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PACIFIC COAST FEDERATION OF FISHERMEN’S ASSOCIATIONS
7 and INSTITUTE FOR FISHERIES RESOURCES

8 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

9 HEARING REGARDING PETITION FILED) **OPPOSITION TO CALIFORNIA**
BY THE DEPARTMENT OF WATER) **DEPARTMENT OF FISH AND WILDLIFE’S**
10 RESOURCES AND U.S. BUREAU OF) **MOTION FOR PROTECTIVE ORDER FOR**
RECLAMATION REQUESTING CHANGES) **SUBPOENA DUCES TECUM**
11 IN WATER RIGHTS FOR THE CALIFORNIA)
WATERFIX PROJECT)
12)
13)

14 **I. INTRODUCTION**

15 Protestants Pacific Coast Federation of Fishermen’s Associations and Institute for
16 Fisheries Resources (collectively, “PCFFA”) submit this opposition to the California Department
17 of Fish and Wildlife’s (“CDFW’s”) March 6, 2018, Motion for Protective Order (“Motion”), filed in
18 response to PCFFA’s March 2, 2018 subpoena duces tecum (“Subpoena”). PCFFA notes
19 preliminarily that CDFW’s Motion does *not* challenge PCFFA’s request for:

- 20 (1) “documents and electronic data under CDFW’s control related to changes to the
21 WaterFix Project,”
- 22 (2) “documents and communications under CDFW’s control related to the WaterFix
23 Project’s compliance with the California and/or Federal Endangered Species Acts,”
- 24 (3) “documents and electronic data under CDFW’s control related to the reinitiation of
25 consultation on the coordinated long-term operation of the [Central Valley Project
26 (“CVP”)] and the [State Water Project (“SWP”)] . . . including, but not limited to, potential
27 CVP and SWP long-term operations with the WaterFix North Delta diversions,”
- 28 (4) “communications between CDFW and Reclamation under CDFW’s control related to

1 the reinitiation of consultation on the coordinated long-term operation of the CVP and
2 SWP . . . including, but not limited to, information related to potential California and/or
3 Federal Endangered Species Act compliance for the long-term operations of the SWP
4 and CVP with the WaterFix Project’s North Delta Diversions,”

5 (5) “communications between CDFW and DWR under CDFW’s control related to the
6 reinitiation of consultation on the coordinated long-term operation of CVP and SWP . . .
7 including, but not limited to, potential California and/or Federal Endangered Species Act
8 compliance for the long-term operations of the SWP and CVP with the WaterFix North
9 Delta diversions,”

10 (6) “communications between CDFW and staff or Board members of the State Water
11 Resources Control Board (“SWRCB”), and all documents shared with staff or Board
12 members of the SWRCB, related to the SWRCB’s WaterFix Water Right Change
13 Petition Hearing [and] the WaterFix Project,” and

14 (7) “communications related to withdrawal by CDFW as a Party to the WaterFix
15 Hearing.”

16 Motion 2-4; Subpoena 6-7. Thus, CDFW has conceded that each of the foregoing requests is
17 reasonable.

18 CDFW’s Motion objects to only two of PCFFA’s requests: (1) for “documents and
19 communications under CDFW’s control related to . . . the SWP’s and CVP’s compliance with
20 the California and/or Federal Endangered Species Acts” (Subpoena 6:6-8; Motion 2:23-3:3),
21 and (2) for “communications between CDFW and staff or Board members of the State Water
22 Resources Control Board (“SWRCB”), and all documents shared with staff or Board members
23 of the SWRCB, related to . . . SWRCB permit terms for the SWP and CVP” (Subpoena 7:6;
24 Motion 4:4-7). CDFW’s motion should be denied because these two requests are, like the
25 others it accepts, demonstrably relevant and reasonable.

26 Contrary to CDFW’s argument that these two requests are beyond the scope of the
27 California WaterFix Hearing, the materials PCFFA seeks therein are directly relevant to (1) this
28 Board’s *determination* of whether the Change Petition will unreasonably affect fish and wildlife,

1 recreational uses of water, or other public trust resources, and (2) this Board’s *consideration of*
2 appropriate Delta flow criteria. That specific determination and consideration are mandated by
3 Water Code sections 1701.2(c) and 85086(c)(2), respectively.

4 Section 1701.2(c) requires the petitioners to disclose, and this Board to determine, “the
5 *extent, if any, to which fish and wildlife would be affected by the change [petition], and a*
6 *statement of any measures proposed to be taken for the protection of fish and wildlife in*
7 *connection with the change.” Id. (emphasis added). Section 85086(c)(2) directs that “[a]ny*
8 *order [by this Board] approving a change in the point of diversion of the [SWP] or the [CVP]*
9 *from the southern Delta to a point on the Sacramento River shall include appropriate Delta flow*
10 *criteria and shall be informed by the analysis conducted pursuant to this section.” Id.*
11 (emphasis added). This statutory direction is augmented by this Board’s Ruling that Part 2 of
12 this Hearing shall address appropriate Delta flow criteria “as required by the Sacramento-San
13 Joaquin Delta Reform Act of 2009.” August 31, 2017 Ruling Letter, p. 12; Water Code §
14 85086(c)(1) and (2).

15 CDFW’s records concerning “SWP’s and CVP’s compliance with the California and/or
16 Federal Endangered Species Acts” and its communications with this Board and its staff
17 regarding “SWRCB permit terms for the SWP and CVP” are directly pertinent to this Board’s
18 *required determination* of fish and wildlife impacts under section 1702.1(a) and *mandatory*
19 *consideration* of “appropriate Delta flow criteria” under section 85086(c)(2), and thus highly
20 pertinent to this proceeding. The Delta Reform Act specifically directs that “[a]ny order
21 approving a change in the point of diversion of the [SWP] or the [CVP] from the southern Delta
22 to a point on the Sacramento River *shall include appropriate Delta flow criteria.”* Water Code §
23 85086(c)(2) (emphasis added). And, to that end, the Delta Reform Act requires CDFW, “based
24 on the best available science,” to “develop and recommend to th[is] [B]oard Delta flow criteria
25 and quantifiable biological objectives for aquatic and terrestrial species of concern dependent
26 on the Delta.” Water Code § 85084.5. PCFFA’s discovery requests are directly pertinent to
27 CDFW’s and this Board’s discharge of these correlative statutory duties. Water Code §§
28 85084.5, 85086(c)(2).

1 Accordingly, the Hearing Officers must deny CDFW’s requests for a protective order, for
2 an order quashing the request for a privilege log, and for relief from the Subpoena deadline, as
3 PCFFA’s subpoena seeks relevant records that are reasonably necessary for the efficient
4 conduct and resolution of this Hearing.

5 **II. ARGUMENT**

6 **A. CALIFORNIA’S DISCOVERY STATUTES ARE LIBERALLY CONSTRUED IN
7 FAVOR OF DISCLOSURE.**

8 California’s “discovery statutes were intended to curtail surprises, enable each side to
9 learn as much as possible about the strengths and weaknesses of its case, and thereby
10 facilitate realistic settlements and efficient trials.” *Williams v. Superior Court* (2017) 3 Cal.5th
11 531, 559 n. 3. As such, they “are to be construed broadly in favor of disclosure, so as to
12 uphold the right to discovery whenever possible.” *Puerto v. Superior Court* (2008) 158
13 Cal.App.4th 1242, 1249; *Fairfield v. Superior Court for Los Angeles County* (1966) 246
14 Cal.App.2d 113, 119-120 (discovery statute “to be liberally interpreted so that it may
15 accomplish its purpose”).

16 Government Code section 11450.030 allows this Board to modify the Subpoena only if it
17 determines that the Subpoena makes “unreasonable or oppressive demands.” Gov’t Code §
18 11450.30(b). Because PCFFA’s discovery requests are neither unreasonable nor oppressive,
19 and to the contrary are fully warranted and appropriate, CDFW’s Motion must be denied.

20 **B. CDFW’S RECORDS DETAILING THE SWP’S AND CVP’S COMPLIANCE WITH
21 THE CALIFORNIA AND/OR FEDERAL ENDANGERED SPECIES ACTS ARE
22 RELEVANT, REASONABLY NECESSARY, AND SHOULD BE PRODUCED**

23 CDFW claims that “records under CDFW’s control that relate to the SWP or CVP’s
24 compliance with [the California Endangered Species Act (“CESA”)] or the federal [Endangered
25 Species Act (“ESA”)], in the absence of [California WaterFix] infrastructure and operations, are
26 not relevant” to the information PCFFA seeks to uncover. Motion at 3:16-18. Not so. The
27 WaterFix Change Petition proposes alterations to the operations of the SWP and CVP.
28 CDFW’s records relating to their operation absent the California WaterFix are both relevant and
reasonably necessary to the efficient conduct and disposition of this Hearing because they

1 show past and existing biological conditions, an essential baseline for any reasoned analysis of
2 how the WaterFix will *change* those conditions. The Department of Water Resources’s
3 (“DWR’s”) lead fisheries biologist Dr. Marin Greenwood has testified that his opinions of
4 whether CWF H3+ will harm listed species rely upon the resource agencies’ determinations –
5 including those of CDFW – regarding the impacts of CVP and SWP operations, and that the
6 “existing Delta water conveyance system” provides “reasonable protection” for listed species.
7 *E.g.* DWR-1012, p. 3. Thus, CDFW’s information on these existing operations and their
8 impacts on listed species will help inform the parties and the Hearing Officers about the validity
9 of these assumptions and conclusions.

10 CDFW cites only one paragraph of PCFFA’s detailed affidavit in support of the
11 Subpoena to argue that PCFFA has not shown that this information is relevant. Motion 3: 9-21,
12 citing paragraph 11 of the Affidavit in Support of PCFFA’s Subpoena Duces Tecum signed by
13 its counsel, Stephan Volker, which appears at pages 8-11 of the Addendum to the Subpoena.
14 But several other paragraphs are pertinent. For example, paragraph 18 of PCFFA’s Affidavit
15 states that “it appears likely that CDFW has significant information on long-term proposed
16 operations for the CVP and SWP, which may include the WaterFix Project, and potential
17 changes to environmental compliance requirements for the CVP and SWP, not provided for in
18 the WaterFix Water Right Change Petition Hearing. This information is relevant and necessary
19 to the Hearing and is also required under statute and regulation for Change Petitions.” *Id.*
20 PCFFA’s Affidavit makes clear that Reclamation is considering alterations to long term
21 operations of the CVP “with and without new or proposed facilities.” *Id.* ¶ 14.

22 The baseline biological information that CDFW possesses regarding existing operations
23 is necessary to examine how the WaterFix Project will impact fish and wildlife, and to determine
24 what measures should be “taken for the protection of fish and wildlife” in connection with the
25 Change Petition. Water Code § 1701.2(c). Thus, PCFFA’s request is likely to lead to
26 discoverable evidence, both relevant and necessary to the Hearing. Gov’t. Code § 11513(c)
27 (relevant evidence “is the sort of evidence on which responsible persons are accustomed to
28 rely in the conduct of serious affairs”). Because this information is relevant and necessary to

1 this Hearing, CDFW’s claim that this request is “apparently unrelated to the rationale set forth in
2 the affidavit” is mistaken. Motion 4-5. PCFFA’s Affidavit fully supports its request for CDFW’s
3 records pertaining to the SWP’s and CVP’s compliance with CESA and the ESA.

4 **C. CDFW’S RECORDS RELATED TO SWRCB PERMIT TERMS FOR THE SWP
5 AND CVP ARE REASONABLE, NECESSARY AND RELEVANT TO THE
6 EFFICIENT CONDUCT AND DISPOSITION OF THE WATERFIX HEARING**

7 As with CDFW’s records regarding SWP’s and CVP’s compliance with CESA and the
8 ESA, CDFW’s records pertaining to permit terms for the SWP and CVP can establish important
9 baseline data to inform the Hearing Officers and the parties as to measures needed “for the
10 protection of fish and wildlife” (Water Code § 1701.2(c)), and to inform the Hearing Officers’
11 consideration of appropriate Delta flow criteria (Water Code § 85086(c)(2)).

12 The Hearing Officers have ruled that Part 2 of this Hearing will be addressing
13 appropriate Delta flow criteria “as required by the Sacramento-San Joaquin Delta Reform Act of
14 2009.” *E.g.* August 31, 2017, Ruling Letter, p. 12. Communications between CDFW and this
15 Board and its staff regarding permit terms for the SWP and CVP are relevant to the Delta flow
16 criteria because the information sought can inform the Hearing Officers and the parties as to
17 the effectiveness and feasibility of existing and potential permit terms to protect and restore the
18 Delta’s fish and wildlife. Such communications are likely to reveal whether, if existing permit
19 terms are *not* effectively protecting fish and wildlife – as overwhelming evidence now confirms
20 and this Board has repeatedly acknowledged – alterations to these permit terms are necessary
21 and appropriate to provide this required protection.

22 Because this information is relevant and necessary to this Hearing, CDFW’s claim that
23 this request is “apparently unrelated to the rationale set forth in the affidavit” is mistaken.
24 Motion 4-5. Accordingly, CDFW should be ordered to produce these materials.

25 **D. THE REQUEST IS NOT UNDULY BURDENSOME**

26 CDFW claims that “the burden presented by these two particular clauses is significantly
27 high.” Motion 4-5. CDFW alleges that it would “greatly expand the list of staff, programs, and
28 offices with potentially responsive records.” Motion 4. But CDFW fails to provide a sufficient
showing that the burden for these clauses is significantly different than for the other materials

1 that PCFFA’s Subpoena requests, and that CDFW has already acceded to producing. *Id.* To
2 avoid producing these materials, CDFW must show that “the quantum of work required” “clearly
3 outweighs the likelihood of discovering admissible evidence.” *Williams v. Superior Court*,
4 *supra*, 3 Ca.5th 531, 550; *West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407,
5 417; C.C.P. § 2017.020(a). Because the information PCFFA seeks is clearly relevant – indeed,
6 essential – to Part 2 of the Hearing, CDFW has not met its burden, and the documents that
7 PCFFA requests must be provided.

8 **E. A PRIVILEGE LOG IS NECESSARY**

9 CDFW’s production of records is subject to Evidence Code sections 1270 and 1560-
10 1567. The Evidence Code mandates that CDFW provide “an affidavit of the custodian or other
11 qualified witness, stating in substance” that a “true copy of *all* the records described in the
12 subpoena duces tecum” have been delivered to the requestor. Evidence Code § 1561(a),
13 (a)(2) (emphasis added).

14 It necessarily follows that CDFW cannot lawfully produce less than “all” the records
15 described in the Subpoena. But absent a privilege log, were CDFW to withhold records,
16 PCFFA, this Board and the parties would be unable to determine whether CDFW has
17 impermissibly withheld responsive material. Consequently, unless a privilege log is required for
18 any withheld records, PCFFA would be denied its statutory right to enforce its Subpoena to
19 secure “all” of the records to which it is entitled. Therefore CDFW must provide a privilege log
20 for any withheld records.

21 **F. CDFW HAS FAILED TO MEET AND CONFER**

22 CDFW did not contact PCFFA to make an informal attempt to resolve this discovery
23 dispute before filing its Motion, as required by Code of Civil Procedure section 2016.040.
24 CDFW’s failure to attempt to informally resolve this discovery dispute provides additional
25 ground for the Hearing Officers to deny CDFW’s motion.

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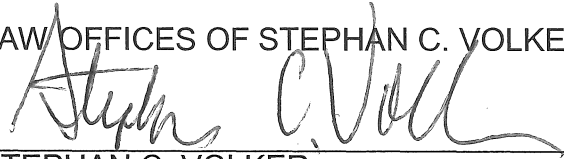
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III. CONCLUSION

For the foregoing reasons, this Board should deny CDFW's Motion and order CDFW to produce "all" of the materials responsive to PCFFA's request along with a privilege log for any materials withheld.

Dated: March 8, 2018

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