submitted after their petition for change was submitted to the Water Board, which also would have allowed petitioners to develop additional information in support of their deficient petition. Instead, the Board scheduled the hearing, then postponed it twice when petitioners requested time to develop additional information in support of the petition, at significant time and expense to the 130 parties participating in the full hearing,

1 as documented in the Board’s latest service list.²

2 According to Water Code section 1703.4, “[t]he protestant and the petitioner shall make a good
3 faith effort to resolve the protest not later than 180 days from the date the period provided pursuant to
4 Section 1703.1 expires. For good cause, the board may allow additional time for the protestant and the
5 petitioner to attempt to resolve the protest.” Petitioners have not made such an effort because they did
6 not submit a complete application. In such circumstances, under Water Code sections 1703.3 and 1703.5,
7 “[t]he board may request from the protestant or the petitioner additional information that the board
8 determines is reasonably necessary to attempt to resolve the protest. The board shall provide a reasonable
9 period for submitting the information, and may allow additional time for good cause shown.” Because
10 the required additional information was not provided by petitioners, the petition must be dismissed.
11 Water Code § 1703.6.

12 The information required by Title 23 C.C.R. section 794 has still not been provided. Nor have
13 petitioners provided the information required by Water Code section 1701.2. (c), which mandates that the
14 petition “[i]nclude all information reasonably available to the petitioner, or that can be obtained from the
15 Department of Fish and Wildlife, concerning the extent, if any, to which fish and wildlife would be
16 affected by the change, and a statement of any measures proposed to be taken for the protection of fish
17 and wildlife in connection with the change.” As Part 1A has ended and petitioners have no further
18 information or evidence to present to the Board, the petition must now be dismissed.

19 **B. Modeling and Other Technical Evidence Is Insufficiently Supported**

20 The Board issued specific requirements for each submitted exhibit based on the technical nature
21 of the requested change. The October 30, 2015 Notice of Petition, at page 33, required that all “[e]xhibits
22 based on technical studies or models shall be accompanied by sufficient information to clearly identify
23 and explain the logic, assumptions, development, and operation of the studies or models.” Further, that
24 Notice warns that “[e]xhibits that rely on unpublished technical documents will be excluded unless the
25 unpublished technical documents are admitted as exhibits.” *Id.* at p. 34. Without supporting

27 ² Available at
28 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/100616revsrvlist.pdf (last accessed Oct. 6, 2016).

1 documentation, testing, and calibration information, the modeling relied upon by petitioners’ is not “the
2 sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.”
3 Gov. Code § 11513(c).

4 On February 11, 2016 the Board issued a Pre-Hearing Conference Ruling that noted “the available
5 information” – upon which petitioners had based their petition and which includes many of the exhibits
6 petitioners submitted as evidence –

7 lack[ed] clarity in several ways, including whether operation criteria are intended to
8 constrain project operations or are identified for modeling purposes only, areas where a
9 specific operational component or mitigation measure is not yet chosen or identified,
operational parameters that are not defined and deferred to an adaptive management
process, and lack of clarity concerning some mitigation measures.

10 *Id.* at p. 6. Because of this lack of clarity, the Board directed petitioners to provide “the information
11 required by section 794 of our regulations in a succinct and easily identifiable format. The other parties
12 will then be able to more accurately assess whether the proposed changes would cause injury.” *Id.* at p. 7.
13 Among other information deemed vital to a petition for change of point in diversion, section 794 requires
14 “the proposed diversion, release and return flow schedules,” “any effects of the proposed change(s) on
15 fish, wildlife, and other instream beneficial uses,” and “identification in quantitative terms of any
16 projected change in water quantity, water quality, timing of diversion or use, consumptive use of the
17 water, reduction in return flows, or reduction in the availability of water within the streams affected by
18 the proposed change(s).” 23 C.C.R. § 794(a)(6), (8), (9).

19 Petitioners admit that they cannot provide the information required by the Board with
20 particularity. “Since the BiOp has not been issued,” petitioners explain, “and DWR and Reclamation do
21 not know the initial operational criteria, the analytical framework presented for Part 1 is a boundary
22 analysis.” DWR 51, p. 10:8-10. While this “boundary analysis” attempts to “provide a broad range of
23 operational criteria,” the conclusions offered in the written testimony by petitioners are not supported by
24 the necessary data or analysis and do not contain the specificity needed to satisfy the informational
25 requirements of the Board’s October 30 Notice, February 11 Ruling, or regulations. DWR 51, p. 10:10.

26 Petitioners’ modeling evidence, and the conclusions petitioners’ witnesses draw from such
27 evidence, is unreliable because it is not based on principles or procedures that have gained general
28 acceptance in their field. *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013; *People v. Kelly* (1976) 17

1 Cal.3d 24; *People v. Leahy* (1994) 8 Cal.4th 587, 594. The *Kelly* rule, known as the “general acceptance
2 test,” allows for the admission of expert opinion grounded in a scientific theory or technique if the theory
3 or technique is generally accepted as reliable in the relevant scientific community. Under this rule,
4 evidence based on a new scientific method must satisfy three requirements to be admissible: (1) the
5 technique has gained general acceptance in its field; (2) the witness furnishing the testimony is qualified
6 to give evidence on the acceptance of the technique; and (3) correct scientific procedures were used.
7 *People v. Diaz* (1992) 3 Cal.4th 495, 526. DWR and Reclamation have not satisfied these criteria.

8 The modeling results relied upon by petitioners’ witnesses do not meet the standard established in
9 the Water Code because they lack the required documentation, analysis, and authentication. The Water
10 Board convened its own scientific panel in 2012 to provide specific recommendations as to the modeling
11 information needed before a Delta management model’s conclusions could be relied on for
12 decisionmaking or admitted into evidence. These recommendations reaffirmed the need for
13 documentation, testing, and calibration information, none of which has been provided for this hearing.
14 Because petitioners have failed to provide the documentation, testing, and calibration information needed
15 to evaluate their “no injury” claims, their petition is incomplete and must be denied.

16 **C. Newly Submitted Evidence Cannot Remedy Petitioners’ Deficient Submission**

17 Supporting evidence should have been submitted with the petition for change, not added later.
18 Yet petitioners have now submitted into evidence modeling files almost four months after the May 31,
19 2016 deadline for submission of petitioners’ exhibits set by this Board’s April 25, 2016 Revised Hearing
20 Schedule. The modeling files submitted by DWR as DWR-500 on September 28, 2016 are untimely and
21 cannot be relied upon to support the petition. Allowing petitioners to submit this extensive new modeling
22 evidence after the close of cross examination denies protestants’ their due process rights.

23 Title 23 C.C.R. section 648.4, in combination with this Board’s scheduling notices, governs the
24 submission of evidence in this WaterFix proceeding. It establishes the “policy of the state and Regional
25 Board to discourage the introduction of surprise testimony and exhibits,” and the requirement that
26 “written testimony and exhibits shall be submitted to the Board and to other parties designated by the
27 Board in accordance with provisions of the hearing notice or other written instructions provided by the
28 Board.” 23 C.C.R. §§ 684.4(a) and (c). The final deadline set by the Board for submission of

1 “petitioners’ case in chief, including witnesses’ proposed testimony, witness qualifications, exhibits, list
2 of exhibits, and a statement of service for Part 1A of the hearing” was “12:00 noon, May 31, 2016.”
3 April 25, 2016 Ruling at 4.

4 DWR had no intention of submitting DWR-500 as part of its case in chief on May 31, 2016.
5 “Petitioners do not believe it is necessary to include the complete model packages for CalSim II and
6 DSM2 in their testimony.” DWR Master Response to Similar Objections Made by Protestants
7 Collectively at 17 fn. 14. But DWR’s legal strategy to intentionally withhold the model packages from
8 the evidence supporting its case in chief has *consequences*.

9 Where this Board’s regulations for the submission of evidence “have not been complied with, the
10 presiding officer may refuse to admit the proposed testimony or the proposed exhibit into evidence, and
11 *shall refuse to do so where there is a showing of prejudice to any party or the Board.* 23 C.C.R. §
12 648.4(e) (emphasis added). Severe prejudice exists for all protestants because they were never afforded
13 an opportunity to review the voluminous modeling data³ now introduced as DWR-500. Nor were
14 protestants given an opportunity to cross examine petitioners’ witnesses on the basis of this new
15 modeling evidence tardily introduced into the record. *Manufactured Home Communities v. County of*
16 *San Luis Obispo* (2008) 167 Cal.App.4th 705, 712 (“Where a board makes a decision based on a party’s
17 testimony, the adversary is entitled to question his or her opponent”); *Goldberg v. Kelly* (1970) 397 U.S.
18 254, 269-270. Thus, DWR-500 is both a surprise exhibit and highly prejudicial to protestants. Because it
19 would be improper for this Board to rely on it, and yet petitioners insist it is essential to their petition, the
20 petition must be dismissed.

21 **III. THE WATER QUALITY PROTECTIONS REQUIRED FOR LAWFUL EVALUATION**
22 **OF THE WATERFIX PETITION ARE ABSENT**

23 Compliance with existing environmental standards is not, as claimed by petitioners, a sufficient
24 basis for the petition because such compliance will not prevent harm to other legal users of the Delta’s
25

26 ³ See, e.g., PCFFA and IFR objections submitted June 3, 2016 (referencing petitioners’ massive data
27 dump and difficulties preparing objections). PCFFA and IFR reiterated these and added other related
28 objections in their Motion to Disqualify Petitioners’ Witnesses and Exclude Their Testimony and
Exhibits filed July 12, 2016 and in their Part 1 Opening Statement filed September 2, 2016.

1 water. The water quality protections relied on by petitioners are either invalid, not yet adopted, or show
2 that the WaterFix will harm rather than protect water flows and quality in the Delta and the legal users
3 who depend on that water.

4 Petitioners have failed to provide this Board with the environmental studies necessary to satisfy
5 their burden under the Water Code and this Board’s regulations. At the outset of this proceeding this
6 Board correctly recognized that “ultimately the final EIR must be adequate to support the [Board’s]
7 decision in this proceeding.” Feb. 11, 2016 Ruling at 9. “If during the course of this proceeding, the
8 [Board] determines that the range of alternatives evaluated by DWR is not adequate to support the
9 Board’s decision, then either DWR or the Board will need to prepare subsequent or supplemental
10 documentation. (*See, id.*, §§ 15096, subd. (e), 15162, 15163.)” *Id.* It is now clear that such subsequent
11 or supplemental documentation is required, *but has not been provided*. No Final EIR/EIS has been
12 prepared and certified. On August 2, 2016 petitioners belatedly issued a final Biological Assessment in
13 which they concede that formal consultation under the ESA is now required – *but not done*. As of August
14 1, 2016, Final Guidance has been issued by the President’s Council on Environmental Quality directing
15 the Bureau of Reclamation to address the effects of climate change in NEPA documents, *but no Final*
16 *EIR/EIS providing that analysis has been done*. The Ninth Circuit Court of Appeals and the Sacramento
17 Superior Court have both issued rulings in the past three months that make clear that existing NEPA and
18 CEQA WaterFix alternatives are inadequate because they *do not consider increasing Delta flows by*
19 *reducing exports*. These rulings also show that petitioners’ failure to consider an alternative that would
20 restore the Delta violates the Delta Reform Act, Water Code section 85001 et seq., as well.

21 Petitioners’ claims that existing water quality protections are adequate do not address these
22 across-the-board regulatory and analytical failures. The Delta is broken and the legal requirements that
23 prescribe how it must be fixed have not been met. Petitioners’ claims that they satisfy these legally
24 deficient Delta protections are therefore irrelevant.

25 Even if these existing Delta water quality standards were instead adequate, petitioners’ claims that
26 they have complied with them would nonetheless fail anyway. Petitioners ignore, for example, their
27 frequent violation of this Board’s own D-1641 requirements through Temporary Urgency Change
28 Petitions (“TUCPs”). Worse, petitioners make a mockery of this Board’s D-1641 water quality standards

1 by characterizing their *evasion* of those standards – through TUCPs – as constituting *compliance* with
2 those standards. Far from showing compliance with D-1641, Petitioners have assumed that the WaterFix
3 will *fail to meet* D-1641 by relying on Temporary Urgency Change Petitions that depart from D-1641's
4 protections. Because the existing standards are deficient and petitioners' promises to honor them in their
5 breach (through TUCPs) are pure sophistry, this Board cannot begin to determine that the WaterFix will
6 not harm legal users of the Delta's water. Consequently the petition must be dismissed.

7 In summary, the petition should be dismissed because petitioners' testimony and exhibits rest on
8 the false premise that compliance with existing environmental standards will prevent harm to other legal
9 users of the Delta's water. *See, e.g.*, DWR-51 (Pierre testimony) at p. 12 (“[t]erms imposed through D-
10 1641” “will not change”). As detailed below, the water quality protections required for lawful evaluation
11 of the WaterFix Petition are either invalid, not yet adopted, or show that the WaterFix will harm rather
12 than protect the Delta's water flows and quality, and legal users who depend on them.

13 **A. The 1995 Bay-Delta Plan Has Not Been Updated.**

14 The Water Quality Control Plan for the San Francisco Bay/San Joaquin-Sacramento Delta Estuary
15 (WQCP) (Water Rights Decision 1641, D-1641) was adopted in 1995, and amended without substantive
16 changes in 2006. “The State Water Board is in the process of a periodic update of the WQCP, which is
17 occurring in phases.” (DWR-51 (Jennifer Pierre testimony) at p. 4 fn. 4 (emphasis added). Indeed, as
18 this Board recognized in its February 11, 2016, Ruling: “The appropriate Delta flow criteria will be more
19 stringent than petitioners' current obligations and may well be more stringent than petitioners' preferred
20 project.” *Id.* at 4. This Board further acknowledged “that the WaterFix, if approved, would be a
21 significant component of Delta operations, and it would be preferable to have Phase 2 [of the Plan
22 update] completed *prior to* acting on the change petition.” *Id.* at 4-5 (emphasis added).

23 Moreover, the Delta Reform Act mandates that any order by this Board approving a diversion
24 point change “shall include appropriate Delta flow criteria and shall be informed by the analysis
25 conducted pursuant to this section.” Water Code § 85086(c)(2). But contrary to this express mandate of
26 the Delta Reform Act, this Board has failed to adopt appropriate Delta flow criteria before considering the
27 Change Petition. This cart-before-the-horse error is highly prejudicial to all of the protestants. Because
28 this Board must base its consideration of the Change Petition on “appropriate Delta flow criteria” rather

1 than the other way around, the Change Petition must be denied at this time.

2 Because existing standards are known to be inadequate, petitioners' speculative testimony that the
3 WaterFix will comply with existing standards is not relevant. Comprehensive and adequate Bay-Delta
4 water quality planning needs to take place before, not after, this Board may proceed with a hearing on the
5 Change Petition.

6 **B. There Has Been No Compliance with the Delta Reform Act.**

7 There is currently no valid Delta Plan in effect. On May 18, 2016, the Sacramento Superior Court
8 issued its 73 page ruling in the seven coordinated Delta Stewardship Council Cases (Judicial Council
9 Coordinated Proceeding No. 4758). In pertinent part, the Ruling ordered that:

10 A peremptory writ shall issue from this Court to Respondent [the Delta
11 Stewardship Council, or "DSC"], ordering Respondent to revise the Delta Plan
and any applicable regulations to:

12 Include quantified or otherwise measurable targets associated with achieving
13 *reduced Delta reliance, reduced environmental harm* from invasive species,
14 *restoring more natural flows*, and increased water supply reliability, in
accordance with the Delta Reform Act.

15
16 *Id.* at 26, 38. (emphasis added). This Board may and should take official notice of this Ruling under 23
17 C.C.R. section 648.2 because judicial notice would be proper (indeed mandatory) under Evidence Code
18 sections 451(a), 452(a) and 453 as previously noted. The WaterFix's compliance with the Delta Plan is
19 pivotal, because that plan is designated as "the comprehensive, long-term management plan for the Delta
20 as adopted by the [Delta Stewardship Council] in accordance with this division." Water Code § 85059.

21 As the Ruling explains, Water Code section 85308(b) "provides that the Delta Plan shall 'include
22 quantified or otherwise measurable targets associated with achieving the objectives of the Delta Plan'"
23 including a numeric or otherwise specific and identifiable standard. *Id.* at 8-9. Contrary to this mandate,
24 "the Delta Plan fails to 'include quantified or otherwise measurable targets associated with' restoring more
25 natural flows as required by the Delta Reform Act." *Id.* at 36. The Court held that Water Code section
26 85302(e)(4) "provides [that] [t]he following sub goals and strategies for restoring a healthy ecosystem
27 shall be included in the Delta Plan... (4) Restore Delta flows and channels to support a healthy estuary
28

1 and other ecosystems.” *Id.* at 34 (emphasis added). The Court reasoned that “simply recommending the
2 BDCP's completion does not promote any options” for better ways to achieve the Delta Reform Act’s
3 goals. *Id.* at 37. The Court emphasized that the Delta Plan must be “legally enforceable.” *Id.* at 8-9.

4 On June 24, 2016, the Court issued a further Order in response to motions for clarification,
5 adhering to and expanding upon its earlier Ruling, and explaining that “[s]pecifically, with regard to
6 reduced Delta reliance, the Court found the Plan failed to include targets that would ensure reduced
7 reliance, as required by the Delta Reform Act.”⁴ The Court repeated its previous ruling that the Delta
8 Plan must be revised “to include quantified or otherwise measurable targets associated with achieving
9 reduced Delta reliance, . . . restoring more natural flows, and increased water supply reliability,” and
10 emphasized that “[t]o be clear, the Delta Plan is invalid and must be set aside until proper revisions are
11 completed.” *Id.*

12 As the Superior Court has repeatedly ruled, more stringent Delta flow criteria to “restor[e] more
13 natural flows” and reduce dependence on the Delta for water supply are clearly necessary. The Delta
14 Reform Act requires measures to “[r]estore Delta flows and channels to support a healthy estuary and
15 other ecosystems.” Water Code § 85302(e)(4). The Act establishes State policy “to reduce reliance on
16 the Delta in meeting California's future water supply needs through a statewide strategy of investing in
17 improved regional supplies, conservation, and water use efficiency.” Water Code § 85021. The primary
18 purpose of this policy is to “[r]estore the Delta ecosystem, including its fisheries and wildlife, as the heart
19 of a healthy estuary and wetland ecosystem.” Water Code § 85020(c).

20 For these reasons, the status quo of a dying Delta under assault by unsustainable, excessive
21 diversions does not satisfy the Delta Reform Act. Instead, reliance on the Delta by consumptive users
22 must be *reduced*, and more natural Delta flows must be *restored*. Consequently, petitioners’ testimony
23 that the WaterFix will maintain existing conditions merely confirms that it will make the Delta’s plight
24 worse. The law requires restoration of the Delta ecosystem, not continued degradation as is occurring
25

26 ⁴ PCFFA and IFR submitted this further Ruling to this Board on July 12, 2016 as Exhibit 2 to their
27 Motion to Disqualify Petitioners’ Witnesses and Exclude Their Testimony and Exhibits, and hereby
28 renew their request for official notice under 23 C.C.R. section 648.2 because judicial notice would be
proper (indeed, mandatory) under Evidence Code sections 451(a), 452(c) and 453.

1 under existing conditions. The petitioners’ promise of “more of the same” requires denial and dismissal
2 of their WaterFix Petition.

3 Like the Delta Stewardship Council, this Board will be sent back to the starting line for violating
4 the law if it continues to consider the Change Petition without first adopting flow criteria sufficient to
5 protect and *restore* public trust resources and to *reduce* exports as required by the Delta Reform Act,
6 Water Code section 85086(c). In the absence of a valid Delta Plan, both the Delta Stewardship Council
7 and this Board are powerless to make the required determination that the WaterFix is consistent with the
8 statutorily-mandated Delta Plan. In the analogous context of the parallel requirement that local land use
9 projects must be consistent with the applicable general plan, it has been settled law for over three decades
10 that the absence of a valid general plan precludes any land use approval that requires a finding of general
11 plan consistency. *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176,
12 1184; *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806.

13 So too here, since there is no valid Delta Plan, neither this Board nor the Delta Stewardship
14 Council can find that the WaterFix is consistent with that plan as required by Water Code section 85225.
15 That section requires a written certification of consistency by both this Board and the Delta Stewardship
16 Council before either may approve the WaterFix. Until that plan’s deficiencies noted by the Superior
17 Court are rectified, this required certification of consistency cannot be made.

18 **C. The WaterFix/BDCP RDEIR/SDEIS Is Preliminary and Inadequate.**

19 It is axiomatic that this Board may not lawfully consider the WaterFix Petition unless it is
20 accompanied by an adequate environmental impact report (“EIR”) as required by the California
21 Environmental Quality Act (“CEQA”), Public Resources Code Section 21000 et seq. “The EIR’s
22 function is to ensure that government officials who decide to build or approve a project do so with a full
23 understanding of the environmental consequences and, equally important, that the public is assured those
24 consequences have been taken into account.” *Vineyard Area Citizens for Responsible Growth, Inc. v.*
25 *City of Rancho Cordova* (2007) 40 Cal.4th 412, 449. Contrary to this mandate, petitioners have not
26 prepared or approved a Final EIR/EIS for the WaterFix. The WaterFix’s RDEIR/SDEIS, including the
27 Draft EIR/EIS that it modifies and incorporates, is merely a *preliminary* document. SWRCB-3. It does
28 not identify a proposed project, nor does it address public concerns regarding the deficiencies in its

1 analysis. *Id.* Because it is still an incomplete draft, its analysis and conclusions are subject to change. It
2 has not been certified as complete or accurate by *any* decisionmaking body.

3 The RDEIR/SDEIS is also inadequate because it does not present a reasonable range of
4 alternatives, as required by CEQA and the National Environmental Policy Act (“NEPA”), 42 U.S.C.
5 section 4321 et seq. Under CEQA, an EIR must consider a reasonable range of alternatives and “*should*
6 *not approve* projects as proposed if there are feasible alternatives or feasible mitigation measures
7 available which would substantially lessen the significant environmental effects of such projects.” *North*
8 *Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 666 (emphasis added). Likewise under
9 NEPA, federal agencies must consider a reasonable range of alternatives that would reduce a project’s
10 environmental impacts, including reducing water diversions where, as here, they harm the Delta. *Pacific*
11 *Coast Federation of Fishermen’s Associations v. U.S. Department of the Interior* (“PCFFA”), PCFFA-18
12 at p. 6, ___ Fed. Appx. ___, 2016 WL 3974183* 2, 3 (9th Cir. No. 14-15514, July 25, 2016 (not selected
13 for publication)).

14 Contrary to both laws, the RDEIR/SDEIS fails to do so. Its range of alternatives is improperly
15 and artificially curtailed by the petitioners’ project objectives, and fails to consider feasible alternatives
16 that would reduce exports and restore natural flows. SWRCB-3 at Section 4. *Id.* Under the Ninth
17 Circuit’s very recent ruling rejecting Reclamation’s refusal to consider reducing Delta exports to protect
18 its fisheries, the Court ruled that Reclamation must “give full and meaningful consideration to the
19 alternative of a reduction in maximum water quantities.” PCFFA-18 at 6; PCFFA *2. Its failure to do so
20 here is likewise “an abuse of discretion.” *Id.* Reclamation is collaterally estopped to contend otherwise.

21 Instead of complying with CEQA and NEPA, petitioners’ RDEIR/SDEIS fails to study any
22 alternative that would “give full and meaningful consideration to the alternative consistent with the Delta
23 Reform Act, reduce diversions by the SWP and CVP – despite multiple comments requesting such an
24 analysis. SWRCB-3 at Section 4. The Environmental Water Caucus prepared one such alternative,
25 which was attached to the January 21, 2016, letter to this Board submitted by Friends of the River, *et al.*,
26 but this alternative was dismissed from consideration. The petitioners’ summary rejection of this
27 alternative violates both CEQA and NEPA. CEQA does not permit a lead agency to dismiss from
28 consideration “any alternatives that feasibly might reduce the environmental impact of a project on the

1 unanalyzed theory that such an alternative might not prove to be environmentally superior to the project.”
2 *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1305 (emphasis
3 omitted). “The purpose of an EIR is to provide the facts and analysis that would support such a
4 conclusion so that the decision maker can evaluate whether it is correct.” *Id.* Omission of this discussion
5 “fail[s] to satisfy the informational purpose of CEQA.” *Id.*

6 CEQA requires an accurate description of the project in the context of the baseline environment.
7 *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952-956. In the
8 context of water diversion projects, an EIR must show how reservoir lake levels are correlated with
9 downstream river flows, and explain the resulting impacts to “fisheries, river habitat, and recreational
10 users.” *Id.* at 954-955. Similarly, a water project EIR must show precisely how “existing supplies can
11 meet future demands for water” in the context of “minimum streamflow requirements,” since the latter
12 “are designed in part to ensure the health of species in the river.” *Friends of the Eel River v. Sonoma*
13 *County Water Agency* (2003) 108 Cal.App.4th 859, 871. In particular, the cumulative impacts of the
14 project on river flows and the dependent fisheries, together with other ongoing diversions, must be
15 included in an accurate and comprehensive cumulative impacts analysis. *Id.* at 871-872.

16 Contrary to these requirements, the RDEIR/SDEIS fails to provide this critical information.
17 EPA’s October 30, 2015 letter reviewing the RDEIR/SDEIS⁵ gave the RDEIR/SDEIS a rating of “‘3’
18 (*Inadequate*).” *Id.* at p. 4. The EPA’s criticism that the RDEIR/SDEIS lacked essential information is
19 consistent with this Board’s October 30, 2015, comment letter on the RDEIR/SDEIS, which stated on
20 page 2 that “there is a large degree of uncertainty regarding the exact effects of the project due to a
21 number of factors.” So even if this preliminary, draft document were instead a final one, it would still not
22 provide a lawful basis for this Board’s review of the WaterFix Petition. *A fortiori*, because the
23 RDEIR/SDEIS is a preliminary, incomplete *draft*, this Board *cannot* rely upon it for its decision in this
24 proceeding.

25
26
27
28 ⁵ The October 30, 2015 EPA letter was attached to the November 24, 2015, letter to this Board
submitted by protestants California Sportfishing Protection Alliance, Environmental Water Caucus,
Friends of the River, and Restore the Delta. Pursuant to 23 C.C.R. section 648.2 and Evidence Code
section 452(c), PCFFA and IFR hereby request official notice of the contents.

1 Nor can this Board sidestep its CEQA responsibilities to base its review on an adequate, final EIR
2 on the grounds it is only acting as a “responsible agency.” The Board has taken the position that because
3 it is only a “responsible agency” rather than the “lead agency” under CEQA, it need not consider whether
4 the RDEIR/SEIS – even assuming it were a final document – is adequate. The Board stated in its
5 WaterFix Notice issued January 15, 2016 that

6 As a general rule, a responsible agency must assume that the CEQA document prepared by
7 the lead agency is adequate for use by the responsible agency. (Cal. Code of Regs., tit. 14,
8 § 15096, subd. (e).) *Accordingly, the adequacy of DWR’s EIR for the WaterFix Project*
9 *for purposes of CEQA compliance is not a key hearing issue, and the parties should not*
10 *submit evidence or argument on this issue.*

11 *Id.* at p. 2. This position appears to overlook several important duties owed by responsible agencies
12 under CEQA that impact these hearing procedures. As the Board acknowledges, it must examine “the
13 potential effects of the water right change petition on other legal users of water.” Those effects
14 necessarily include the *environmental* impacts of the WaterFix. And, those impacts must be understood
15 before the Board can make an informed determination of the availability of water for the project, and the
16 terms and conditions governing its operation, including those needed to protect the environment, that
17 should be imposed should the project be approved. *Id.*

18 The Board is the principal responsible agency for the project and cannot make these essential
19 determinations before CEQA review is complete. Where, as here, the Board acts as a “responsible
20 agency” under CEQA, Public Resources Code (“PRC”) section 21069 and CEQA Guidelines [14
21 California Code of Regulations (“CCR”)] section 15096, the Board “must independently make its own
22 findings and conclusions” in writing and “accompanied by a supporting statement of facts.” *Resource*
23 *Defense Fund v. Local Agency Formation Commission* (1987) 191 Cal.App.3d 886, 896 (citing CEQA
24 Guidelines §§ 15091 and 15096).

25 Thus, contrary to this Board’s disavowal of any duty to address the adequacy of the WaterFix EIR,
26 it must fully participate in the environmental review process, *independently assess the adequacy of the*
27 *final environmental impact report*, “make the findings required by [CEQA Guidelines] Section 15091 for
28 each significant effect of the project and . . . make the findings in Section 15093 [i.e., a statement of
overriding considerations] if necessary.” CEQA Guidelines § 15096(h).

1 These are not merely procedural guidelines. They also impose substantive duties. CEQA directs
2 that “no public agency shall approve or carry out a project for which an EIR has been certified which
3 identifies one or more significant environmental effects of the project unless the public agency makes one
4 or more written findings for each of those significant effects, accompanied by a brief explanation of the
5 rationale for each finding.” CEQA Guidelines § 15091(a). This prohibition applies fully to responsible
6 agencies such as the Board. *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th
7 1186, 1207.

8 CEQA’s findings requirement enforces its mandate “that public agencies should not approve
9 projects as proposed if there are feasible alternatives or feasible mitigation measures available which
10 would substantially lessen the significant environmental effects of such projects.” PRC § 21002. Where
11 a project poses significant effects on the environment, “[e]ach public agency shall mitigate or avoid the
12 significant effects on the environment of projects that it carries out or approves whenever it is feasible to
13 do so.” PRC §§ 21002.1(b), 21081; CEQA Guidelines §§ 15091, 15093. To assure that agencies fully
14 document their efforts to identify and mitigate a project’s potentially significant effects on the
15 environment, CEQA directs:

16 21081. No approval if significant effect unless findings

17 Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or
18 carry out a project for which an environmental impact report has been certified which identifies
19 one or more significant effects on the environment that would occur if the project is approved or
20 carried out unless both of the following occur:

- 21 (a) The public agency makes one or more of the following findings with respect to each
22 significant effect:
- 23 (1) Changes or alterations have been required in, or incorporated into, the project which
24 mitigate or avoid the significant effects on the environment,
 - 25 (2) Those changes or alterations are within the responsibility and jurisdiction of another
26 public agency and have been, or can and should be, adopted by that other agency,
 - 27 (3) Specific economic, legal, social, technological, or other considerations, including
28 consideration for the provision of employment opportunities for highly trained
 workers, make infeasible the mitigation measures or alternatives identified in the
 environmental impact report.

1 b) With respect to significant effects which were subject to a finding under paragraph (3) of
2 subdivision (a), the public agency finds that specific overriding economic, legal, social,
3 technological, or other benefits of the project outweigh the significant effects on the
4 environment.

5 PRC § 21081. In making these required findings, “the public agency shall base its findings on substantial
6 evidence in the record.” PRC § 21081.5.

7 These rules are fully applicable to responsible agencies such as the Board in its WaterFix-related
8 decisionmaking. “Before approving or carrying out part of a project under CEQA, a responsible agency
9 . . . ‘must . . . issue its own findings regarding the feasibility of relevant mitigation measures or project
10 alternatives that can substantially lessen or avoid significant environmental effects. Furthermore, where
11 necessary, a responsible agency must issue its own statement of overriding considerations. [Citations.]”
12 *RiverWatch v. Olivenhain Municipal Water Dist.*, *supra*, 170 Cal.App.4th at 1207 (quoting Remy, et al.,
13 Guide to CEQA (11th ed. 2007), ch. III. B. 2., p. 53 and PRC § 21081). “If the responsible agency finds
14 that any alternatives or mitigation measures within its powers are feasible and would substantially lessen
15 or avoid a significant effect of the project, the responsible agency may not approve the project as
16 proposed, but must adopt the feasible mitigation measures or alternatives.” *Id.* at 1202 (quoting 1 Kostka
17 & Zischke, Practice Under the California Environmental Quality Act (Cont. Ed. Bar 2d ed. 2008) § 3.22,
18 p. 126); CEQA Guidelines § 15096(g)(2). “[A]s with a lead agency . . . , ‘[b]efore approving the project,
19 the [responsible] agency . . . must . . . find either that the project’s significant environmental effects
20 identified in the EIR have been avoided or mitigated, or that unmitigated effects are outweighed by the
21 project’s benefits.’” *Id.* at 1207 (quoting *Laurel Heights Improvement Assn. v. Regents of University of*
22 *California* (1988) 47 Cal.3d 376 at 391).

23 Thus, the Board’s position that “a responsible agency must assume that the CEQA document
24 prepared by the lead agency is adequate” is in error, and “the adequacy of DWR’s EIR for the WaterFix
25 Project” *is* a “key hearing issue” that should be addressed prior to the Water Board’s review of the
26 potential effects of the WaterFix on legal users of water. And, as explained below, the Board must
27 determine the adequacy of the environmental impact report/statement prior to any Clean Water Act
28 section 401 certification.

1 As PCFFA and IFR noted in Attachment 1 to their Protest submitted to the Board on January 5,
2 2016, and incorporated herein by reference, the Water Board has a duty under the federal Clean Water
3 Act (“CWA”) to (1) designate beneficial uses (33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.6(a)) of the
4 Sacramento/San Joaquin River Delta and San Francisco Bay (“Bay-Delta”), (2) establish water quality
5 criteria (33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.6(c)) sufficient to protect those uses, and (3) adopt
6 an anti-degradation policy sufficient to identify and prevent degradation of the water quality mandated for
7 a particular water body (40 C.F.R. §§ 131.6(d), 131.12(a)). The Board must submit its water quality
8 criteria to EPA for review to confirm their adequacy for protection of designated uses, and must also
9 review the adequacy of its water quality objectives (in federal parlance, “standards”) to assure that all
10 designated uses are protected. 33 U.S.C. § 1313(1); 40 C.F.R. § 131.20. The Board has failed to
11 complete this required review in a timely manner.

12 The current Bay-Delta Plan – D-1641 – was adopted over two decades ago. It does not protect
13 fish, wildlife, and other public trust uses of the Bay-Delta. As a result of the Board’s past and continuing
14 authorization of excessive diversions of freshwater flows, the Bay-Delta’s ecological system is, as
15 explained previously, collapsing. This imminent ecological crisis must be addressed *before* this Board
16 may take any action on this project. In addition, the Board has neglected its duties under the California
17 Constitution to avoid unreasonable uses of water (Art. 10 § 2), and under the California Water Code to
18 (1) take into account the amount of water required for fish, wildlife, and recreation (Water Code §§ 1243,
19 1243.5), (2) reduce reliance on the Delta (Water Code §§ 85020(c), 85021), and (3) fully consider fish
20 and wildlife and other public trust uses that must be protected by a water quality control plan (Water
21 Code §§ 1257, 1258).

22 In summary, designation of beneficial uses, water quality criteria, unreasonable uses of water,
23 water quantities and quality needed for fish, wildlife, and recreation, updating of the Bay Delta Water
24 Quality Control Plan and other applicable water quality control plans to protect beneficial uses, and the
25 neglected state and federal triennial reviews of the Bay-Delta Plan under CWA section 303(c) are all *key*
26 *hearing issues* in Part 1 that must be addressed *prior* to any examination of the potential effects of the
27 WaterFix’s water right change petition on legal users of water and prior to a Clean Water Act 401
28 certification for the project.

1 As PCFFA and IFR have pointed out above and in their January 22, 2016 letter to this Board, to
2 date the Board has neglected to take into account fundamental constitutional, statutory, and regulatory
3 requirements. These issues are, indeed, the principal hearing issues that must be addressed prior to any
4 consideration and determination of (1) the WaterFix’s potential injury to existing water rights, (2) the
5 creation of new water rights, or (3) the required Clean Water Act section 401 certification. As explained
6 above, NEPA, CEQA, ESA, the California Endangered Species Act (“CESA”) (Fish and Game Code
7 section 2050 et seq.), the California Constitution, and relevant provisions of the Water Code all require
8 protection for fish, wildlife, recreation and other public trust uses, and these protections must be
9 determined after – not before – informed environmental review. Because that required review has not
10 occurred, this Board must deny and dismiss the WaterFix Petition.

11 In conclusion, the starting point for determining whether there will be negative effects to legal
12 users of water should be an adequate Final EIR/EIS with a robust analysis of alternatives, including an
13 alternative that reduces water exports and restores natural flows in the Delta. Instead, petitioners have
14 presented testimony and exhibits that have never been examined in any final and adequate analysis of
15 environmental impacts under California law. Rather than comply with CEQA, petitioners insist that this
16 Board unlawfully proceed on the basis of petitioners’ own self-serving testimony and exhibits. Their
17 attempted evasion of CEQA’s requirements must not be rewarded by allowing their premature Change
18 Petition to proceed to hearing. Accordingly, their testimony and exhibits must, along with their Change
19 Petition, be rejected and dismissed.

20 **D. The Biological Opinions Required Under the Endangered Species Act**
21 **Have Not Been Prepared.**

22 As noted above, the Delta’s threatened and endangered species, including winter- and spring-run
23 chinook salmon, Central Valley steelhead, green sturgeon and the Delta smelt, are in sharp decline due to
24 excessive diversions of fresh water flows from the Delta. The WaterFix does not propose to reduce these
25 diversions. Instead, it proposes to maintain – and most likely, increase – this unsustainable level of
26 excessive exports. Consequently, it is undisputed that the WaterFix project requires preparation of
27 Biological Opinions by the NMFS (which has jurisdiction over anadromous fisheries such salmon and
28 steelhead) and USFWS (which has jurisdiction over “inland” fisheries such as the Delta smelt). 16

1 U.S.C. § 1536(b)(3), (4); 50 C.F.R. §§ 402.12-402.14.

2 The governing ESA regulations specify that “[e]ach Federal agency shall review its actions *at the*
3 *earliest possible time* to determine whether any action may affect listed species or critical habitat. If such
4 a determination is made, formal consultation is required” *Karuk Tribe of California v. U.S. Forest*
5 *Service*, 681 F.3d 1006, 1020 (9th Cir. 2012) (*en banc*) (emphasis added), *cert. denied*, 133 S.Ct. 1579
6 (2013). This is not an idle exercise. On August 2, 2016, Reclamation issued its Biological Assessment
7 (dated July 2016) for the WaterFix and requested formal consultation with both NMFS and USFWS
8 because Reclamation has determined that the WaterFix is “likely to adversely affect” several endangered
9 and threatened fish species and their designated critical habitats. SWRCB-104 at Chapter 7, Table 7-1, p.
10 7-36.

11 To proceed with further hearings on the WaterFix in the face of Reclamation’s admission that
12 Biological Opinions are *required* under ESA ignores the purpose of this required consultation. It also
13 contravenes this Board’s duty under CEQA (and Reclamation’s parallel duty under NEPA) to consider
14 the WaterFix’s admittedly adverse impacts on threatened and endangered species as an integral part of the
15 environmental reviews required under CEQA and NEPA. *Vineyard Area Citizens, supra*, 40 Cal.4th at
16 449 (overturning Sacramento County’s failure to address in its EIR the foreseeable “loss of Cosumnes
17 River stream flows” “[e]specially given the sensitivity and listed status of the resident salmon species”);
18 *Friends of the Eel River, supra*, 108 Cal.App.4th at 869-872 (setting aside an EIR that failed to
19 adequately address a water project’s cumulative effects on the Russian River and its sensitive fisheries);
20 40 C.F.R. § 1502.25(a) (“To the fullest extent possible, agencies shall prepare draft environmental impact
21 statements *concurrently with and integrated with* environmental impact analyses and related surveys and
22 studies required by the . . . Endangered Species Act”)

23 The Board’s seemingly cavalier approach to enforcing the petitioners’ compliance with the clear
24 mandates of CEQA, NEPA and the ESA is puzzling, given the extraordinary resources whose survival
25 hangs in the balance. Extinction is forever. This Board has the highest possible duty under these laws to
26 assure that none of the species are extirpated because the strict requirements of CEQA, NEPA and the
27 ESA were neglected.

28 ///

1 **V. THIS BOARD SHOULD DISMISS THE PETITION BECAUSE PETITIONERS’**
2 **WITNESSES AND EXHIBITS FAIL TO SHOW THAT THE WATERFIX WILL**
3 **NOT HARM LEGAL USERS OF WATER.**

4 As noted, the legal predicates for petitioners’ testimony and exhibits are absent, since the 1995
5 Bay-Delta Plan is obsolete, the 2013 Delta Plan has been invalidated by the court, there is no CEQA-
6 required final EIR/EIS for the WaterFix Project, and there is no ESA-required Biological Opinion.
7 Absent valid, updated and adequate environmental standards against which to measure the impacts of the
8 WaterFix, there is no basis for petitioners’ witnesses’ claims that the WaterFix will not harm legal users
9 of water because it will conform to applicable environmental standards. Accordingly, petitioners have
10 failed to provide evidence that identifies the specific impacts of the WaterFix on legal users of water. As
11 shown below, despite this Board’s clear instruction that petitioners must provide this specific
12 information, they have failed to do so. Accordingly, their witnesses, testimony and exhibits should be
13 excluded, and their Petition must be denied and dismissed.

14 As PCFFA and IFR noted in their previous objections to petitioners’ evidence, “even in
15 [administrative] proceedings, with the relaxed standards of admissibility, the evidence must be relevant
16 and reliable.” *Aengst v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283. In
17 recognition of this fundamental principle of administrative law, this Board has repeatedly instructed
18 petitioners to make sure that their witnesses and evidence provided sufficient specificity based on fact
19 rather than assumptions to demonstrate that other legal users of water would not be harmed by the
20 Project. The Board’s October 30, 2015 Notice of Petition, for example, required that all “[e]xhibits based
21 on technical studies or models shall be accompanied by sufficient information to clearly identify and
22 explain the logic, assumptions, development, and operation of the studies or models.” *Id.* at 33. Further,
23 the Board warned that “[e]xhibits that rely on unpublished technical documents *will be excluded* unless
24 the unpublished technical documents are admitted as exhibits.” *Id.* at 34, emphasis added.

25 Petitioners failed to comply with this direction. Consequently, in its February 11, 2016 Pre-
26 Hearing Conference Ruling, this Board warned petitioners that “the available information” – upon which
27 petitioners had based their petition and which included many of the exhibits petitioners have now
28 submitted as proposed evidence –

///

1 lack[ed] clarity in several ways, including whether operation criteria are intended to
2 constrain project operations or are identified for modeling purposes only, areas where a
3 specific operational component or mitigation measure is not yet chosen or identified,
4 operational parameters that are not defined and deferred to an adaptive management
5 process, and lack of clarity concerning some mitigation measures.

6 *Id.* at 6. Because of this lack of clarity, the Board directed petitioners to provide “the information
7 required by section 794 of our regulations in a succinct and easily identifiable format. The other parties
8 will then be able to more accurately assess whether the proposed changes would cause injury.” *Id.* at 7.
9 Among other information deemed vital to a petition for change in point of diversion, section 794 requires
10 “the proposed division, release and return flow schedules,” “any effects of the proposed change(s) on fish,
11 wildlife, and other instream beneficial uses,” and “identification in quantitative terms of any projected
12 change in water quantity, water quality, timing of diversion or use, consumptive use of the water,
13 reduction in return flows, or reduction in the availability of water within the streams affected by the
14 proposed change(s).” 23 C.C.R. § 794(a)(6), (8), (9).

15 Petitioners now admit that they cannot provide the information required by the Board with
16 particularity. “Since the BiOp has not been issued,” petitioners explain, “and DWR and Reclamation do
17 not know the initial operational criteria, the analytical framework presented for Part 1 is a boundary
18 analysis.” DWR 51 at p. 10, lines 8-10. While this “boundary analysis” attempts to “provide a broad
19 range of operational criteria,” the conclusions stated in the written testimony offered by petitioners are not
20 supported by the necessary data or analysis and do not contain the specificity necessary to satisfy the
21 informational requirements of the Board's October 30 Notice, February 11 Ruling, or regulations. DWR
22 51 at p. 10, line 10.

23 All testimony by petitioners’ witnesses on project modeling must be excluded because it is not
24 based on principles or procedures that have gained general acceptance in their field. In 1976 the
25 California Supreme Court approved the venerable rule of admissibility for new scientific methodologies
26 that the District of Columbia Circuit Court of Appeals had adopted in 1923. *People v. Kelly* (1976) 17
27 Cal.3d 24, 30 (approving and applying *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *People*
28 *v. Leahy* (1974) 8 Cal.4th 587, 594 (same). “Under the *Kelly-Frye* Rule, evidence based on a new
scientific method of proof is admissible only upon a showing that the procedure has been generally

1 accepted as reliable in the scientific community in which it was developed.” *In re Amber B.* (1987) 191
2 Cal.App.3d 682, 686. Petitioners’ proffered modeling evidence fails to meet this fundamental standard of
3 general acceptance by the relevant scientific community. As shown in the testimony of PCFFA’s expert
4 Deirdre Des Jardins submitted on September 2, 2016, petitioners’ modeling fails to address key factors
5 that predict foreseeable droughts, sea level rise and other consequences of global warming and
6 consequent climate change. *Id.* at pp. 3-15. Additionally, as noted above petitioners’ modeling is
7 erroneously premised on the false assumption that compliance with existing environmental standards will
8 assure the WaterFix will harm no legal users of water.⁶ To the contrary, since the primary environmental
9 standards governing management of the Delta are either obsolete, have not yet been adopted, or have
10 been deemed inadequate, petitioners’ premise is a logical fallacy.

11 The modeling results relied upon by petitioners’ witnesses do not meet the *Kelly* rule for the
12 additional reason that they have failed to provide a proper foundation in actual data and understandable
13 analysis to “provide a reasonable basis for the particular opinion offered.” *Lockheed Litigation Cases*
14 (2004) 115 Cal.App.4th 558, 564. Under Evidence Code section 803, this Board “shall . . . exclude”
15 opinion testimony in the form of an opinion that is based in whole or in significant part on matter that is
16 not a proper basis for such an opinion.”

17 This Board is well aware of the importance of providing adequate documentation of model
18 assumptions, validation through testing, and adjustment by calibration. In 2012 this Board convened its
19 own scientific panel to provide specific recommendations as to the requirements for assuring that
20 hydrologic models are accurate and reliable. Neither of the models on which petitioners rely – CalSim II
21 and DSM2 – has ever been validated for use by any external and disinterested experts. The absence of
22 this required validation requires exclusion of petitioners’ testimony based upon these models. *Seering v.*
23 *Department of Social Services* (1987) 194 Cal.App.3d 298, 310-311. Despite PCFFA’s and IFR’s
24 repeated objections on this ground, petitioners have never addressed this fatal deficiency.

26
27 ⁶ Worse – as PCFFA and IFR have shown through cross-examination of petitioners’ witnesses –
28 petitioners’ modeling ignores the hundreds of days that they have requested and received this Board’s
approval of Temporary Urgency Change Petitions that allow deviation from even the weak and
inadequate protections otherwise provided by D-1641. *See, e.g.,* PCFFA-12.

1 Yet this defect strikes at the heart of the entire basis for petitioners' claim that the WaterFix will
2 not harm legal users of water. Numerous independent experts familiar with these models have questioned
3 their validity. According to one review,

4 Better quality control is needed both for the model and its current version and the input
5 data. Procedures for model calibration and verification are also needed. Currently many
6 users are not sure of the accuracy of the results. A sensitivity and uncertainty prediction
7 capability and analysis is needed.

8 PCFFA-20 (California Bay Delta Science Program, *A Strategic Review of CalSim II and its Use for Water*
9 *Planning, Management, and Operations in Central California* (Dec. 4, 2003) ("2003 Peer Review") at p.

10 8. The lack of acceptance of CalSim II has been persistent, as a subsequent peer review found that

11 CalSim II work fails to adequately report technical results that would give knowledgeable
12 readers some sense of the quality, accuracy, sensitivity, or uncertainty present in the
13 results. This issue was prominent in the previous CalSim review panel report.

14 PCFFA-79 (CALFED Science Program, *San Joaquin River Valley CalSim II Model Review*, (Jan. 12,
15 2006) ("2006 Peer Review") at p. 10. FWS also criticized petitioners' modeling and had to develop its
16 own alternative because it felt that CalSim II was *unusable*:

17 The inaccuracies in CALSIM lead us to use actual data to develop an empirical baseline

18 We calculated monthly or multiple month averages or medians based on these daily
19 hydrology data sets. The historical time series are intended to show where changes in
20 water project operations have caused or contributed to changed Delta hydrology and to
21 serve as an empirical baseline of SWP and CVP operations for comparison to proposed
22 futures modeled using CALSIM II.

23 SWRCB-87 (2008 Fish and Wildlife Service Formal Endangered Species Act Consultation on the
24 Proposed Coordinated Operations of the Central Valley Project (CVP) and State Water Project (SWP) at
25 p. 205. FWS also thereby demonstrated that use of actual data for an empirical baseline was not only
26 desirable, but also possible, further illustrating petitioners' failure to use the best available science.

27 CalSim II has never been calibrated, in direct defiance of recommendations by qualified and
28 disinterested experts who served on the 2003 and 2006 peer review panels, quoted above. Moreover, this
29 lack of calibration is in direct contradiction to petitioners' own responses to those peer reviews. PCFFA-
30 80. (*Peer Review Response: A Report by DWR/Reclamation in Reply to the Peer Review of the CalSim-*

1 *II Model Sponsored by the CALFED Science Program in December 2003*) (Aug. 2004) at p. 19.)

2 The 2006 Peer Review panel also recommended documentation of model assumptions and error
3 analyses. Under “Uncertainty in Model Results,” the reviewers noted that “[c]urrently no general
4 guidance is available to indicate whether differences of 1 taf [thousand acre feet], 50 taf, 100 taf, or 500
5 taf are significant enough to rise above the level of error and noise inherent in the model.” PCFFA-79, p.
6 6. As a result, the reviewers recommended, “[a]t a minimum, error analyses should be conducted,
7 combining a sensitivity analysis of critical model results to some of the largest and least well supported
8 model assumptions with an assessment of the likely range of error in these major model parameters and
9 assumptions.” *Id.* While the 2007 Peer Review Response (DWR-507) attempts to do the mandated error
10 analyses for the San Joaquin River component, the analyses were never externally reviewed. Other
11 components of the model lack any detailed or meaningful error analysis. Without adequate error analysis,
12 general acceptance by the scientific community is not possible, and petitioners’ modeling is not
13 admissible evidence in an adjudicative hearing before the Board.

14 Petitioners have also failed to demonstrate that their models are based on “best available science.”
15 A model is only as good as the data it utilizes, and petitioners have failed to demonstrate the accuracy and
16 validity of the data on which their models rely. Supporting evidence should have been submitted with the
17 Petition, so protestants would be able to review it in a timely manner. If modeling is not in evidence,
18 protestants are deprived of their due process right to question petitioners’ witnesses about that modeling.
19 “[I]n civil proceedings a party has a due process right under the Fifth and Fourteenth Amendments to the
20 Federal Constitution to cross-examine and confront witnesses.” *Seering, supra*, 194 Cal.App.3d at 304,
21 quoting *In re Mary S.* (1986) 186 Cal.App.3d 414, 419. “[In] a civil proceeding the constitutional right
22 involves general notions of procedural due process.” *Id.* Because petitioners’ testimony based on their
23 modeling fails to identify the underlying data as necessary to permit petitioners’ informed cross-
24 examination, both the model and the testimony based thereon are objectionable on due process grounds.
25 *Id.* Moreover, since the underlying data is not in evidence, such testimony is objectionable for the
26 additional reason that it assumes facts not in evidence. *Dee v. PCS Property Management, Inc.* (2009)
27 174 Cal.App.4th 390, 404 (an opinion based on assumed facts, without adequate foundation for
28 concluding that those facts exist, is unreliable and therefore should be excluded).

1 Finally, petitioners' failure to disclose the basis for their preemptive exclusion of environmentally
2 more protective alternatives (such as alternatives that would reduce exports and restore natural flows as
3 required by the Delta Reform Act) is objectionable. For example, Appendix 3I of the Draft Bay Delta
4 Conservation Plan (SWRCB-4) states that certain alternatives for flow criteria were eliminated from
5 consideration by petitioners during preliminary modeling, with the Board's agreement. This premature
6 elimination of alternatives from consideration by the public – let alone the parties to this proceeding –
7 impermissibly sidesteps the hearing process and protestants' due process right to cross-examine
8 petitioners' witnesses as to the basis for their testimony.

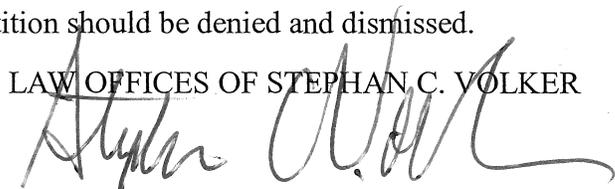
9 In summary, petitioners' witnesses have failed to demonstrate that the modeling on which they
10 rely is "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious
11 affairs." Government Code § 11513(c). Petitioners have failed to provide a sufficient foundation for
12 their modeling to demonstrate its reliability and accuracy. And, most importantly, petitioners have failed
13 to demonstrate that the methodology employed in their modeling is generally accepted by the relevant
14 scientific community as required under the *Kelly* standard. Accordingly, all of petitioners' testimony and
15 exhibits that are based on the CalSim II and DSM2 models must be excluded, and petitioners' Change
16 Petition must be denied and dismissed.

17 VI. CONCLUSION

18 For the foregoing reasons, petitioners have failed to "demonstrate a reasonable likelihood that the
19 proposed change will not injure any other legal user of water." Water Code § 1701.2(d). Their Change
20 Petition is premature because it precedes, rather than follows, compliance with CEQA, NEPA, ESA, the
21 Delta Reform Act, the Water Code and the Clean Water Act. And, all of petitioners' proffered witnesses,
22 testimony and exhibits and the modeling on which they are premised are based on incomplete
23 environmental studies that fail to demonstrate that the WaterFix will not harm legal users of water.
24 Accordingly, petitioners' Change Petition should be denied and dismissed.

25 Dated: October 7, 2016

LAW OFFICES OF STEPHAN C. VOLKER

26 
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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' MOTION TO DISMISS WATERFIX
PETITION**

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 October 6, 2016, 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 October 7, 2016.



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