

1 DEIRDRE DES JARDINS
2 145 Beel Dr
3 Santa Cruz, California 95060
4 Telephone: (831) 423-6857
5 Cell phone: (831) 566-6320
6 Email: ddj@cah2oresearch.com

7 Principal, California Water Research

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

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

SUPPORT FOR NRDC'S CROSS-
EXAMINATION EXHIBITS TESTING
WATERFIX PROJECT ASSUMPTIONS

16 Deirdre Des Jardins, Principal at California Water Research ("California Water
17 Research"), hereby provides the following arguments in support of NRDC's cross-examination
18 exhibits testing WaterFix project assumptions.

- 19 1. DWR's Lack of Written Commitment to Part 3
- 20 2. Reclamation's Participation Has Clearly Changed
- 21 3. NRDC'S Cross Examination on Project Assumptions
- 22 4. Due Process Rights to Cross-Examination and Impeachment of Witnesses

23 As argued on points and authorities below, NRDC's exhibits should be admitted. Due process
24 under the California and federal Constitution also requires that the Hearing Officers allow full
25 cross-examination of DWR's witnesses on WaterFix project assumptions.

1 **1. DWR’s Lack of Written Commitment to Part 3**

2 There appears to be a fundamental misunderstanding in the February 21, 2018 Hearing
3 ruling regarding the commitment by the California Department of Water Resources (“DWR”) to
4 the Hearing Officers’ proposal for a Part 3 of the Hearing. The Hearing Ruling stated,

5 DWR has already committed in its written submittals to do the following if and when
6 Petitioners decide to exercise the option of proceeding with staged implementation of the
7 WaterFix Project: (1) inform us and the other parties; (2) introduce the EIR supplement
8 and testimony that addresses whether it is necessary to revisit Part 1 or Part 2 hearing
9 issues in light of the staged implementation; and (3) make its witnesses available for
10 cross-examination by the parties.
11 (*Id.* at p. 3-4.)

12 However, DWR’s February 9, 2018 response to the Hearing Officers’ questions did *not*
13 commit to introducing the Supplemental EIR in this proceeding. Instead, DWR’s response refers
14 to obtaining the change permit *before* finishing the Supplemental EIR:

15 ...should DWR move forward with that option upon obtaining a change to its permit,
16 they are commencing the planning work now to anticipate the inevitable (albeit meritless)
17 claims that any staged implementation is not within the scope of the certified EIR or any
18 regulatory permits, including the permit sought in this hearing. (*Id.* at p. 3:9-12.)

19 DWR’s response also states

20 If it becomes more certain that construction will be staged and any party feels the need to
21 contest that point or argue for modification of these proceedings, they can attempt to do
22 so. (*Id.* at p. 3:17-19.)

23 There is thus a fundamental flaw with the February 21, 2018 Hearing ruling that cross-
24 examination or rebuttal based on changes to a staged implementation will take place in Part 3 of
25 the Hearing. As argued below, the Hearing Officers must allow cross-examination on the
26 assumptions in the Final EIR/EIS and the CWF H3+ operational scenario submitted as evidence
27 in Part 2.¹

28 ¹ California Water Research does not waive other arguments asserted in California Water Research’s February 21,
2018 filing by this submission.

1 **2. Reclamation’s Participation Has Clearly Changed**

2 The Department of Water Resources moved that the Hearing Officers start Part 2 of the
3 Hearing without a Record of Decision on August 3, 2017, stating in part “there is no definitive
4 schedule for issuance of the Record of Decision.” (p. 1.) The Board of Westlands Water
5 District, the largest South of Delta CVP contractor, voted not to participate in the WaterFix
6 project on September 19, 2017. This clearly and substantially affected Reclamation’s
7 participation in the project, and there is no indication that Reclamation will ever issue a Record
8 of Decision adopting the operations proposed in the WaterFix Final EIR/EIS. DWR’s witnesses
9 are nevertheless testifying about the initial operational scenario analyzed in the WaterFix Final
10 EIR/EIS, which assumes full buildout at 2030, and full participation by Reclamation.

11 **3. NRDC’S Cross Examination on Project Assumptions**

12 The Natural Resources Defense Council (“NRDC”) introduced on cross-examination
13 exhibit NRDC-102, the official minutes of the December 7, 2017 meeting of the Board of the
14 San Luis and Delta Mendota Water Authority, whose members include the CVP South of Delta
15 contractors. The official minutes show that Jason Peltier reported that efforts to find a viable
16 option for CVP involvement in the WaterFix have not been successful, and that the Director of
17 the Department of Water Resources stated that a state-only, staged version of the WaterFix will
18 be announced later this year. (p. 3-4.) NRDC-102 is directly relevant to the assertion that Alt 4A
19 with full CVP participation continues to be the proposed project.

20 NRDC also introduced on cross-examination exhibit NRDC-100, a contract with
21 Hallmark Group, dated December 18, 2017, which states:

22 Recent meetings with fish and wildlife agencies have triggered additional planning and
23 permitting activities such as the development of a supplemental EIR/EIS. (p. 1.)

24 This exhibit is directly relevant to the assertion that the fish and wildlife regulatory conditions
25 for the WaterFix project have been determined.

1 Neither of these exhibits constitute cross-examination on the details of a staged
2 implementation of the WaterFix, which are not determined at this point. They instead constitute
3 cross-examination on whether Gwen Buchholz' testimony that the initial operational scenario
4 analyzed in the WaterFix Final EIR/EIS is the adopted project is misleading and inaccurate.
5 NRDC simply exercised a party's right to cross-examine opposing witnesses and impeach any
6 witness.

7 **4. Due Process Rights to Cross-Examination and Impeachment of Witnesses**

8 All adjudicative proceedings before the SWRCB are governed by section 11513 of the
9 Government Code. (Cal. Code Regs. tit 23 § 648, subd. (b).) Government Code section 11513,
10 subdivision (b) provides in part

11
12 Each party shall have these rights: [...] to cross-examine opposing witnesses on any
13 matter relevant to the issues even though that matter was not covered in the direct
14 examination; to impeach any witness regardless of which party first called him or her to
15 testify; and to rebut the evidence against him or her. (underlining added.)

16 These statutory and regulatory provisions implement basic due process protections required by
17 Article I, § 7 of the California Constitution, and the Fifth and Fourteenth Amendments to the
18 U.S. Constitution.

19 The court in *Manufactured Home Communities v. County of San Luis Obispo* (2008) 167
20 Cal.App.4th 705 ruled:

21 The right to cross-examine applies in a wide variety of administrative proceedings.
22 [citations omitted.] It is especially important where findings against a party are based on
23 an adverse witness's testimony. [citations omitted.] (*Id* at 711.)

24 As for what testimony requires cross-examination, *Manufactured Home Communities, supra*,
25 states:

26 Where it makes a decision based on a party's testimony, the adversary is entitled to
27 question his or her opponent. [citations omitted.] (*Id* at 712.)

1 *Manufactured Home Communities, supra*, also cites *Fost v. Superior Court* (2000) 80
2 Cal.App.4th 724, 733, 95 Cal.Rptr.2d 620. This decision explains that cross-examination is an
3 absolute right:

4 Because it relates to the fundamental fairness of the proceedings, cross-examination is
5 said to represent an “absolute right,” not merely a privilege (*People v. Abner* (1962) 209
6 Cal.App.2d 484, 489, 25 Cal.Rptr. 882; *People v. Flores* (1936) 15 Cal.App.2d 385, 401,
7 59 P.2d 517), and denial or undue restriction thereof may be reversible error. (*People v.*
8 *Redwine* (1958) 166 Cal.App.2d 371, 333 P.2d 188.)

9 This is the view not just of California courts but of the highest court of our land, which
10 has declared: “Cross-examination of a witness is a matter of right. [Citation.] Its
11 permissible purposes, among others, are that facts may be brought out tending to discredit
12 the witness by showing that his testimony in chief was untrue or biased. [Citations.]
13 (*Id* at 626.)

14 The court continues to state that denial of the opportunity cross-examination results in prejudice
15 and denial of a fair trial:

16 Prejudice ensues from a denial of the opportunity to place the witness in his proper
17 setting and put the weight of his testimony and his credibility to a test, without which the
18 jury cannot fairly appraise them. [Citations.] To say that prejudice can be established
19 only by showing that the cross-examination, if pursued, would necessarily have brought
20 out facts tending to discredit the testimony in chief, is to deny a substantial right and
21 withdraw one of the safeguards essential to a fair trial. [Citations.]” (*Alford v. United*
22 *States* (1931) 282 U.S. 687, 691-692, 51 S.Ct. 218, 75 L.Ed. 624; accord, *Chambers v.*
23 *Mississippi* (1973) 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297; *Smith v. Illinois*
24 (1968) 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed.2d 956; *Douglas v. Alabama* (1965)
25 380 U.S. 415, 419-420, 85 S.Ct. 1074, 13 L.Ed.2d 934.) In short, cross-examination is
26 “an essential and fundamental requirement for the kind of fair trial which is this country's
27 constitutional goal.” (*Pointer v. Texas* (1965) 380 U.S. 400, 405, 85 S.Ct. 1065, 13
28 L.Ed.2d 923.) (*Id* at 626.)

19 In conclusion, to conform with the California and federal Constitutions, statute, and
20 regulation, and to avoid prejudice in this proceeding, the Hearing Officers must not arbitrarily
21 restrict cross-examination of DWR’s witnesses in this trial. Cross-examination on the
22 assumptions of the WaterFix Final EIR/EIS, the Notice of Decision, and the CWF H3+ scenario
23 must be allowed. To rule otherwise would fundamentally and irrevocably compromise any
24 decision based on DWR’s witnesses’ testimony on the project.

Dated Feb 25, 2018

Sincerely,



Deirdre Des Jardins
Principal, California Water Research

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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 **Support for NRDC's Cross-Examination**
9 **Exhibits Testing Waterfix Project Assumptions**

10 to be served by Electronic Mail (email) upon the parties listed in the Current Service List
11 for the California Water Fix Petition Hearing, dated January 24, 2018, posted by the
12 State Water Resources Control Board at
13 [http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)
14 [waterfix/service_list.shtml](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 February 25, 2018.

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Signature:



Name: Deirdre Des Jardins
Title: Principal, California Water Research

Party/Affiliation:
Deirdre Des Jardins

Address:
145 Beel Dr
Santa Cruz, California 95060