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Submitted to CWFhearing@waterboards.ca.gov and California WaterFix Service List

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**Subject: Procedural topics for California WaterFix Water Rights Change
Petition Pre-Hearing Conference, October 19, 2017**

Dear Hearing Officers Doduc and Marcus, and Staff of the Hearing process:

Restore the Delta's (RTD's) mission is to save the San Francisco Bay-Delta Estuary for our children and future generations, a grassroots campaign of residents and organizations committed to restoring the Sacramento-San Joaquin Delta so that fisheries and farming can thrive there together. We fight for Delta waters that are fishable, swimmable, drinkable, and farmable, able to support the health of the estuary, San Francisco Bay, and the ocean beyond.

Thank you for the opportunity to request topics for the pre-hearing conference on October 19th.

Topic 1: Status and timing of Board development of “appropriate Delta flow criteria” during Part 2 of this Proceeding.

As you are aware, Deirdre Des Jardins of California Water Research, requested on August 4, 2017, that the Board employ the rules of the Administrative Procedures Act for determining “appropriate flow criteria” required by Water Code Section 85086, subd. (c) (2). The Hearing Officers rejected Ms. Des Jardins’ request in their August 31, 2017, ruling.

This Water Code Section states as follows:

(2) Any order approving a change in the point of diversion of the State Water Project or the federal Central Valley Project from the southern Delta to a point on the Sacramento River shall include appropriate Delta flow criteria and shall be informed by the analysis conducted pursuant to this section. The flow criteria shall be subject to modification over time based on a science-based adaptive management program that integrates scientific and monitoring results, including the contribution of habitat and other conservation measures, into ongoing Delta water management.

“Consistent with our prior ruling [of March 4, 2016],” writes the Hearing Officers, “we conclude that the State Water Board is not required to develop appropriate Delta flow criteria through a separate rule making process subject to the APA, and deny the request from Ms. Des Jardins.” (Ruling, August 31, 2017, p. 15.) In this same ruling, the Board requested that parties answer Question 3(d),

“What Delta flow criteria are appropriate and should be included in any approval of the petition, taking into consideration, the 2010 Delta flow criteria report, competing beneficial uses of water, and the relative responsibility of the Projects and other water right holders for meeting water quality objectives?”

Despite the Hearing Officers rejecting Ms. Des Jardins’ proposal, there remains confusion and ambiguity surrounding the meaning of the above-quoted Water Code Section. For example, the term “appropriate Delta flow criteria” is nowhere defined in the Delta Reform Act of 2009.

In addition, state case law, if not statutory law, compels the State Water Board to conduct its own independent environmental review of alternative “appropriate Delta flow criteria.” State Water Resources Control Board Water Rights Decision 1631 was a result of several court cases, including the 1983 Mono Lake Decision and the two subsequent CalTrout decisions.¹ These decisions clarified, among other things, that the Board’s role in the appropriation of water in California included its duty to take account of protecting the public trust resources in the Mono Lake case and to fulfill the process needed to achieve reasonable protection.

While the facts involved in Mono Lake are somewhat different, there are analogies we ask the Board to consider for discussion at the pre-hearing conference and provide a ruling afterward. In each case, first, the State Water Board, must on account of this exogenous requirement, produce flow criteria that are to be reasonably protective of the

¹ State Water Resources Control Board, *Mono Lake Basin Water Right Decision 1631: Decision and Order Amending Water Right Licenses to Establish Fishery Protection Flows in Streams Tributary to Mono Lake and to Protect Public Trust Resources at Mono Lake and in the Mono Lake Basin*, September 28, 1994, accessible at https://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1631.pdf; *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983); *California Trout v. State Water Resources Control Board*, 207 Cal.App.3d 585 (1989); and *California Trout, Inc. v. Superior Court*, 218 Cal.App.3d 187 (1990).

public trust, and second, each case involves a project's rights to divert fresh water from water bodies directly affected by immediate salinity conditions.

In the Mono Lake situation, the "exogenous requirement" was placed on the Board by court decisions. In response, the Board's process for review of the Mono Basin water rights included issuance of an environmental impact report by the Board; a water right hearing conducted by the Board; and reliance on computer models submitted by the California Department of Fish and Game and the Los Angeles Department of Water and Power to assist in evaluating anticipated effects of alternative proposals for regulating Mono Basin water diversions.

In the California WaterFix/Bay-Delta Estuary situation, the "exogenous requirement" was provided by the State Legislature in the form of a requirement to develop and apply to the change in water rights for a BDCP/WaterFix-type project "appropriate Delta flow criteria." In response, here, the Board is presently proposing to rely on the water rights hearing only to develop and apply flow criteria to the WaterFix project that it apparently hopes will emerge from the proceeding.

It is the Hearing Officers' duty to clarify scope, meaning, and due process for obtaining "appropriate Delta flow criteria." Question 3(d) of the August 31 ruling clearly emphasizes the need to comply with the above Water Code section. Parties need clarity about this process from the Board, including its view of Board duties and obligations described under *National Audubon*, the *CalTrout* cases, and its previous D-1631 for how to arrive at these flow criteria.

We request specifically to learn from the Hearing Officers when (that is, at what point in the process) and for how long their distillation of "appropriate Delta flow criteria" applicable to the change petition, will be available for review by parties to this proceeding, and through what mechanism (e.g., with or without Board direct CEQA compliance?).

Topic 2: Absence of a research program for the California WaterFix adaptive management program.

The second part of Water Code Section 85086(c)(2) indicates that the "appropriate Delta flow criteria" are subject to change "over time based on a science-based adaptive management program that integrates scientific and monitoring results, including the contribution of habitat and other conservation measures, into ongoing Delta water management."

At present, the project description submitted by Petitioners on September 8, 2017, includes only a "placeholder" or a "black box" for adaptive management in its operational criteria, stating in footnote 9 for South Delta operations that

“The criteria do not fully reflect the complexities of CVP/SWP operations, dynamic hydrology, or spatial and temporal variation in the distribution of aquatic species. As a result the criteria will be achieved by operating within an initial range of real time operational criteria from January through March and in June. ***This initial range, including operational triggers, will be determined through future discussion***, including a starting point of -1250 to -5000 cfs based on a 14-day running average, and will be informed by the Adaptive Management Program, including real time monitoring. ***Further the 3-day averaging period may be modified through future discussion. Modifications to the 3-day average period and the range of operating criteria may be needed***, in part, because: 1) the water year type is forecasted in February but not finalized until May and 2) 0 cfs, or positive OMR in wet and above normal years may be attained coincident with unimpaired flows.”

(Emphasis added.)

Appendix 3.H of the Draft Biological Assessment for California WaterFix, issued in August 2016, offers a “framework” of adaptive management for the project. This “framework” encompasses “key uncertainties (p. 4, plus several appendices describing them),” and “decision making, process, and governance (p. 6).” However, these elements of adaptive management possess neither firm commitment to nor clear linkage with how and when “discussions” (mentioned above in footnote 9) of these adaptive management elements will be linked to changes or modifications to California WaterFix initial operating criteria.

We respectfully request that the Hearing Officers discuss with all parties at the pre-hearing conference consideration of requiring Petitioners to present as part of their Part 2 case-in-chief the California WaterFix adaptive management program (not just its “framework”), including its research program scope (including specific studies linked to construction period and operational uncertainties), funding sources, and permanent institutional assurances for the overall program.

Topic 3: Given Westlands Water District’s decision to opt out of California WaterFix Participation, will this have an effect on the project described in Petitioners’ Change Petition?

The proposed Alternative 4A, as Alternative 4 before it, was predicated on a financing plan originally put forward for two tunnels extending from three north Delta Diversion points that eventually arrived at the northern edge of Clifton Court Forebay. With the largest agricultural water contractor in the Central Valley declining to fund it, Petitioners may wish some kind of project to move forward with adding points of diversions to their water rights in this or some other proceeding; but the project may or may not change significantly. This matter is procedural because it may involve either 1) the Board dismissing the petition as premature, or for other reasons; or 2) the Petitioners themselves withdrawing the petition in order to plan anew; or 3) continuation of the existing proceeding.

The prehearing conference would be an excellent opportunity for all parties to air these issues for consideration by the Hearing Officers.

Topic 4: What is the status of the Bureau of Reclamation's water rights to this change petition given likelihood of the project changing?

The Board should include this as a topic in the prehearing conference about whether parties addressing this question should submit their testimony and evidence as part of their Part 2 cases-in-chief or provide it at a separate, later date when the Board may deem suitable for consideration of additional Part 1 issues.

This topic is relevant because we are aware that the Bureau declined to require WaterFix participation of its water contractors in the Central Valley Project, and still has obtained no congressional appropriation and authorization for Reclamation funding or construction of WaterFix itself. The absence of more diligent Bureau support and commitment to WaterFix—as Westlands Water District's staff report of September 19, 2017, stated—meant that any CVP contractor who wished to participate in WaterFix would have to pay for capital costs and operating/maintenance costs out of their own pockets. There would be no taxpayer subsidy to make the project more affordable to Westlands and all other CVP contractors.

This is a procedural matter for discussion at the prehearing conference because it raises the specter whether Reclamation will or will not seriously and diligently pursue use of the WaterFix even if granted water rights to divert at the three proposed North Delta diversion points by the State Water Board.

Thank you for considering these topics for the October 19th pre-hearing conference.



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Attachment: Certificate of Service