Before the
California State Water Resources Control Board

Hearing in the Matter of California Department of Water Resources and United States Bureau of Reclamation Request for a Change in Point of Diversion for California Water Fix

DWR’s Consolidated Response to Motions Based Upon Its March 28, 2018 Letter

The CA Department of Water Resources (DWR) submits this response to motions based upon its March 28, 2018 letter regarding public availability of a project optimization fact sheet and details relevant to the water rights change petition hearing.¹ ²

DWR asserts that the project optimizations reduce the impacts of the California WaterFix upon fish and wildlife. A straightforward reading of the information contained in its submission supports continuation of Part 2 without modification. Because a Part 2

¹ DWR’s consolidated response addresses LAND et al.’s and San Joaquin County et al.’s Motion to Stay or Continue Hearing, CSPA et al.’s Motion to Stay or Continue WaterFix Part 2 Hearing, Clifton Court, L.P.’s April 2, 2018 letter, Deirdre Des Jardins’ Joinder in CSPA et al.’s Motion to Stay or Continue the WaterFix Hearing, Save the California Delta Alliance, et al.’s Motion to Require Petitioner to: 1) Amend the Petition to Reflect ACOE-required Changes; 2) Schedule Part 2 Rebuttal After Issuance of Supplemental Environmental Impact Report Addressing ACOD-required Changes; and 3) Combine Delta Alliance’s Case-in-chief with its Rebuttal Case for Presentation During Rebuttal Phase, and North Delta CARES Action Committee’s April 3, 2018 letter.

² DWR objects to the late filings of PCFFA and IFR joining CSPA et al., LAND et al. and San Joaquin County et al., Restore the Delta joining CSPA et al., LAND et al. and San Joaquin County et al., Snug Harbor Resorts, LLC joining CSPA et al., LAND et al. and San Joaquin County et al., Contra Costa County et al. joining LAND et al. and San Joaquin County et al., and County of Sacramento et al joining LAND et al. and San Joaquin County et al. However, to the extent these filings are merely joiners with timely submitted filings, this response addresses the points raised. DWR reserves the right to respond to any new arguments raised by the late filings.
rebuttal testimony deadline has not been announced, the Hearing Officers can take the project optimizations release into account in scheduling rebuttal testimony. Furthermore, previous rulings state that there remains the option of revisiting specific portions of Part 1 should the Hearing Officers feel that unexplored impacts remain at the end of Part 2.

DWR also asserts that nothing submitted in the opposition filings alter the approach to Part 3. If and when DWR makes a determination to more formally proceed with staged construction, DWR will communicate this at its first opportunity and it is expected the Hearing Officers would then announce if there is a need for a Part 3. That triggering event has not occurred.

The arguments set forth by other parties fall into several categories that are comprised of 1) reasserting claims over the oft-argued petition sufficiency; 2) challenging aspects of CEQA compliance; 3) procedural arguments on timing of future aspects of this hearing; 4) characterization of the April 2, 2018 Metropolitan Water District of Southern California (Metropolitan) message from its General Manager, Mr. Kightlinger, to the Board of Directors and Member Agency Managers; and 5) requests for an immediate determination by the Hearing Officers as to what evidence should be the basis of a decision on the Petition.

Additionally, DWR is responding to Mr. Derringer’s question on March 29, 2018 regarding the degree to which DWR is bound by the project optimizations. This is found in section 6 below.

DWR asserts the following in response to the categories of arguments. 1) Similar arguments over the sufficiency of the petition have been ruled upon multiple times. 2) multiple rulings state that CEQA challenges are not properly within the scope of this hearing. 3) The public disclosure of project optimizations does not alter the appropriateness of the current hearing process. 4) The Metropolitan communication is not, nor does it assert to be, a decision by DWR or the Metropolitan Board on the matter of a staged construction approach to the California WaterFix. Any decision based upon this communication is premature. In addition, conflating this communication with the project
optimizations is inappropriate. 5) Any immediate determination by the Hearing Officers as to what evidence should be the basis of a determination on this Petition is premature. And, 6) DWR cannot determine at this time which components of the project optimizations will be reflected in permit terms and conditions from any of the regulatory processes that govern this project.

1. Claims over Petition Sufficiency Are Repetitive and Should Be Denied

Parties reasserting claims over the oft-argued petition sufficiency are both repetitive, a waste of judicial resources given their frequency, and a mischaracterization of the degree of change contained in the project optimizations. These challenges are a mere repackaging of motions and requests previously made.

The project optimizations are largely proposed to further avoid and minimize potential environmental impacts of the California WaterFix and, as such, do not change the Petition fundamentals of adding three points of diversion at the locations indicated in the Petition, with no other changes requested in the permits.

The project optimizations do not change the modeling submitted for this Petition.

The project optimizations do not change the operational scenario described in Petitioners’ Part 2 testimony.

The supporting information submitted at the time of the previous rulings was found sufficient and puts to rest these repetitive claims as to the sufficiency of the Petition. This hearing was intended to produce additional information, and the Hearing Officers have constructed a hearing process that can accommodate information developed in the course of the case-in-chief. That is the purpose of allowing for rebuttal.

Nothing in the project optimizations alters the prior rulings or the process of the hearing. All of the information contained in the project optimizations falls squarely within the scope of Part 2 rebuttal as defined by the Hearing Officers.

2. CEQA Challenges Are Not Properly Within the Scope of the Hearing

Parties assert that the proposed supplemental environmental impact report does not comply with CEQA. For instance, LAND et al. asserts that there is an absence of a Notice
of Preparation. This is outside the scope of this hearing and should be disregarded based upon prior rulings of the Hearing Officers.

3. Timing of Project Optimizations Do Not Alter the Hearing Process

The timing of the release of project optimizations do not alter the hearing process. The information was disclosed at a time when all parties have an opportunity to assess it without prejudice as to the rebuttal component of Part 2. The information falls entirely within what would be appropriate rebuttal topics for Part 2. There is an established process by which parties can review, evaluate and respond to information disclosed within the cases-in-chief and cross-examination. This process has the capacity to account for new information that is responsive to Part 2 issues and cross-examination during the development of rebuttal based upon the scope of rebuttal previously established by the Hearing Officers. In a prior ruling the Hearing Officers have determined that rebuttal can consist of both Part 2 issues as well as Part 1 issues raised in connection with information that is responsive to Part 2 issues. There are no modifications to the hearing process necessary to accommodate the concerns of the other Parties.

4. It is Premature to Alter the Hearing Based Upon Metropolitan’s Communication

Metropolitan’s communication by its General Manager is not a decision by DWR. It is premature to act upon this communication. Furthermore, Metropolitan’s communication is unrelated to the project optimizations announced by DWR. The California WaterFix remains a two-tunnel three-intake 9,000cfs project. Assertions to the contrary are speculative and not an appropriate basis to alter the Part 2 structure.

The Hearing Officers have previously discussed how a Part 3 would be announced should DWR determine that it would pursue a staged construction approach to California WaterFix.

5. Requests for an Immediate Determination on What Evidence is Supportive of a Future Decision is Premature

Ms. Des Jardins states that the Hearing Officers should establish now the weight
they will give to specific witness testimony. This is premature. Dr. Earle’s testimony, DWR’s maps, and Jeff Michaels’ testimony are before the Hearing Officers and Ms. Des Jardins’ attempt to preclude the consideration of submitted evidence based upon refinements that have not been entered into evidence nor explored through the hearing process is unsurmountable and speculative. The weight of evidence is appropriately considered by the Hearing Officers at the conclusion of the hearing.

6. Determination of the Binding Nature of the Project Optimization is Speculative at this Time

DWR understands that the Hearing Officers and the Hearing Officers’ counsel is looking to gauge the permanence of the project optimizations. At this time there are no permit terms or conditions that DWR can reference that would require incorporation of these changes. There may be additional information DWR can provide on this issue as the other permitting processes progress.

DWR asserts that the project optimizations reduce the impacts of the California WaterFix upon fish and wildlife. A straightforward reading of the information contained in its submission supports continuation of Part 2 without modification. Because a Part 2 rebuttal testimony deadline has not been announced, the Hearing Officers can take the project optimizations release into account in scheduling rebuttal testimony. Furthermore, previous rulings state that there remains the option of revisiting specific portions of Part 1 should the Hearing Officers feel that unexplored impacts remain at the end of Part 2.

DWR also asserts that nothing submitted in the opposition filings alter the approach to Part 3. If and when DWR makes a determination to more formally proceed with staged construction, DWR will communicate this at its first opportunity and it is expected the Hearing Officers would then announce if there is a need for a Part 3. That triggering event has not occurred.

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Dated: April 4, 2018

CALIFORNIA DEPARTMENT OF WATER RESOURCES

Tripp Mizell, Sr. Attorney