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14 On behalf of South Delta Water Agency,
15 Central Delta Water Agency, Lafayette Ranch,
16 Heritage Lands, Mark Bachetti Farms
17 and Rudy Mussi Investments L.P.

18 **STATE OF CALIFORNIA**

19 **STATE WATER RESOURCES CONTROL BOARD**

20 Hearing in the Matter of California
21 Department of Water Resources and
22 United States Department of the Interior,
23 Bureau of Reclamation Request for a
24 Change in Point of Diversion for
25 California Water Fix

26 **SOUTH DELTA WATER AGENCY
27 PARTIES' OPENING STATEMENT**

28 In their opening statement Petitioners note that water is one of the necessary
resources for the health, safety and economic success of the State of California and
the country as a whole. They are of course correct but fail to note that the importance
of water has nothing to do with the issues before the Board in this hearing, excepting
perhaps that because of its importance the Petition must be scrutinized like no other.

1 The California WaterFix proposes fundamental changes to the Delta and the
2 most important water storage and delivery systems in the state, the Central Valley
3 Project and the State Water Project. The potential impacts from such changes would
4 be far reaching and potentially devastating to other water users and to the
5 environment. Petitioners request for this monumental change petition is premature
6 and incomplete. Despite the State Board's specific requests, Petitioners have not
7 proposed project conditions, have not provided a complete analysis of the potential
8 impacts from the project and have not even attempted to identify which water users,
9 specifically could be injured from same. Instead, Petitioners have pushed the process
10 forward before they even know how the project will funded or operated, and before
11 numerous soon-to-be mandated limitations on the project are determined.

12 In an act of apparent negligence, the Petitioners mistakenly admitted during
13 cross examination that even though they are vociferously claiming an intent to abide
14 by most of the current regulatory mandates,, they, nevertheless, plan to seek relief
15 from such mandates every few years by using the non-public urgency change petition
16 process pursuant to Water Code section 1700 et.seq. Thus, Petitioners As described
17 in the January 2016 draft Biological Assessment for the WaterFix, after 14 months of
18 dry or critical conditions ***Petitioners will ask to be relieved from their regulatory***
19 ***burdens by pursuing another TUCP.*** Given that such conditions occurred about
20 20% of the time historically, Petitioners are promising to meet their obligations in 4 out
21 of 5 years. This means of course we cannot possibly assess what the effects of the
22 CWF will be effects of the CWF at least 20% of the time. On this basis alone the
23 Petition must be dismissed.

24 The attractive moniker "WaterFix" is merely a bureaucratic cover for a massive
25 twin tunnel project that seeks to take water for export before it can pass though the
26 Delta where it currently provides lifesaving and legally mandated benefits to other
27 legal users, including, especially, in-Delta agriculture. The premise for the WaterFix
28 is to have millions of acre feet ***less*** pass through the Delta each year. Given that the

1 estuary is already on the brink of collapse, it becomes apparent that the proponents
2 are either blind to the past 50 plus years of degradation in the Delta caused by the
3 CVP and SWP or actually intend to destroy the Delta to once and for all relieve them
4 from the myriad of regulatory and statutory obligations they so often ignore. Even with
5 only the barest understandings of physics one would know that having less fresh
6 water move through a struggling fresh water estuary can only make things worse; but
7 the Petitioners soldier on anyway.

8 As expected, the “scientific analysis” presented by Petitioners sets forth the
9 “facts” as they see them. 1. “They will not change their operations of upstream
10 reservoirs so no one can be harmed.” Of course with the twin tunnels the incentive is
11 to move upstream storage to south of Delta storage which removes it as a source to
12 meet water quality mandates. 2. “They will comply with all regulatory mandates.” Of
13 course they don’t mean **all** mandates as they seek changes to D-1641 export/inflow
14 rules, relaxation of current BiOps requirements and of course will not even try to meet
15 the southern Delta salinity standards. 3. “The modeling shows on average the project
16 causes very small changes in salinity levels in the Delta.” Of course the averages
17 they show mask specific effects by mixing high flows years with low flow years. And
18 of course the modeled data can only be used for comparative purposes and does not
19 predict actual conditions. The undeniable fact the actual salinity at any particular
20 location (especially in the southern Delta) can be significantly higher than the modeled
21 data is yet another reason why the Petition must be dismissed.

22 If the modeling in support of the Petition cannot be relied upon to reflect actual
23 conditions, rather only for comparative analysis, Petitioners have not put on a case to
24 show if impacts are significant or not or if injury to legal users occurs. Petitioners have
25 confused CEQA and NEPA law with the requirements of a change petition. Under
26 CEQA and NEPA a party discloses the effects of a project. Harm to any particular
27 interest is not fatal in a CEQA/NEPA analysis. In fact, some significant effects can be
28 deemed “unavoidable” and therefore excused or tolerated. Under the change petition

1 process Petitioners must show ***no harm to legal users***. If Petitioners cannot show
2 when and how much actual salinity increases occur, they cannot simply conclude it is
3 somehow insignificant. Petitioners have not shown if a comparative increase in EC of
4 100 would be added onto 200 EC or added onto 1000 EC. It is noteworthy that the
5 subject change petition process normally deals with someone moving a pump a few
6 hundred feet downstream. Such requests are only granted if they do not cause injury
7 to other legal users of water. Here the Petitioners are fundamentally changing the
8 operation of the Delta. One must ignore reality to think such changes will not cause
9 harm to other legal users of water.

10 Further, Petitioners provided modelers to show the averaged data, but they
11 forgot to provide experts to interpret the data's effect on legal users. More
12 specifically, Petitioners case provides no evidence that increased salinity levels in
13 delta channels will not cause injury to crops. Notwithstanding the Petitioners' complete
14 failure to meet their burdens under a change petition, SDWA has prepared a case
15 which shows that the analyses done by Petitioners are not only insufficient but that by
16 using Petitioners' own data, injury will occur to other legal users.

17 The Petitioners' No Action Alternative is based upon their current operations.
18 However, their current operations are not in conformance with various statutory and
19 regulatory laws. PL 99-546 (authorizing the Coordinated Operations Agreement), PL
20 102-575 (Central Valley Project Improvement Act) and PL 108-361 (CalFed
21 reauthorization) all direct the USBR to meet the water quality obligations imposed
22 upon them by the SWRCB; not some, not partially, not sometimes. Those obligations
23 include the three interior southern Delta salinity standards which the Petitioners claim
24 they cannot meet. PL 108-361 further required the USBR to develop a Plan to Meet
25 Standards and to decrease the use of New Melones for such purposes. Instead, the
26 USBR produced a plan which seeks to "improve water quality near Vernalis;" a plan
27 significantly different than meeting the three other southern Delta standards.
28

1 The Petitioners are not only violating federal law by not meeting these standards, they
2 are violating their permit conditions as set forth in D-1641. As the SWRCB well
3 knows, DWR and USBR were first identified as responsible for meeting the 0.7/1.0 EC
4 standard in the 1995 Bay-Delta Water Quality Control Plan. That Plan's
5 implementation program noted that two of the four compliance locations should be met
6 immediately and the other two within two years. D-1641, adopted some five years
7 later, both delayed the 0.7 standard and allowed DWR and USBR to avoid meeting it
8 by implementing a barrier or similarly effective program. This regulatory two-step was
9 thrown out by the court and the 0.7 EC standard was to be effective as of April 2005.
10 DWR and USBR then ignored the 2005 deadline and pleaded an inability to meet the
11 standard. This resulted in a cease and desist hearing which purported to confirm the
12 obligations to meet the standard but then gave the projects more time to figure out
13 how to do so. This new deadline could not be met so the SWRCB amended the CDO
14 to give the projects even more time, but inserted a "final final" deadline of 2013. To
15 none one's surprise that deadline came and went with nary a sound from DWR, USBR
16 or the SWRCB. Twenty-one years after the 0.7 EC standard was developed it
17 remains unmet and unenforced.

18 Though the 0.7 EC standard is ignored and unmet, it remains a state mandated
19 obligation; further mandated by federal law. It therefore cannot be omitted from any
20 CEQA, NEPA or SWRCB analysis. Unless and until the Petitioners comply with their
21 current obligations and make modeling inputs to reflect operations that accomplish
22 such compliance, no analysis of impacts of the project can be made. This is not just
23 because the operations to comply with the mandates might alter modeling impacts,
24 but also because the compliance will likely significantly alter estimations of exports.
25 Such estimations of course determine which alternative the Petitioners eventually
26 choose.

27 SDWA's case in chief will show all of these shortcomings. In addition, it will
28 present the evidence that even using Petitioners own modeling; there will be injury to

1 other legal users. SDWA will first present three Delta farmers who are indeed legal
2 users. They will also show how existing conditions regarding salinity and water levels
3 adversely affect their farming operations and cause them injury. Though the existing
4 level of harm to Delta farmers is not the focus of the hearing, the information is
5 relevant and necessary so that the SWRCB can be fully aware of the conditions onto
6 which the WaterFix would to be imposed.

7 SDWA. Will next present the evidence of a modeling engineer who analyzed
8 the DWR/USBR data provided to the SWRCB. Using the DSM2 and CalSim II models
9 which he removed from the DWR/USBR data information on salinity (EC's) from more
10 locations than just those present by the Petitioners. He also broke the data down into
11 daily and 5-day averages rather than just the monthly 16 year averages presented by
12 Petitioners. This data shows that notwithstanding Petitioners conclusions of
13 insignificant impacts to Delta salinity, the actual data shows times and years when
14 significant increases in EC occur under WaterFix scenarios when compared to the
15 NAA. The modeler will also explain how the DWR data can only be used for
16 comparative purposes and not to determine injury to other users. The DSM2 model
17 results can significantly understate what would actually occur. Thus the Petitioners
18 presentation shows averages well below the standards while we know that standards
19 such as the southern Delta salinity standards are often violated.

20 SDWA's__modeler will also show how changes in residence time and
21 temperature might affect the conditions under which harmful algal blooms occur.

22 From the modeling data, SDWA's__soils engineer/agronomist expert will explain
23 and calculate how even small changes in salinity of the applied water reduce crop
24 production. He will explain that under certain leaching fraction assumptions there are
25 4 years out of the 16 when crop reductions occur under WaterFix scenario H3 when
26 compared to the NAA. He will also explain how his calculations are dependent on the
27 applied water EC set forth in Petitioners modeling and that this data likely understates
28 the actual applied water EC.

1 Using the information calculated by the soil engineer, SDWA's economist will present
2 testimony as to how he calculated the monetary impacts resulting from the WaterFix
3 changes to salinity, including regional impacts. This witness will also explain how the
4 Water Fix project is economically infeasible. Not only do state and federal regulations
5 require an economic feasibility analysis, the SWRCB itself also specifically asked the
6 Petitioners to provide the information showing the feasibility of the project. Petitioners
7 failed to do so and have in fact not produced any such feasibility analysis. This
8 witness will describe how the project unrealistically estimates deliveries and costs
9 when in fact it simply cannot work unless Petitioners specifically exceed current export
10 limitations. The WaterFix creates the incentive to increase exports over other
11 considerations. A project which can only succeed by violating restrictions on its
12 operations suggests that any and all assurances of mitigation or compliance with
13 regulations simply cannot be relied on much less funded.

14 SDWA, in conjunction with San Joaquin County, will also present witnesses
15 relating to toxic algal growth, including microcystis. Such testimony will show that
16 when the WaterFix stops Delta cross flow and decreases exports from the southern
17 Delta in favor of exports from the new northern intakes, residence time, temperature
18 and other factors will encourage algal growth in various Delta channels. These algal
19 growths are known to be harmful to humans and life-threatening to livestock and fish.
20 The Petitioners failed to address this particular injury.

21 SDWA's testimony will also include a history of the Petitioners CVP and SWP
22 projects, as well as the history of the BDCP/WaterFix. Such testimony will explain that
23 The CVP and SWP are statutorily obligated to protect the Delta from salinity intrusion
24 and to provide a good quality supply of water for in-Delta agricultural use. Instead, the
25 projects have operated to maximize exports and barely meet or fail to meet water
26 quality standards. The beginning point for any project, especially one as
27 comprehensive and massive as the WaterFix is to calculate how much water is
28 available for all superior rights and needs and then determine when and how much is

1 available for export. As history shows, the projects were to only export water that is
2 surplus to Delta and area of origin needs. In practice, the Petitioners manipulate
3 upstream storage so they can export water that should have been kept in storage to
4 meet water quality obligations. SDWA's case in chief will demonstrate that the best
5 evidence of this comes from the recent drought when the entire operations of the CVP
6 and SWP were constantly altered through the use of temporary urgency permit
7 changes. In the worst drought of the past 100 years (according to the Petitioners)
8 they still exported millions of acre feet of water while fishery and other water quality
9 needs went unmet. Every drop of exported water was needed for in-Delta or area of
10 origin needs yet it was still exported.

11 The SWRCB should not entertain a change petition when the Petitioners entire
12 operations are geared to periodically violate state and federal law and applicable
13 regulatory mandates. The evidence, testimony and cross-examination up to this point
14 have shown that the Petitioners have not met their burden to show no injury to legal
15 users. SDWA et.al., and others will provide clear and unassailable evidence of such
16 harm. The Petition should be dismissed.