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

9 **HEARING IN THE MATTER OF CALIFORNIA**
10 **DEPARTMENT OF WATER RESOURCES**
11 **AND UNITED STATES BUREAU OF**
12 **RECLAMATION REQUEST FOR A CHANGE**
13 **IN POINT OF DIVERSION FOR CALIFORNIA**
14 **WATER FIX**

15 **STATE WATER CONTRACTORS**
16 **CONSOLIDATED OPPOSITION TO**
17 **THE NATURAL RESOURCE**
18 **DEFENSE COUNCIL’S, DEFENDERS**
19 **OF WILDLIFE’S AND THE BAY**
20 **INSTITUTE’S RENEWED MOTION TO**
21 **STAY PART II OF THE HEARING**
22 **DUE TO ANTICIPATED CHANGES IN**
23 **THE PROPOSED PROJECT AND**
24 **JOINDERS THERETO;**

25 **AND SELECT RESPONSES TO**
26 **QUESTIONS FROM THE HEARING**
27 **OFFICERS**

28 State Water Contractors (“SWC”) submits its Consolidated Opposition to Natural Resource Defense Council, Defenders of Wildlife and the Bay Institute Motion (collectively “NRDC”) for Stay of Part II of the Hearing Due to Anticipated Changes in the Proposed Project (“Motion”) and joinders thereto.¹ Additionally, SWC submit answers to certain

¹ Joinders to the Natural Resource Defense Council et al.’s Motion were filed by the following protestants: County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority; Local Agencies of the North Delta; Bogle Vineyards / Delta Watershed Landowner Coalition, Diablo Vineyards and Brad Lange / Delta Watershed landowner Coalition, Stillwater Orchards / Delta Watershed Landowner Coalition; Restore the Delta; City of Antioch; California Water Research; California Sportfishing Protection Alliance, California Water Impact Network, and AquaAlliance; North Delta Cares; Carter Mutual Water Company, El Dorado Irrigation District, El Dorado Water and Power Authority, Howald Farms Inc., Maxwell Irrigation District, Natomas Central Mutual Water Company, Meridian Farms Water Company, Oji Brothers Farm Inc., Oji Family Partnership, Pelger Mutual Water Company,

1 questions posed by the Hearing Officers in their email of February 8, 2018.

2 **I. INTRODUCTION**

3 Protestants continue to request that the Board apply a different standard to this
4 change petition that is not legally required. The facts and the law do not support the
5 Motion. The hearing notice identified the Part 2 hearing issues and they are limited to : will
6 the changes proposed in the petition unreasonably affect fish and wildlife or recreational
7 uses of water, or other public trust resources; will the proposed changes in points of
8 diversion alter water flows in a manner that unreasonably affects fish, wildlife, or
9 recreational uses of water; will the proposed changes in points of diversion alter water
10 quality in a manner that unreasonably affects fish, wildlife, or recreational uses of water; if
11 so, what specific conditions, if any, should the State Water Board include in any approval of
12 the Petition to avoid unreasonable effects to fish, wildlife, or recreational uses; what Delta
13 flow criteria are appropriate and should be included in any approval of the petition, taking
14 into consideration the 2010 Delta flow criteria report, competing beneficial uses of water,
15 and the relative responsibility of the Projects and other water right holders for meeting
16 water quality objectives; are the proposed changes requested in the petition in the public
17 interest; what specific conditions, if any, should be included in any approval of the Petition
18 to ensure that the changes are in the public interest? (August 31, 2017 Ruling, pp.12-13.)
19 These issues do not include participation and financing, nor do they include construction
20 timing.

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24 Pleasant-Grove Verona Mutual Water Co., Princetonodora-Glenn Irrigation District;
25 Provident Irrigation District, Reclamation District 108, Sacramento Municipal Utility District,
26 Henry D. Richter et al., River Garden Farms Company, South Sutter Water District, Sutter
27 Extension Water District, Suter Mutual Water Company, Tisdale Irrigation and Drainage
28 Company, Windswept Land and Livestock Company, North Delta Water Agency,
Reclamation District 999, Reclamation District 2060, Reclamation District 2068, Brannan-
Andrus Levee Maintenance District, Reclamation District 407, Reclamation District 2067,
Reclamation District 317, Reclamation District 551, Reclamation District 563, Reclamation
District 150, Reclamation District 2098, Reclamation District 800 (Baron Tract), Tehama-
Colusa Canal Authority; Patrick Porgans; County of Yolo.

1 In the Motion, NRDC asserts a requirement for certainty of participation, financing,
2 construction and permitting before the State Water Resources Control Board (“State Water
3 Board”) can process this petition. This is not a legal requirement as was recognized in
4 previous rulings and is not supported by any legal authority or the State Water Board’s past
5 practices. (August 31, 2017 Ruling.)

6 The Motion and Hearing Officers’ questions arise over concerns raised from a memo
7 sent from DWR Director Karla Nemeth to the public water agencies throughout California
8 that contract for State Water Project (“SWP”) deliveries. This memo did not modify the
9 project or the petition. At this time, DWR continues to pursue the full California WaterFix
10 project as petitioned. DWR is not modifying the project or the petition. DWR provided the
11 memo to inform the public water agencies that there is an option for staged construction.
12 Public water agencies choosing to fund this project need to understand the available
13 construction options so that they may present information to their boards and publicly
14 consider decisions to fund this project.

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16 **A. The Project Noticed and Petitioned Remains the Same**

17 DWR has unequivocally stated that it is not proposing any changes to the petition
18 before the State Water Board. As is often the case with large water projects, the requested
19 permit will cover the whole project but it may be constructed in stages. While DWR has
20 stated that it remains committed to fully implementing the California WaterFix as proposed,
21 they are simply including a potential option to construct the project in stages. This option
22 would allow the Department and local water agencies the flexibility to move forward with
23 construction of the first 6,000 cubic-feet per second (cfs) of California WaterFix, including
24 one tunnel, two intakes, an intermediate forebay, and one pumping station. Additional
25 construction will follow where a third intake, second tunnel, and second pumping station will
26 be built that will complete the project.

1 DWR confirmed to public water agencies participating in California WaterFix that
2 DWR will pursue the project as planned. (February 7, 2018 memorandum.) Most recently,
3 Director Nemeth provided this same confirmation to the Hearing Officers, stating DWR is
4 “not modifying the project or the change requested in our petition.” (Director Nemeth, Part
5 2 Policy Statement.) Indeed, when asked to clarify by Hearing Officer Doduc that DWR is
6 not intending to change the petition before the State Water Board, Director Nemeth stated
7 “that’s correct.” (Rough Transcript February 8, 2018, pg. 12:18-22.) Consistently
8 throughout this proceeding where the issue of project description has arisen, DWR has
9 unequivocally stated that the Petition remains unchanged.

10
11 **B. Part 2 Should Proceed as Planned**

12 The evidence submitted supporting the California WaterFix H3+ scenario in Part 2 is
13 the relevant modeling and analysis for this proceeding, because DWR continues to seek
14 implementation of the full project. DWR has made public modeling runs for a staged
15 construction approach available. If the Hearing Officers find it necessary to expand the
16 water rights hearing to address the concerns of other parties with regard to the construction
17 timeframe the further proceeding should be limited to the narrow issue of whether there are
18 new effects that are solely the result of phased construction. This can be accommodated
19 without disrupting the Part 2 schedule.

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21 **C. NRDC’s Motion is Not Support by Legal Authority**

22 The case law, statutes and regulations cited by NRDC do not support its motion.
23 NRDC further relies on unsubstantiated assumptions regarding future compliance with due
24 diligence requirements.

25 In fact, much of the cited authority is inapplicable to the pending petition for change
26 pursuant to Water Code Sections 1700 et seq. NRDC conflates the requirements for water
27 right permit applications and the requirements for a petition for change to an existing
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1 permitted water right. These erroneous citations include Water Code Sections 1396 and
2 1397 and State Water Board regulations section 687, which are not applicable in this
3 proceeding. (October 30, 2015 Notice, pp. 3, 31.)

4 NRDC argues that DWR has not provided a legally sufficient project description. As
5 the Hearing Officers have repeatedly ruled, most recently in their August 31, 2017 ruling,
6 the project description provided by Petitioners is adequate under the requirements of
7 California Code of Regulations, title 23, section 794, to allow participants to meaningfully
8 participate. In their August 31, 2017 ruling, the Hearing Officers stated that “[n]ot all
9 uncertainties need to be resolved for an adequate project description, and one of the
10 purposes of this proceeding is to hear evidence and argument concerning proposed
11 operating conditions.” Because DWR has not modified its Petition, this ruling directly
12 addresses NRDC’s assertions.

13 Without providing any evidence, NRDC also assumes DWR will not diligently pursue
14 the California WaterFix. As explained by DWR on numerous occasions, it will diligently
15 pursue California WaterFix and fully comply with the Delta Reform Act requirements should
16 this project be permitted. As to the requirements to exercise due diligence, raised by State
17 Water Board regulations 840 and 844, the *California Trout v. State Water Resources*
18 *Control Board* case generally, and State Water Board standard permit term 9, claims based
19 upon these are premature. The conditions are meant to be implemented when a permit
20 has issued, not during the hearing for a change in a water right. It is not logical or
21 appropriate to assume due diligence with respect to project construction before a permit is
22 even issued.

23 Finally, before the hearings officers, Mr. Obegi asserted that the State Water Board
24 lacked the legal authority to grant a change petition for a project that would be constructed
25 in stages, but provided no legal authority or citation for that assertion. (Rough Transcript,
26 February 8, 2108, pg. 15:18-20.) NRDC provided no authority for its statement because
27 the law does not support NRDC’s view. Large water projects that are subject to State
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1 Water Board authority are often implemented in stages. Examples include the 30 plus year
2 implementation of the Central Valley Project, the more recent San Joaquin River
3 Restoration Program, and the capacity increases to the Contra Costa Water District's Los
4 Vaqueros project.²

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6 **D. SWC Proposal for Accommodating Testimony Regarding Evidence for Staged**
7 **Construction**

8 Part 2 should proceed as scheduled since evidence must be provided for potential
9 impacts from the full project. If at a later date the State Water Board finds it necessary to
10 consider additional testimony specifically on the staged construction approach it can be
11 accommodated in Part 2. If the State Water Board finds it necessary, parties should submit
12 evidence limited to whether there are new effects that are solely the result of phased
13 construction. The current hearing process can accommodate this limited additional
14 testimony without undue delay.

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16 **II. SWC'S RESPONSE TO THE STATE WATER BOARD'S QUESTIONS**

17 On February 8th, the State Water Board released its questions that are to be
18 answered by other parties. SWC joins in DWR's responses to questions 3 through 6.

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27 ² The San Joaquin River Restoration Program involves changes to Bureau of Reclamation water
28 rights permits that include petitions for changes in points of diversion and rediversion.

1 **III. Conclusion**

2 For these reasons, SWC respectfully requests that the Hearing Officers deny the
3 pending motions to stay the Part 2 hearings scheduled to commence on Thursday,
4 February 22, 2018.

5 Dated: February 13, 2018

6 STATE WATER CONTRACTORS

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9 Stefanie D. Morris
10 General Counsel

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