

1 Steven Ingram (SBN 197509)
2 Shannon Little (SBN 260342)
3 CALIFORNIA DEPARTMENT OF FISH
4 AND WILDLIFE
5 OFFICE OF THE GENERAL COUNSEL
6 1416 9TH ST, Suite 1341
7 SACRAMENTO, CA 95814
8 (916) 651-7650
9 E-mail: shannon.little@wildlife.ca.gov

10 Attorney for the DEPARTMENT OF FISH AND WILDLIFE

11 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

12 HEARING IN THE MATTER OF) CALIFORNIA DEPARTMENT OF FISH
13 CALIFORNIA DEPARTMENT OF WATER) AND WILDLIFE'S MOTION FOR
14 RESOURCES AND U.S. BUREAU OF) PROTECTIVE ORDER FOR SUBPOENA
15 RECLAMATION REQUEST FOR A) DUCES TECUM FROM PACIFIC COAST
16 CHANGE IN POINT OF DIVERSION FOR) FEDERATION OF FISHERMEN'S
17 CALIFORNIA WATERFIX) ASSOCIATIONS AND INSTITUTE FOR
18) FISHERIES RESOURCES
19)
20)
21)

22 The California Department of Fish and Wildlife (CDFW) objects to components of
23 the March 2, 2018 Subpoena Duces Tecum (Subpoena) served by the Law Offices of
24 Stephan C. Volker, on behalf of the Pacific Coast Federation of Fishermen's
25 Associations and Institute for Fisheries Resources, pursuant to Water Code section
1080, Government Code sections 11450.10-11450.50, Code of Civil Procedure sections
1985 and 1987, and California Code of Regulations, title 23, section 649.6,
subdivision(a), in the matter of the California Department of Water Resources (DWR)
and U.S. Bureau of Reclamation's (Reclamation) Request for a Change in Point of
Diversion for California WaterFix (CWF). CDFW requests that the Hearing Officers

1 issue a protective order limiting the scope and other specific provisions of the
2 Subpoena.

3 CDFW makes this motion pursuant to Title 23 of the California Code of
4 Regulations section 648, subdivision (b) and Government Code section 11450.30,
5 which enables the hearing officer to issue a protective order or quash a subpoena or
6 subpoena duces tecum to protect a witness from unreasonable or oppressive demands.

7
8 **I. STATEMENT OF FACTS**

9 CDFW is not a party to the proceeding before the State Water Resources Control
10 Board pertaining to the requested change in point of diversion for the CWF project.
11 CDFW was personally served with the Subpoena and accompanying documents on
12 March 2, 2018. Section III of an Addendum to the Subpoena lists seven categories of
13 records that CDFW must provide. The Subpoena requires delivery of the documents by
14 March 19, 2018 at 9:30 a.m.

15 **II. REQUEST FOR A PROTECTIVE ORDER**

16 CDFW requests an order from the Hearing Officers to protect it from components
17 of the Subpoena that are unreasonably broad and vague and that are unlikely to result
18 in evidence relevant to the hearing. CDFW further requests an order quashing the
19 Subpoena's request for a privilege log. If the Hearing Officers deny either of these
20 requests, CDFW requests relief from the deadline set out in the Subpoena.

21
22 **A. Scope of Subpoena**

23 Paragraph III.A.2. of the Addendum to the Subpoena seeks "All documents and
24 communications under CDFW's control related to the WaterFix Project's compliance
25 with the California and/or Federal Endangered Species Acts, and the SWP's [State
Water Project] and CVP's [Central Valley Project] compliance with the California and/or

1 Federal Endangered Species Acts," since July 27, 2017. The second clause of this
2 sentence, seeking all documents and communications related to the SWP's and CVP's
3 compliance with the California Endangered Species Act (CESA) and the federal
4 Endangered Species Act, is unreasonably broad and burdensome. Because CDFW
5 has an ongoing regulatory relationship with the SWP, the clause encompasses a very
6 wide range of issues, crossing multiple programs and CDFW offices, and would include
7 records related to ongoing implementation of minimization and mitigation measures in
8 permits and authorizations for current SWP and CVP infrastructure and operations.

9 Mr. Volker's affidavit in support of the Subpoena states in Paragraph 11 that it
10 "appears likely that CDFW has significant information on changes to engineering
11 design, proposed construction, and proposed operations for the WaterFix Project, and
12 changes to environmental compliance requirements for the WaterFix Project, not
13 provided for the WaterFix Water Right Change Petition Hearing." CDFW does not
14 concede to Mr. Volker's assumptions about information CDFW may have or to the
15 relevance Mr. Volker's assumptions may have at this stage in the proceedings.

16 However, records under CDFW's control that relate to the SWP or CVP's compliance
17 with CESA or the federal ESA, in the absence of CWF infrastructure and operations, are
18 not relevant to the information Mr. Volker seeks to uncover, related to changes to
19 potential engineering design, proposed construction, and proposed operations of the
20 CWF project. This is because the CWF project involves new construction, new
21 operational rules, and new governing CESA and ESA authorizations.

22 Because the Subpoena does not demonstrate how a sweeping request to
23 receive all records of the SWP and CVP's CESA and federal ESA compliance is
24 relevant, CDFW requests that the Hearing Officers issue a protective order quashing
25 the clause of the Addendum to the Subpoena that seeks all documents and

1 communications related to "the SWP's and CVP's compliance with the California and/or
2 Federal Endangered Species Acts" since July 27, 2017.

3 Secondly, Paragraph III.C.1. to the Addendum to the Subpoena seeks all
4 "communications between CDFW and staff or Board members of the SWRCB, related
5 to the SWRCB's WaterFix Water Right Change Petition Hearing, the WaterFix Project,
6 or SWRCB permit terms for the SWP and CVP, under CDFW's control" since August
7 26, 2015. The request for records relating to "SWRCB permit terms for the SWP and
8 CVP" does not appear to be limited to terms potentially applicable to the CWF project.
9 As with the clause discussed above, this clause appears to encompass all existing
10 SWRCB permit terms applicable to the SWP and CVP and is unreasonably broad,
11 burdensome, and has a high potential of producing records that go far beyond the
12 scope of the hearing. Nothing in the affidavit in support of the Subpoena appears to
13 relate to the relevance or necessity of permit terms currently or formerly applicable to
14 the SWP and CVP, in the absence of the CWF project. Therefore, CDFW requests that
15 the Hearing Officers issue a protective order limiting this clause to SWRCB permit terms
16 for the SWP and CVP with implementation of the CWF project.

17 Furthermore, as discussed below, CDFW does not believe that it can provide the
18 records responsive to the two clauses above, with reasonable effort, within the
19 timeframe provided in the request. Responding to these requests would greatly expand
20 the list of staff, programs, and offices with potentially responsive records, and likely
21 present a much greater number of records than CDFW can reasonably review and
22 produce within the timeframe set forth in the Subpoena. As a non-party to these
23 proceedings, CDFW does not provide any argument or opinion as to the relevance,
24 duplicativeness, or availability of information the Subpoena seeks in other paragraphs
25 and clauses. However, the burden presented by these two particular clauses is

1 significantly high, and apparently unrelated to the rationale set forth in the affidavit, that
2 CDFW considered necessary to seek this order.

3 **B. Privilege Log**

4
5 The Addendum to the Subpoena states that CDFW should prepare a privilege
6 log for any communications responsive to Paragraph III.C, that are withheld on the
7 grounds of privilege. CDFW is aware of no authority under the Water Code,
8 Government Code, or Title 23 of the California Code of Regulations requiring responses
9 to a subpoena duces tecum in a proceeding before the State Water Resources Control
10 Board to be accompanied by a privilege log, or authorizing parties to make such
11 demands. In the absence of any authority requiring such a log, CDFW does not
12 anticipate providing one.

13 **C. Subpoena Timeframe**

14 Should the Hearing Officers determine not to grant this motion, CDFW advises
15 that the breadth of records potentially responsive to the clauses of paragraphs III.A.2.
16 and III.C.1. of the Addendum, discussed above, or the preparation of a privilege log,
17 would make it impossible for CDFW to provide the responsive records within the
18 timeframe provided for in the Subpoena. CDFW requests that if the Hearing Officers
19 deny either request above, that they provide an additional 45 days for CDFW to gather
20 and review responsive documents and prepare any necessary privilege log in response
21 to this Subpoena.

22 **III. Conclusion**

23
24 For the reasons set out above, CDFW requests that the Hearing Officers issue a
25 protective order relieving CDFW from: 1) any obligation to provide "All documents and
communications under CDFW's control related to... the SWP's and CVP's compliance

1 with the California and/or Federal Endangered Species Acts," since July 27, 2017; and
2 2) any obligation to provide "all communications between CDFW and staff or Board
3 members of the SWRCB, related to...SWRCB permit terms for the SWP and CVP,
4 except as such permit terms relate specifically to the CWF project; and 3) any obligation
5 to provide a privilege log. If the Hearing Officers deny any of these requests, CDFW
6 requests an additional 45 days to provide its response to the Subpoena.

7
8 Dated: March 6, 2018

CALIFORNIA DEPARTMENT OF
FISH AND WILDLIFE

Shannon K. Little

Shannon Little
Office of the General Counsel