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6
7 **BEFORE THE**
8 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

9 HEARING REGARDING PETITION
10 FILED BY THE DEPARTMENT OF
WATER RESOURCES AND U.S. BUREAU
11 OF RECLAMATION REQUESTING
CHANGES IN WATER RIGHTS FOR THE
12 CALIFORNIA WATERFIX PROJECT

MOTION FOR RECONSIDERATION AND
DISMISSAL OF PETITION
OR IN THE ALTERNATIVE, MOTION TO
PUT EX PARTE COMMUNICATIONS IN
THE RECORD AND REOPEN PART 1

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15 **I. INTRODUCTION**

16 Deirdre Des Jardins, Principal at California Water Research (“California Water
17 Research”) hereby moves for reconsideration of the Hearing Officers March 15, 2017 ruling that
18 motions to dismiss will not be considered, and further moves to dismiss the Petition, based on
19 points and authorities argued below. If the Hearing Officers decline to dismiss the petition,
20 California Water Research moves that the Hearing Officers reopen Part 1 of the hearing to
21 address the prejudice created by extensive Ex Parte contacts between the Department of Water
22 Resources and the Hearing team prior to and during Part 1 of the Hearing. In that case,
23 California Water Research moves:

- 24 (1) That the Hearing Officers put Ex Parte communications between the Department of
25 Water Resources and the Hearing team regarding the adequacy of the WaterFix Water

1 Right Change Petition and the modeling for the Petition into evidence, under Govt
2 Code § 11430.50 (a)(1), and allow protestants to comment on the communications, as
3 required under Govt Code 11430.50(a.)

4 (2) That, prior to putting the Ex Parte communications in the record, that the Hearing
5 Officers first stay the hearing to provide a suitable period for discovery of further
6 relevant Ex Parte information, as moved by Save the California Delta Alliance et. al.
7 on January 12, 2018¹, and by County of Sacramento et. al. on Jan 15, 2018²,
8 including deposition of witnesses;

9 (3) That, following official submittal of the Ex Parte communications into the Hearing
10 Record, the Hearing Officers reopen Part 1 of the Hearing record, under Government
11 Code section 11430.50, subdivisions (c)(1) and (c)(2), to allow protestants to submit
12 comments and evidence that the Ex Parte contacts affected the Hearing counsels's
13 advice to the Hearing Officers to

- 14 a. proceed with a change petition that was lacking the information required
15 under statute and regulation
- 16 b. rule against objections to evidence and testimony based on relevance and
17 reliability

21 ¹¹ The January 12, 2018 *Motion to Continue Hearings for 90 Days to Allow Reformation of Waterfix Hearings to*
22 *Conform to the Rule of Law* by Save the California Delta Alliance et. al. and all documents and evidence filed in
23 support thereof, is incorporated as if set forth fully herein. Available at
https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2018/20180112_scda_motion.pdf

24 ² The Jan 15, 2018 *Motion to Stay or Continue Waterfix Part 2 Hearing* by County of Sacramento et. al. and all
25 documents and evidence filed in support thereof, is incorporated as if set forth fully herein. Available at
https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2018/20180115_cosac_motion.pdf

1 c. rule that no further objections before the hearing would be allowed, and the
2 Hearing Team would make all further decisions on admissibility and
3 reliability.;

4 d. rule that no further written objections could be filed.

5 (4) The Hearing Officers provide an opportunity for motions by parties, following receipt
6 of the evidence, including motions for disqualification and motions for
7 reconsideration of hearing rulings.

8 (5) That the Hearing Officers continue Part 2 of the Hearing to allow for reopening of
9 Part 1.

10 California Water Research also requests that the Hearing team counsel, Dana Heinrich, recuse
11 herself from either discussing or advising on these motions, based on a conflict of interest.

12 II. LEGAL ARGUMENT

13 A. MOTION TO DISMISS

14 The Hearing Officers, advised by the Hearing Team counsel, ruled on March 15, 2017 that
15 motions to dismiss would be summarily denied. The ruling stated:
16

17 In the order dismissing the enforcement proceedings against BBID and WSID, the State
18 Water Board expressly stated that it does not generally allow parties to move for
19 judgment during the course of an evidentiary hearing, and discouraged parties in future
20 proceedings from attempting to do so. (Order WR 2016-0015, p. 12.) The issues involved
21 in this proceeding are fundamentally different from the issues involved in the
22 enforcement proceedings against BBID and WSID. Accordingly, we decline to depart
23 from our usual practice of reaching a decision on the merits based on the entire record
24 after all of the parties have presented all of their evidence. Accordingly, any motions to
25 dismiss filed at the conclusion of Part 1 of the hearing will be summarily denied. (See
26 *Erika K. v. Brett D.* (2008) 161 Cal.App.4th 1259, 1271 [trial court has absolute
27 discretion to deny section 631.8 motion for judgment regardless of the state of the
28 evidence].) (underlining added.)

1 The finding of the court in *Erika K. v. Brett D.*, supra, was only with respect to motions for
2 summary judgement under section 631.8 of the Code of Civil Procedure. The ruling did not
3 address situations where the initial pleading was legally insufficient, where the judge allowed the
4 petitioner to repeatedly amend the pleading with testimony during the trial, where facts in the
5 testimony amending the pleading were later found to be misleading and inaccurate, and where
6 there was extensive Ex Parte contact with the judge during the trial that irrevocably tainted the
7 rulings in the case to proceed with a legally insufficient pleading. All of these elements are
8 present in the WaterFix hearing, as argued on points and authorities below.

9 The Hearing team counsel, Dana Heinrich, presumably accepted the petitioners'
10 application for filing based on "substantial compliance" provision of the Board's regulations
11 (Cal. Code Regs, tit. 23, § 675.)

12 Upon receipt, an application will be reviewed for compliance with the
13 requirements of the Water Code and this subchapter. An application will be
14 accepted for filing when it substantially complies with the requirements.
15 Substantial compliance means that the application is made in a good faith
16 attempt to conform to the rules and regulations of the board and to the law,
17 and the information submitted and the form of submission are sufficient in view
18 of the particular circumstances to fulfill the purpose of the requirements.

19 To the extent that the Petitioners knew at the time of filing that the proposed design and
20 operations of the project were subject to change, and have repeatedly failed to make timely
21 disclosure that the project was changing, it does not show a good faith effort to "conform to the
22 rules and regulations of the board and to the law."³

23 As explained below, the Hearing Officers ruled that the petitioners should submit
24 additional information required for the application in Petitioners' case in chief in Part 1A of the
25 hearing, but never formally considered whether the information provided was fully responsive

26 ³ Petitioners could have asked for an extension of time to complete the application under the California Code of
27 Regulations, title 23, section 681, but never did.

1 and complied with the Board’s regulations. The California Code of Regulations, Title 23,
2 section 648, subdivision (b) provides:

3 Failure by an applicant to comply with a written request for information
4 pursuant to subdivision (a) of this section within a reasonable time and in a
5 responsive manner may be cause for the board to cancel or reject the
6 application pursuant to Government Code Section 65956(c) or the State
7 Administrative Manual Permit Guidelines Section 1099, adopted on January 31,
8 1978.

9 To the extent that Petitioners’ case in chief in Part 1 did not contain complete and
10 accurate information required under statute and regulation (Wat. Code § 1701.2, Cal. Code
11 Regs., tit. 23, § 794(a.)), it was wholly prejudicial to bar motions to dismiss the petition, pursuant
12 to Title 23, section 648, subdivision (b), supra. There is a prima facie case that this barring of
13 motions to dismiss was influenced by Ex Parte review and approval of information for the
14 Petitioners’ cases in chief in Part 1 by the Hearing team, as argued below.

15 B. EX PARTE CONTACTS

16 Although the Hearing team has stated that they did not convey information communicated by
17 Petitioners to the Hearing Officers, as advisors to the Hearing Officers, the communications were
18 sufficient to violate common law principals on Ex Parte communications in administrative
19 hearings. Sacramento County et. al argued in their January 15, 2018 *Motion to Stay or Continue*
20 *Waterfix Part 2 Hearing*,

21 The California Supreme Court interprets “presiding officer” as it is used in the APA to
22 mean all decision makers, including “an officer who presides over an evidentiary
23 hearing,” “agency heads and their delegees, whether or not they preside over an
24 evidentiary hearing,” and, significantly, advisors to decision makers. (Department of
25 Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40
26 Cal.4th 1, 9-10 (Quintanar); see also Gov. Code, § 11405.80.) On this point, the Supreme
27 Court explained:

28 The Court of Appeal drew no distinction between communications between
a prosecutor and a final agency decision maker on the one hand, and those
between a prosecutor and the decision maker’s advisor, on the other. Nor

1 do we. Each form of contact equally compromises the protections the
2 APA's adjudicative bill of rights sought to adopt; nothing in the APA
3 contemplates permitting an agency to accomplish through secondhand
4 communications what is forbidden through firsthand communications. (p. 8,
5 citations omitted.) (*Id* at 8:13-9:21.)

6 Save the California Delta Alliance et. al. also asserted in their December 28, 2017 *Letter to*
7 *Michael Lauffer Dated December 28, 2017*⁴ that the Canon of Judicial Conduct (Canon 3(B)(7))
8 applies to actions by the Hearing team counsel and Hearing Officers in proceedings before the
9 State Water Resources Control Board. California Water Research notes that the Board never
10 adopted Chapter 16 of the APA act on the Administrative Adjudication Code of Ethics (Govt.
11 Code § 11475 et. seq.) The Board's 2002 resolution to exempt adjudicatory proceedings before
12 the Board from Chapter 16 of the APA stated⁵,

13 Experience with Article 16 has indicated that the majority of its provisions are
14 duplicative of existing law in the APA and the Political Reform Act (Gov. Code § 81000
15 et seq.), and that the remaining provisions are unduly vague or not conducive to the
16 efficient performance of the duties of presiding officers. (*Id* at p. 2.)

17 However, the April 25, 2013 *Ex Parte Communications Questions and Answers*
18 *Document* by Michael Lauffer, the Chief Counsel for the State Water Resources Control Board⁶
19 clearly recognizes that the Board performs a judicial function in adjudicatory proceedings:

20 Ex parte communications rules reflect the water boards' hybrid powers. Unlike the
21 Legislature, the water boards have attributes of both legislative power and judicial power.
22 The ex parte communications prohibition arises when the water boards are exercising

23 ⁴ Save the California Delta Alliance's December 28, 2017 *Letter to Michael Lauffer* is and all documents and
24 evidence filed in support thereof, is incorporated as if set forth fully herein. Available at
25 https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2017/20171228_SCDA_PRA.pdf

26 ⁵ The Board's 2002 *Resolution Adopting Amended Regulation Governing Adjudicative Proceedings* is available at
27 https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2002/rs2002-0166.pdf. Requested for
28 admission by reference.

⁶ Included as an attachment in Save the California Delta Alliances' December 28, 2017 *Letter to Michael Lauffer*

1 their judicial power. Rules and due process preclude judges from receiving ex parte
2 communications on matters pending before them or inferior courts. (p. 18.)

3 As Lauffer’s April 25, 2013 memo recognized, the Board cannot, as a matter of law,
4 exempt its adjudicatory procedures from the common law principles of judicial ethics. Save the
5 California Delta Alliance’s January 12, 2018 motion cited an appellate court ruling regarding
6 “violation of the ‘common law ... of legal ethics.’”, (STCDA motion , p. 3 at 15-20, citing
7 *Mathew Zaheri Corporation v. New Motor Vehicle Board* (1997) 55 Cal. App. 4th 1305, 1315–
8 1317) and also regarding bias (STCDA, p. 3 at 10-14, citing *Mathew Zaheri*, supra, at 1315.)

9 Having not adopted Chapter 16 of the APA act, the common law principles embodied in
10 the Canon of Judicial Ethics apply, as does the interpretation of the prohibition on Ex Parte
11 Communications in the Board’s October 30, 2015 Hearing Notice, and in Lauffer’s memo.

12 In conclusion, common law rules on judicial ethics, as embodied by the Canon of
13 Judicial ethics and the Chief Counsel’s memo on Ex Parte communications, apply to both the
14 Hearing Officers and the Hearing team in Board proceedings.

15 C. EX PARTE COMMUNICATIONS, BIAS, AND DISQUALIFICATION

16 As argued below, there is prima facie evidence that the substantial Ex Parte communications
17 between the Petitioners and the Hearing team counsel influenced the Hearing team counsel’s
18 advice to the Hearing Officers on a series of rulings that were extremely prejudicial to
19 protestants. Instead of reconsidering the decisions, the rulings doubled down, barring motions to
20 dismiss and the submittal of evidentiary objections.

21 For this situation to arise shows unacceptable bias and poor judgement. Government
22 Code section 11425.40 provides that “[t]he presiding officer is subject to disqualification for
23 bias, prejudice, or interest in the proceeding.” In *State Water Resources Control Bd. Cases*
24 (2006) 136 Cal.App.4th 674, the court held that “[t]he contention that a fair hearing requires a
25 neutral and unbiased decision maker is a fundamental component of a fair adjudication....” (*Id.*

1 at 840, quoting Breakzone Billiards v. City of Torrance (2000) 81 Cal.App.4th 1205, 1234.) As
2 argued by Sacramento County et. al., and quoted below, the California Supreme Court interprets
3 “presiding officer” as it is used in the APA to include advisors to decision makers.

4 If the Petition is not dismissed, the Ex Parte communications must be put into the
5 Hearing Record, as required under Government Code section 11430.50, and the Hearing parties
6 must have the chance to comment and submit evidence, and move for disqualification of the
7 Hearing team counsel and/or reconsideration of the rulings.

8
9 **III. RULINGS ON ADEQUACY OF PETITION**

10 The Board’s standard application form was attached to the WaterFix Water Right Change
11 Petition and signed by the Petitioners’ agents (Exhibit SWRCB-1, p. 9.) The Board’s standard
12 Petition application form requires the following:

13 **DESCRIPTION OF PROPOSED CHANGES OR WORK REMAINING TO BE**
14 **COMPLETED** For a petition for change, provide a description of the proposed changes
15 to your project including, but not limited to, type of construction activity, structures
16 existing or to be built, area to be graded or excavated, increase in water diversion and use
17 (up to the amount authorized by the permit), changes in land use, and project operational
18 changes, including changes in how the water will be used. (Exhibit SWRCB-1, p. 6.)

19 This information is required by statute (Wat. Code § 1701.2) and regulation (Tit. 23 Cal.
20 Code Regs § 794.) The response by the Petitioners’ agents referred to Alternative 4A in the
21 WaterFix Partially Recirculated Draft EIR/EIS in the response to this form, stating in part:

22 Alternative 4A includes the construction of three fish-screened intakes on the east bank
23 of the Sacramento River between Clarksburg and Courtland, each with a capacity of
24 3,000 cfs. [...] Specific discussions of the components of Alternative 4A most relevant to
25 the attached water rights change petition can be found within the Partially Recirculated
26 Draft EIR / Supplemental Draft EIS at sections 1.1; 1.1.4; 4.1; 4.1.2.2; 4.1.2.3; 4.1.2.4;
27 4.3.7; 4.3.8; 11.1.5.2; Appendix A; Appendix 3B (Exhibit SWRCB-1, p. 6.)

1 Multiple protestants moved to dismiss the petition, based on the contention that (1) the
2 project description in the Partially Recirculated Draft EIR / Supplemental Draft EIS was subject
3 to change, and (2) the RDEIR/SDEIS did not provide the detailed information required under
4 statute and regulation (Wat. Code § 1701.2, Cal. Code Regs., tit. 23, § 794(a.))

5 The Hearing Officers' February 11, 2016 ruling⁷ simply cited the Petitioner's assertion
6 that the information required under section 794 was in the RDEIR/SDEIS:

7 California Code of Regulations, title 23, section 794 contains a detailed list of
8 information that must be provided in a change petition, including effects on other known
9 users of water, and any quantified changes in water quality, quantity, timing of diversion
10 and use, reduction in return flows and other pertinent information. The petitioners'
11 change petition specifies that this information is contained in the CEQA/NEPA
12 documents. (*Id* at p. 5.)

13 The Hearing Officers' February 11, 2016 hearing ruling also referred to modeling of operational
14 scenarios not referenced or submitted with the petition application, that petitioners proposed as
15 supporting the petition:

16 Further, petitioners submitted a post-pre-hearing conference letter stating that additional
17 CALSIM and DSM2 hydrologic and water quality modeling data prepared for the
18 biological assessment for the WaterFix ESA processes are available upon request.
19 (*Id* at p. 6.)

20 And further ruled,

21 The petitioners' cases in chief must, to the extent possible, contain the information
22 required by section 794 of our regulations in a succinct and easily identifiable format.
23 (*Id* at p. 7.)

24 The Hearing Officers thus accepted the petitioners' proposed reliance on modeling of
25 operational scenarios, external to the petition application, to provide information on "quantified
26 changes in water quality, quantity, timing of diversion and use, reduction in return flows and
27

28 ⁷ Available at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/021116phc_ruling.pdf

1 other pertinent information.” This reliance on modeling, not specified in the petition
2 application, for information required to be *in the petition at time of filing* (Cal Code Regs tit. 23 §
3 794(d)) has allowed the Petitioners to repeatedly change the proposed operations of the WaterFix
4 project during the course of the WaterFix hearing, and to knowingly submit evidence and
5 testimony on proposed operations that were obsolete and/or speculative, forcing protestants to
6 collective spend millions of dollars analyzing and responding to evidence and testimony that was
7 obsolete and speculative. This is an abuse of computer modeling. As testified by Deirdre Des
8 Jardins in Part 1B, engineering standards require validation before use of computer models,
9 including use as evidence. Validation of operational simulations includes confirming that the
10 operations being simulated are a valid representation of the operations.

11 The petition application and supporting information required under statute and regulation, is
12 also sworn document (Cal Code Regs tit. 23 § 711), similar to a pleading in a civil court, and to
13 repeatedly and knowingly amend it with obsolete or speculative information is an abuse of
14 process. As described below, Petitioners proposed different operations before the hearing, on
15 submission of Petitioners’ case in chief in Part 1, and on submission of the Petitioners’ case in
16 chief in Part 2, and concealed discussions of these changes from the Hearing parties. The
17 proposed operations for Part 2 have been changed far beyond what could be called
18 “clarifications” of the H3-H4 operational range in the petition application, as explained in the Jan
19 26, 2018 motion to Continue by the City of Antioch.⁸ Friends of the River et. al. also cited the
20 change in project description in comments on the Part 2 pre-hearing conference⁹:

22 ⁸ California Water Research hereby incorporates the January 26, 2018 Motion to Continue -- Motion for
23 Continuance of Phase 2 and Reconsideration of Reopening of Part 1 by the City of Antioch, as if set forth fully
24 herein. Available at
https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2018/20180126_antioch.pdf

25 ⁹ California Water Research hereby incorporates the September 21, 2017 pre-hearing comments of Friends of the
26 River et. al. as if set forth fully herein. Available at

1 Other significant changes in the project and circumstances include the September 19, 2017,
2 reported decisions by the Westlands Water District and Los Angeles to not participate in the
3 Water Fix Project. [...] As either a lead or responsible agency, the State Water Board needs
4 to consider requiring a subsequent EIR under CEQA, Public Resources Code § 21166(a), (b),
5 and (c), because substantial changes are proposed in the project, substantial changes occur
with respect to the circumstances under which the project is being undertaken, and new
information has become available. Accord, 14 Code Cal. Regs (CEQA Guidelines) § §
15162; 15096(e)(3). (p. 2)

6 Since the preferred alternative in the RDEIR/SDEIS is clearly the description of the project
7 in the petition application, and was recognized as such in the February 11, 2016 pre-hearing
8 conference ruling, the petitioners are now proposing a different project. The petition must be
9 dismissed, and a new petition must be submitted with true, correct, and complete project
10 information.

11 California Water Research submitted the September 20, 2017 announcement of the decision
12 by the Board of Westlands Water District to not participate in the project for Official Notice on
13 September 27, 2017¹⁰, but no action was taken on the submission. The City of Antioch also cited
14 prima facie evidence that the Department of Water Resources is changing the project to a phased
15 implementation, that was simply not analyzed in the RDEIR/SDEIS that was submitted as a
16 description of the project in the petition application.¹¹ A phased project implementation would
17 substantially change the Early Long Term operations submitted for Part 2, as well as the Early
18

19 https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2017/20170921_fotr_pt2phctopic.pdf

21 ¹⁰ California Water Research's Request for Official Notice: WWD statement on the California WaterFix, and the
22 attached official statement by Westlands Water District are hereby incorporated as if set forth in full herein.

23 Available at
https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2017/20170927_ddj_request.pdf and at
https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2017/20170927_ddj_wwd.pdf

25 ¹¹ January 26, 2018 Motion to Continue -- Motion for Continuance of Phase 2 and Reconsideration of Reopening of
26 Part 1 by the City of Antioch, p. 2.

1 Long Term proposed engineering design submitted in Part 1. Since the WaterFix preferred
2 project operations under Late Long Term levels of sea level rise were not analyzed in the
3 RDEIR/SDEIS, there is simply no appropriate analysis for any time period. Clearly the errors
4 here are cumulative, and egregious. The question then is why the Hearing Officers and Hearing
5 Team counsel have allowed them to accumulate.

6 Documents obtained under a Public Records Act request by Patrick Porgans (“PRA
7 documents”) show that there were substantial Ex Parte contacts with the Hearing Team on the
8 adequacy of the Petition. DWR’s counsel, employees, and contractors had Ex Parte meetings
9 with the Hearing Team counsel, Dana Heinrich, and other members of the Hearing Team on
10 September 15, 2015, and October 28, 2015, to discuss the adequacy of the petition, and on
11 January 25, 2015 to discuss the WaterFix Final EIR/EIS. To the extent that these Ex Parte
12 contacts have influenced the Hearing Team to advise the Hearing Officers to repeatedly proceed
13 with the hearing, without resolving issues of obsolete, speculative, or inaccurate project
14 information, they have been wholly prejudicial to protestants.

15 IV. MODELING SHELL GAME

16 A. PRE-HEARING

17
18 The Sacramento Valley Water Users sent a letter to the Petitioners on February 17, 2016,
19 requesting information on the “fundamental hydrologic modeling for California WaterFix” and
20 stating that “confirmation and production” of information on proposed operations was
21 “necessary to afford Protestants with a full and fair opportunity to prepare for and participate in
22
23
24
25

1 the Hearing.” (p. 2.)¹² California Water Research also sent a letter to the Hearing Officers on
2 February 4, 2016 which stated in part¹³:

3 Without this modelling evidence, the Petition is incomplete. As a result of the Petitioners’
4 failure to include the substantiating information in its Petition, or to adequately notice its
5 availability and disseminate it to interested parties, the Petition should not proceed to
6 hearing until it is provided. (23 Cal. Code Regs., § 794 subd. (g); see also Wat. Code, §
7 1703.6, subd. (a) (requiring cancellation of petition in this circumstance).) (p. 3.)

8 The Hearing Officers March 4, 2016 Hearing ruling required that petitioners respond to
9 the letters within 7 days (p. 11.)¹⁴ On March 11, 2016, the Petitioners responded, providing the
10 table on the following page (p. 3), and stating, “As noted in Table 1 above, the modeling
11 conducted for the BA is the basis of the information that will be used in the case-in-chief in the
12 Hearing process” (p. 8.)¹⁵ The letter was cc:ed to Tom Howard, the Executive Director of the
13 State Water Resources Control Board, and Michael Lauffer, Chief Counsel for the State Water
14 Resources Control Board (p. 8), indicating that the proposal to use the BA modeling for DWR’s
15 case in chief was submitted for approval by the Executive Director and Chief Counsel.
16 However, PRA documents indicate that the Department of Water Resources began secret

17 ¹² The Sacramento Valley Water Users’ February 17, 2016 letter to the Petitioners is hereby incorporated as if set
18 forth in full herein. Available at
https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/20160217_svwu.pdf

19 ¹³ California Water Research’s February 17, 2016 letter to the Petitioners is hereby incorporated as if set forth in full
20 herein. Available at
https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/comments/docs/c_omltr_phc_deidredes.pdf

21 ¹⁴ The Hearing Officers’ March 4, 2016 ruling is hereby incorporated as if set forth in full herein. Available at
22 https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/cwf_final_030416_ruling.pdf

23 ¹⁵ The Petitioners’ March 11, 2016 Written Response to March 4 Requirement to Address Information Requests
24 from California Water Research and Sacramento Valley Water Users is hereby incorporated as if set forth in full
25 herein. Available at
https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20160311_pet_response.pdf

1 meetings with the WaterFix Hearing Team to change the proposed operations and associated
 2 modeling less than a month after providing this response. The implication that the Executive
 3 Director and Chief Counsel were reviewing and approving the modeling, rather than the Hearing
 4 Team, was fundamentally misleading and deceptive.

	Recirculated DEIR/SDEIS	Final EIR/EIS	CWF Biological Assessment for ESA Section 7	Change Petition
No Action Alternative	No Action Alternative at Early Long Term (ELT)	No Action Alternative at ELT with Fremont Weir updates	No Action Alternative at ELT revised per ESA requirements	Same as Biological Assessment (BA)
Alternative 4A	Modeled as a range between Alternative 4 H3 and H4 operations at ELT	Alternative 4A H3+ operations at ELT	Alternative 4A H3+ operations at ELT	Same as BA
CALSIM Version	2010	2010	2015	2015
Date Data Available	November 2011 (model runs developed for administrative record)	February 2016	February 2016	February 2016

17 PRA documents show a mention that the Hearing Team counsel was contacted by Ken
 18 Bogdan, an attorney for the Department of Water Resources, and the Hearing Team counsel
 19 relayed that DWR had additional modeling for the Board. The PRA documents show there was
 20 correspondence between the Hearing Team and Mr. Bogdan, and a web conference on April 21,
 21 2016 about the new modeling. A different set of modeling was reviewed and approved by the
 22 Hearing Team in the Ex Parte meetings. The Hearing Officers ruled on April 25, 2016 that
 23 DWR could submit additional modeling, but without disclosing the Ex Parte review and
 24 approval.¹⁶ In the April 25, 2016 Hearing Ruling, the Board ruled,

25 ¹⁶ The Hearing Officers April 25, 2016 Hearing ruling is hereby incorporated as if set forth in full herein. Available
 26 at

1 Consistent with the proposal in their letter requesting a continuance, petitioners are
2 directed to submit to the State Water Board by May 15, 2016, a status report on
3 settlement discussions, potential proposed permit conditions, and any other additional
4 modeling in support of the WaterFix EIR/EIS project description. (p. 2.)

5 However, the Petitioners' March 28, 2016 letter requesting a continuance had not
6 mentioned the need to submit additional modeling in support of the WaterFix EIR/EIS project
7 description, but referred only to settlements.¹⁷

8 On May 25, 2016, the Petitioners submitted different operational scenarios for the Hearing than
9 in the Biological Assessment modeling. The new operating scenarios were not actual proposed
10 operations, but only a "Boundary analysis." As Jennifer Pierre testified for the petitioners:

11 The initial operating criteria anticipated to be required for the proposed project
12 for ESA and CESA permitting purposes, and which are presented in the
13 RDEIR/SDEIS, Chapter 4, with Alternative 4A (the proposed project) as a
14 range between Operating Scenario H3 and Scenario H4.
15 (Exhibit DWR-51, at 10:22-11:5.)

16 Ms. Pierre continued:

17 [s]ince the BiOp has not been issued and DWR and Reclamation do not know the initial
18 operational criteria, the analytical framework presented for Part 1 is a boundary analysis."
19 (Exhibit DWR-51, at p. 11.)

20 PRA documents show that the Hearing team had a meeting with the petitioners on May 26, the
21 day after the modeling was submitted.

22 There is thus a prima facie case that DWR's Ex Parte meetings with the Hearing team to
23 review and approve the modeling affected the Hearing officers' April 25, 2016 ruling on a

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25 https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20160425_cwf_ruling.pdf

26 ¹⁷ The Petitioners' March 28, 2016 letter is hereby incorporated as if set forth in full herein. Available at
27 https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20160425_cwf_ruling.pdf

1 renewed motion to dismiss the petition, due to an unstable project description.¹⁸ The Hearing
2 Officers ruled,

3 The request to dismiss the petition is denied. [...] Rather than supplement the petition, the
4 petitioners are expected to provide more information concerning project operations and
5 potential effects on legal users of water during the petitioners' case in chief. (*Id* at p. 3.)

6 And also ruled,

7 issues concerning the modeling conducted for the WaterFix can be addressed during the
8 hearing, and do not need to be resolved before the hearing can proceed. (*Id* at p. 4.)

9 The Hearing Officers later barred filing of motions to dismiss at the close of Part 1, as discussed
10 in Part I of this motion. These rulings have been profoundly prejudicial for protestants.

11 C. OBSOLETE OPERATIONS SUBMITTED FOR PART 2

12 There is also prima evidence that the Early Long Term modeled operations submitted for Part
13 2 are now obsolete or subject to change. Westlands Water District voted on September 19, 2017
14 not to fund the WaterFix project. (Record submitted for official notice by California Water
15 Research on September 27, 2017.) The Department of Water Resources published a Request for
16 Qualifications document for the project, which states in part,

17 DWR is in the process of evaluating different ways of implementing the CWF including
18 possible construction in stages, with the first stage consisting of two North Delta intakes
19 instead of three, and one main tunnel instead of two. The second stage of construction
20 would complete the facilities as approved at a subsequent time. (p. 1.)

21 Reclamation has also not officially adopted the project in WaterFix Final EIR/EIS. The
22 Petitioners are thus still proceeding with a petition application containing obsolete, misleading,
23 incomplete, and/or inaccurate information. The Hearing Officers ruled on November 8, 2017,
24

25 ¹⁸ The April 3, 2016 renewed motion to dismiss the petition by Planning and Conservation League et. al., is hereby
26 incorporated as if set forth in full herein. Available at

1 that “petitioners have not proposed to alter the physical parameters of the project or proposed
2 any changes to operating criteria that cannot be addressed in Part 2 of the hearing.” (p. 1.)¹⁹

3 If the hearing proceeds through the final phase and conclusion, based on Petitioners’ testimony
4 about their CEQA document, and the Notice Of Determination by the Department of Water
5 Resources, it will be of fatal prejudice to protestants.

6 V. EX PARTE COMMUNICATIONS AND OBJECTIONS ON RELEVANCE

7 A. Objections

8
9 Objections to the relevance of the modeling to Petitioners’ actual proposed project were
10 also raised by protestants, prior to the Hearing. Protestant’s objections cited in part the ruling in
11 *Seering v. Department of Social Services* (1987) 194 Cal.App.3d 298 that Kelly-Frye standards
12 apply to administrative hearings. *People v. Kelly*, 17 Cal. 3d 24 (Cal.1976) requires that the
13 following be established for evidence to be admissible:

- 14 (i) expert must establish reliability of the method,
15 (ii) witness must be qualified as an expert
16 (iii) witness’s testimony must be “relevant,” and
17 (iv) witness must demonstrate use of proper scientific procedures.
(underlining added.)

18 There are similar requirements in the 2012 Supreme Court decision in *Sargon Enterprises, Inc. v.*
University of Southern Cal. (2012) 55 Cal.4th 747,770 which stated:

19 We construe this to mean that the matter relied on must provide a reasonable basis for the
20 particular opinion offered, and that an expert opinion based on speculation or conjecture
21 is inadmissible. (*Id* at 770, citing *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558,
564)

24 ¹⁹ The Hearing Officers’ November 8, 2017 Hearing ruling is hereby incorporated as if set forth in full herein.
Available at
25 [https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/ruling_notices/do](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/ruling_notices/docs/20171108_cwf_ruling.pdf)
26 [cs/20171108_cwf_ruling.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/ruling_notices/docs/20171108_cwf_ruling.pdf)

1 Protestants also cited *Sargon*, supra, and *Lockheed*, supra in objections to the
2 admissibility of the Petitioners' modeling evidence. Protestants submitted exhibits by the
3 extended deadline set by the Hearing Officers ruled that pre-hearing objections were due on July
4 12, 2016 at 12:00 pm.

5 B. EX PARTE CONTACTS

6 Documents obtained under Public Records Act requests by Patrick Porgans show that
7 at 1:00 pm and 1:11 pm DWR counsel and DWR's DHCCP environmental lead sent these two
8 messages to the Hearing team counsel and Hearing team expert:
9

10 From: Bogdan, Kenneth M.@DWR
11 Sent: Tuesday, July 12, 2016 1:11 PM
12 To: Heinrich, Dana@Waterboards

13 Subject: FW: Hi Diane, I sent you an invite for an App 5E follow-up meeting based on
14 availability from Kyle.

15 Hi Dana - I think it is critical that Diane be at this meeting - anything you can do to help
16 get her there would be appreciated. We are at the final stages in preparing the Final EIR
17 and this is the last substantive issue that needs to be completed .

18 Thanks!

19 From: Yee, Marcus@DWR
20 Sent: Tuesday, July 12, 2016 1:00 PM
21 To: Riddle, Diane@Waterboards
22 Cc: Bogdan, Kenneth M.@DWR

23 Subject: Hi Diane, I sent you an invite for an App 5E follow-up meeting based on
24 availability from Kyle.

25 Hopefully, the time will work for you.
26 -marcus

27 DWR's website shows that Marcus Yee is the Environmental Scientist and DHCCP lead,
28 DWR Division of Environmental Services, and Kenneth Bogdan is with DWR's Office of Chief
counsel.

To the extent there was extensive Ex Parte contacts between the Hearing Team and
employees of the the Department of Water Resources, to review and approve the modeling for

1 the WaterFix hearing, it was predecisional on the issues of relevance and admissibility. To the
2 extent these Ex Parte contacts were concealed from discovery by DWR, it fundamentally
3 compromised the Hearing process. The Board's July 22, 2016 ruling on objections raised by the
4 protestants stated²⁰,

5 We recognize that petitioners bear the burden of establishing that the proposed changes
6 will not injure other legal users of water. As we stated in our February ruling, however,
7 not all uncertainties can or need to be resolved before beginning the hearing. In fact, the
8 purpose of this hearing is to resolve some of the issues concerning how the proposed
9 project would be operated.

10 At this point, any remaining uncertainty concerning the proposed project and its
11 effects should be raised in the hearing process, including but not limited to cross-
12 examination, and the protestants' cases in chief. (*Id* at p. 2.)

13 This ruling was simply contrary to requirements in *People v. Kelly*, supra that scientific
14 evidence to be relevant to be admissible and in *Sargon Enterprises, Inc. v. University of Southern*
15 *Cal.* and *Lockheed Litigation Cases* that evidence based on factors which are speculative or
16 conjectural is inadmissible.

17 C. RULING THAT HEARING TEAM WOULD DECIDE RELIABILITY

18 The Hearing Officers also ruled that DWR's CALSIM II hydrologic modeling of
19 speculative and obsolete operations for Part 1 was admissible on February 21, 2017. The
20 Hearing Officers did not make any findings on the requirements in *People v. Kelly*, supra that
21 evidence be relevant. The February 21, 2017 ruling simply stated that Kelly-Frye was not
22 applicable to Board hearings, referring in part to the advice of the Hearing Team²¹:

23 ²⁰ The Hearing Officers July 22, 2016 Hearing ruling is hereby incorporated as if set forth in full herein. Available
24 at
25 https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20160722_cwf_ruling.pdf

26 ²¹ The Hearing Officers February 21, 2017 Hearing ruling is hereby incorporated as if set forth in full herein.
27 Available at
28 https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/ruling_notices/docs/20170221_cwf_ruling.pdf

1 *Seering* is distinguishable from this case because that case involved an administrative
2 proceeding before an ALJ, who may not have had any scientific background. [...] the
3 hearing officers are assisted and advised in every adjudicative proceeding by a team
4 comprised of professional attorneys, engineers, and scientists with the expertise necessary
5 to evaluate whatever scientific information is presented in the proceeding. (*Id* at p. 8.)

6 Although State Water Board staff did not create CalSim II or DSM2, staff have an in-
7 depth knowledge of the models, having used the models themselves for purposes of water
8 quality control planning and implementation in the Delta. (*Id* at p. 8.)

9 State Water Board staff and the Board Members have developed a solid understanding of
10 both the utility and the limitations of models such as CalSim II and DSM2. [...] For this
11 reason, application of the *Kelly* rule in this proceeding to petitioners' testimony based on
12 modeling results is unnecessary to ensure that the modeling evidence is afforded the
13 proper weight. (*Id* at p. 9.)

14 This ruling to admit the CALSIM hydrologic modeling of speculative and obsolete
15 operations and the evidence and testimony that relied on it did not address the objections based
16 on *Sargon Enterprises, Inc. v. University of Southern Cal. supra* or *Lockheed Litigation Cases,*
17 *supra*. These cases require that scientific evidence that is based on factors that are speculative or
18 conjectural, is not admissible.

19 The Hearing Officers also barred all further objections based on Kelly-Frye standards in
20 their ruling of March 15, 2017²², stating:

21 Objections Based on the Kelly Rule. The Kelly rule does not apply. Accordingly, expert
22 testimony based on a new scientific technique does not require a showing that the
23 technique has been generally accepted in the relevant scientific community. (*Id* at p. 3.)

24 The March 15, 2017 Hearing ruling also barred the filing of any objections before the rebuttal,
25 stating that

26 ²² The Hearing Officers' March 15, 2017 Hearing ruling is hereby incorporated as if set forth in full herein.
27 Available at
28 [https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/ruling_notices/do
cs/20170315_cwf_ruling.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/ruling_notices/docs/20170315_cwf_ruling.pdf)

1 First, the parties should not make any objections to the admissibility of rebuttal testimony
2 [... before the hearing resumes for presentation of rebuttal. We will review the written
3 testimony carefully before the hearing resumes to ensure that the testimony is relevant,
4 within the scope of rebuttal, and sufficiently reliable to be admissible. (*Id* at p. 2.)

5 As California Water Research argued on November 6, 2017²³

6 The cumulative effect of these rulings is an unreasonable burden on protestants to
7 respond to testimony and evidence based on “operating scenarios,” which can never rise
8 to the level of substantial evidence. In (*Pacific Gas*, 189 Cal. App. 3d at 1135), the court
9 held:

10 The value of opinion evidence rests not in the conclusion reached but in the
11 factors considered and the reasoning employed. [citations omitted] Where an
12 expert bases his conclusion upon assumptions which are not supported by the
13 record, upon matters which are not reasonably relied upon by other experts, or
14 upon factors which are speculative, remote or conjectural, then his conclusion has
15 no evidentiary value. [citations omitted] In those circumstances the expert's
16 opinion cannot rise to the dignity of substantial evidence. [citations omitted.]
17 (*Id* at p. 5, underlining added.)

18 The November 8, 2018 Hearing ruling then barred the filing of any written evidentiary
19 objections before or during Part 2 of the Water Fix hearing, stating:

20 We have directed the parties not to file evidentiary objections to the admissibility of
21 testimony before the hearing resumes for presentation of Part 2 cases-in-chief. We further
22 direct that all objections to the admissibility of evidence be made orally during the
23 hearing before or at the time the evidence is offered into the record. We may allow the
24 submission of written motions at the request of the moving party if we determine that a
25 written motion would assist us in ruling on the issue. If a written motion is permitted,
26 written responses will also be allowed. (p. 3.)

27 For the Hearing Officers to overrule evidentiary objections based on standards for
28 admissibility of scientific evidence is one thing, but to bar their submission for the Hearing
record is another, and raises significant issues of bias. The right to a fair hearing procedure

²³ California Water Research’s November 6, 2017 letter to the Hearing Officers, *Re: Statutory and regulatory requirements for Change Petition still not met*, is hereby incorporated as if set forth in full herein. Available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2017/20171106_ddj_motion.pdf

1 includes the right to impartial adjudicators. (*Applebaum v. Board of Directors* (1980) 104 Cal.
2 App. 3d 648, 658 [163 Cal. Rptr. 831].)

3 VI. CONCLUSION

4 To the extent that the Hearing counsel, who approved the modeling for the Board,
5 advised the Hearing Officers on this series of prejudicial rulings, it is a fundamental violation of
6 the right to a fair trial under Government Code section 1094.5. To the extent the Hearing Team,
7 who approved the modeling for the Board in Ex Parte meetings with the Department of Water
8 Resources, not only gave advice on its admissibility, but will be also be giving advice on the
9 weight to give the modeling for the Board's final ruling, it is a violation of the right under
10 Government Code section 11425.10, subdivision (4) to have a separation of adjudicatory and
11 advocacy functions.

12
13
14 Dated Jan 31, 2018

Respectfully submitted,

15
16 

17
18 Deirdre Des Jardins
19 Principal, California Water Research

1 **STATEMENT OF SERVICE**

2
3 **CALIFORNIA WATERFIX PETITION HEARING**
4 **Department of Water Resources and U.S. Bureau of Reclamation**
5 **(Petitioners)**

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

8 **MOTION FOR RECONSIDERATION AND DISMISSAL OF PETITION**
9 **OR IN THE ALTERNATIVE, MOTION TO PUT EX PARTE COMMUNICATIONS**
10 **IN THE RECORD AND REOPEN PART 1**

11 to be served by Electronic Mail (email) upon the parties listed in the Current Service List
12 for the California Water Fix Petition Hearing, dated January 24, 2018, posted by the
13 State Water Resources Control Board at
14 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

15 *Note: In the event that any emails to any parties on the Current Service List are
16 undeliverable, you must attempt to effectuate service using another method of service, if
17 necessary, and submit another statement of service that describes any changes to the
18 date and method of service for those parties.*

19 I certify that the foregoing is true and correct and that this document was executed on
20 January 31, 2018.

21 

22 Signature:

23 Name: Deirdre Des Jardins

24 Title: Principal, California Water Research

25 Party/Affiliation:

26 Deirdre Des Jardins

27 Address:

145 Beel Dr
Santa Cruz, California 95060

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