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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

16 JOINDER IN RENEWED MOTION OF  
17 NATURAL RESOURCES DEFENSE  
18 COUNCIL ET. AL. TO STAY OR  
19 CONTINUE PART 2 OF THE WATERFIX  
20 HEARING

21 Deirdre Des Jardins, principal at California Water Research (“California Water  
22 Research”), hereby joins in and incorporates in full the February 7, 2018 renewed motion by the  
23 Natural Resources Defense Council et. al. (“NRDC”) to stay or continue Part 2 of the WaterFix  
24 Hearing. California Water Research provides further points and authorities in support of the  
25 motion to stay or continue Part 2, as argued below.

26 While the Hearing Officers have ruled that they must act on the Petition that is before the  
27 Board, as discussed in the attached affidavit, the sworn Petition that is before the Board (Exhibit  
28 SWRCB-1) refers to information in the Partially Recirculated Draft EIR/EIS, and has never been  
amended. If the Hearing Officers allow the Petitioners to correct the Petition by submission of  
new evidence and testimony (Cal. Code Regs., tit. 23, 683(a)), the Hearing Officers must ensure

1 that the information is accurate and fully responsive to any request to correct the information in  
2 the Change Petition.

3           The Department of Water Resources has announced changes to a phased implementation  
4 of the WaterFix project, and is now claiming:

5                     Preliminary modeling indicates that there are no new water quality or aquatic  
6 issues related to staging the implementation. DWR expects no changes in impact  
7 determinations and no changes to mitigation.

8                     (February 7, 2018 letter from Karla Nemeth, *To: Public Water Agencies  
Participating in WaterFix*, p. 2.)

9 As explained in the attached affidavit, there is prima facie evidence that DWR knew that the  
10 project was changing to a staged implementation at the time DWR submitted testimony and  
11 evidence for Part 2. DWR's actions in knowingly submitting obsolete, misleading, and  
12 inaccurate testimony and evidence for the Hearing are egregious. To proceed with Part 2, given  
13 this announcement, is to deprive Protestants of the right under due process to fully examine and  
14 rebut DWR's assertions that there are no new water quality or aquatic issues related to staging  
15 the implementation, including the right to fully examine and rebut DWR's preliminary modeling.  
16 This has been settled law for over a century (*Int. Com. Comm. v. Louis. & Nash. R.R.*, (1913)  
17 227 U.S. 88, 93.)

18           More recent cases were cited by the Pacific Coast Federation of Fishermen's  
19 Associations, "[I]n civil proceedings a party has a due process right under the Fifth and  
20 Fourteenth Amendments to the Federal Constitution to cross-examine and confront witnesses."  
21 *Seering v. Department of Social Services* (1987) 194 Cal.App.3d 298 at 304, quoting *In re Mary*  
22 *S.* (1986) 186 Cal.App.3d 414, 419. "[In] a civil proceeding the constitutional right involves  
23 general notions of procedural due process." *Id.* DWR cannot simply provide hand-waving  
24 arguments, relying on facts not in evidence, that there are no differences in project impacts. *Dee*  
25 *v. PCS Property Management, Inc.* (2009) 174 Cal.App.4th 390, 404 (an opinion based on  
26

1 assumed facts, without adequate foundation for concluding that those facts exist, is unreliable  
2 and therefore should be excluded.)

3           There is also evidence that the withdrawal of Westlands Water District from the project  
4 has affected the planned operations of the Central Valley Project. As explained in the attached  
5 affidavit by Deirdre Des Jardins, the U.S. Bureau of Reclamation appears to not be proposing to  
6 issue a Record of Decision on the WaterFix Environmental Impact Statement, and has instead  
7 started a concurrent NEPA process to determine coordinated operations of the Central Valley  
8 Project and State Water Project. This has not been disclosed to the WaterFix hearing parties or  
9 the Hearing Officers.

10           California Water Research hereby submits the attached Affidavit of Obsolete,  
11 Misleading, and Inaccurate Information Submitted in Support of the Waterfix Water Right  
12 Change Petition by Deirdre Des Jardins. While there is no clear precedent for this situation in  
13 case law on decisions by the Water Board, courts have held that county planning department  
14 employees have a personal duty, as public employees, to not sign off on building permits with  
15 inaccurate information about compliance with building codes (*Cooper v. Jevne* (1976) 56  
16 Cal.App.3d 860.) The WaterFix facilities are not a building, but they could also cause massive  
17 injury to fish and wildlife and legal users of water. California Water Research argues that State  
18 Water Resources Control Board members also have a duty to not knowingly consider or approve  
19 a water right change petition with obsolete, misleading, or inaccurate information about injury to  
20 fish and wildlife or legal users of water, required by statute and regulation.

21           In conclusion, both due process and duty as State Water Resources Control Board  
22 members requires the Hearing Officers to continue the hearing and require Petitioners to provide  
23 complete and accurate information about the actual project they are proposing to build and  
24 operate, so that there is complete and accurate information available for the hearing about injury  
25 to fish and wildlife or legal users of water.

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Dated Feb 7, 2018

Respectfully submitted,



Deirdre Des Jardins  
Principal, California Water Research

1  
2 AFFIDAVIT OF OBSOLETE, MISLEADING, AND INACCURATE INFORMATION  
3 SUBMITTED IN SUPPORT OF WATERFIX WATER RIGHT CHANGE PETITION

4 I, Deirdre Des Jardins, do hereby declare as follows:

5 Based on information and belief, the California Department of Water Resources and the  
6 United States Bureau of Reclamation are knowingly and willfully pursuing a change Petition  
7 application with obsolete (currently false), misleading, and inaccurate information on the  
8 WaterFix project, submitted to meet statutory and regulatory requirements. Petitioners also  
9 knowingly and willfully submitted misleading and inaccurate statements regarding current  
10 proposed operations on September 8, 2017. In addition, the California Department of Water  
11 Resources has submitted extensive witness testimony which states, for example,

12 For purposes of Part 2 of the hearing, including this testimony, the California WaterFix  
13 (CWF) project is described by Alternative 4A under an operational scenario described as  
14 H3+ that is set forth in the Final Environmental Impact Report/Environmental Impact  
15 Statement and supplemental information adopted by DWR through the issuance of a  
16 Notice of Determination in July 2017 (2017 Certified FEIR)  
(Exhibit DWR-1011, Testimony of Aaron Miller p. 2.)

17 As explained below, there is prima facie evidence that the statement “For the purposes of  
18 Part 2 of this hearing ... the California WaterFix (CWF) project is described by Alternative 4A  
19 .... adopted by DWR through the issuance of a Notice of Determination” is deliberately  
20 misleading and inaccurate, and designed to conceal the fact that the project adopted by DWR in  
21 the Notice of Determination is changing to a phased implementation, due to withdrawal of the  
22 largest Central Valley Project partner, Westlands Water District, from the project.

23 The Bureau of Reclamation has not issued a Record of Decision for the WaterFix  
24 Environmental Impact Statement in over a year, and is currently in the middle of a new NEPA  
25 process to determine long-term coordinated operations of the State Water Project and Central  
26 Valley Project, including the WaterFix project. Reclamation is providing no witness testimony  
27 on Reclamation’s operational plans for the CVP, and Reclamation’s counsel has filed a statement

1 in the hearing that the Department of Interior is not required to respond to any subpoenas for  
2 witnesses or records from Hearing parties. The Department of Fish and Wildlife, which is  
3 reported to be reviewing environmental compliance, DWR's new phased project, and is also  
4 participating in Reclamation's new NEPA process as a coordinating agency, has withdrawn as a  
5 party from the hearing.

6 In sum, there is prima facie evidence that Petitioners have knowingly and willfully submitted  
7 obsolete, inaccurate, and misleading information to the Board, that is required by statute and  
8 regulation for change petitions.

9  
10 **I. The Change Petition is Sworn Under Penalty of Perjury**

11  
12 Section 711 of Title 23 of the California Code of Regulations, requires that applications  
13 for Change Petitions be certified as true under penalty of perjury:

14 Applications and accompanying statements, including information required by Section  
15 731, reports required of permittees and licensees and petitions for extension of time and  
16 for changes, shall be certified as true under penalty of perjury in accordance with Section  
2015.5 of the Code of Civil Procedure. (underlining added.)

17 The Board's standard Petition application form, "Environmental Information for  
18 Petitions," requests the information required by statute and the Board's regulation, and requires a  
19 signature on the following statement:

20  
21 I (we) hereby certify that the statements I (we) have furnished above and in the  
22 attachments are complete to the best of my (our) ability and that the facts, statements, and  
23 information presented are true and correct to the best of my (our) knowledge.  
(Exhibit SWRCB-1, p. 9.)

24 The application form for the WaterFix Water Right Change Petition was sworn by Nancy  
25 Quan, Supervising Engineer at the Department of Water Resources' State Water Project Analysis  
26 Office as an authorized agent for the Department of Water Resources, and by Richard J.  
27 Woodley as an authorized agent for the Bureau of Reclamation (Exhibit SWRCB-1, p. 9.)

1 The Board's standard Petition application form also requires the following:

2           **DESCRIPTION OF PROPOSED CHANGES OR WORK REMAINING TO BE**  
3           **COMPLETED** For a petition for change, provide a description of the proposed changes  
4           to your project including, but not limited to, type of construction activity, structures  
5           existing or to be built, area to be graded or excavated, increase in water diversion and use  
6           (up to the amount authorized by the permit), changes in land use, and project operational  
7           changes, including changes in how the water will be used. (Exhibit SWRCB-1, p. 6.)

8           This information is required by statute (Wat Code § 1701.2(c), Wat. Code § 1701.2(e))  
9           and regulation (Tit 23 Cal Code Regs § 794(a.)) The response by the Petitioners' agents referred  
10          to Alternative 4A in the Draft EIR/EIS in the response to this form, stating in part:

11           It is the intent of the Petitioners to Alternative 4A includes the construction of three fish-  
12           screened intakes on the east bank of the Sacramento River between Clarksburg and  
13           Courtland, each with a capacity of 3,000 cfs. [...] Specific discussions of the components  
14           of Alternative 4A most relevant to the attached water rights change petition can be found  
15           within the Partially Recirculated Draft EIR / Supplemental Draft EIS at sections 1.1;  
16           1.1.4; 4.1; 4.1.2.2; 4.1.2.3; 4.1.2.4; 4.3.7; 4.3.8; 11.1.5.2; Appendix A; Appendix 3B  
17           (Exhibit SWRCB-1, p. 6.)

18          The letter submitting the Petition also stated,

19           The California WaterFix described in this Petition is described as Alternative 4A, the  
20           preferred alternative, in the Draft EIR/EIS. (Exhibit SWRCB-1, p. 17.)

21          The rest of the responses on the Board's application form referred to the Partially Recirculated  
22          Draft EIR / Supplemental Draft EIS. The Petitioners are attempting to amend this information,  
23          submitted with the signed, Petition, with the WaterFix Final EIR/EIS, published on December  
24          22, 2016, and the Notice of Determination on July 21, 2017.

25           However, there is substantial evidence that the proposed project has changed since the  
26           Notice of Determination was filed. Petitioners appear to be simply submitting the Final EIR/EIS  
27           to avoid having to produce new analyses of impacts on fish and wildlife and legal users of water  
28           for this proceeding. In this respect, the September 8, 2017 statement by the Petitioners appears  
29           to be intentionally misleading:

1 The attached tables describe a summary of the operating criteria for the project that was  
2 approved by DWR on July 21, 2017 and is described in the Final Environmental Impact  
3 Report and additional information made available to the public at that time. The tables also  
4 describe the operating criteria for the projects permitted by the National Marine Fisheries  
5 Service, U.S. Fish and Wildlife Service, and the California Department of Fish and Wildlife.  
6 (p. 2.)

7 The September 8, 2017 statement by the Petitioners only refers to “the operating criteria for  
8 the project project that was approved by DWR,” and does not state that the tables describe how  
9 DWR intends to operate the project. DWR has also provided no witnesses for Part 2 who testify  
10 that DWR intends to operate the project according to the CWF H3+ scenario. Aaron Miller,  
11 DWR’s witness for Part 2, only states that “it is possible to operationalize” the CWF H3+  
12 operational scenario presented for the project. (Exhibit DWR-1011, p. x.)

## 13 **II. Evidence of a Changing WaterFix Project**

14 The WaterFix Partially Recirculated Draft EIR/EIS, which is the project in the signed,  
15 sworn WaterFix Change Petition application, assumed full participation by the United States  
16 Bureau of Reclamation in the project, which is simply no longer the case. A February 7, 2018  
17 letter from Karla Nemeth, Director of the California Department of Water Resources announces  
18 that the project is changing. The letter states,

19 DWR will fully evaluate the potential environmental impacts of the staged  
20 implementation option and expects to issue a draft supplemental Environmental Impact  
21 Report in June of 2018, with a final in October 2018. The additional information  
22 developed for CEQA will also be used to supplement the Endangered Species Act,  
23 Section 7 and California Endangered Species Act, Section 2081 record. DWR does not  
24 expect substantial change to the Biological Opinions or Section 2081 Incidental Take  
25 Permit issued in 2017.

26 (February 7, 2018 letter from Karla Nemeth, *To: Public Water Agencies Participating in  
27 WaterFix*, p. 2.)

28 There is prima facie evidence that this information has been known for some time.  
Westlands Water District voted not to participate in the WaterFix project on September 19, 2017,  
less than three weeks after the Petitioners submitted their summary of operating criteria to the



1 WaterFix hearing. Santa Clara Valley Water District voted unanimously on October 17, 2017  
2 for a resolution supporting a scaled-down and staged project:

3 Given that Westlands Water District and certain other agriculture districts  
4 have declined to participate in the WaterFix project, we are supportive of  
5 a lower-cost, scaled-down, and staged project that is consistent with the  
6 existing environmental impact reports and other administrative  
7 proceedings. We support considering an approach that incorporates the  
8 following in the first stage of the project:

- 9 a) One tunnel instead of the two tunnels;
- 10 b) A reduced intake volume from the original 9,000 cubic feet per second;
- 11 c) A reduced number of intakes on the Sacramento River ...

12 (SCVWD Resolution 17-68, p. x.)

13 In sum, there is prima facie evidence that the Department of Water Resources knowingly  
14 and willfully submitted obsolete, misleading, and inaccurate testimony and evidence in support  
15 of the Change Petition for Part 2.

### 16 **III. Reclamation’s Separate NEPA Process**

17 As described below, the Bureau of Reclamation has not signed a Record of Decision for  
18 the WaterFix project and has instead embarked on a separate NEPA process with the Department  
19 of Water Resources to determine long-term operations of the Central Valley Project and State  
20 Water Project, including potential operations of the WaterFix. The WaterFix Final EIR/EIS was  
21 published by the California Department of Water Resources (“DWR”) on December 22, 2016.  
22 Reclamation signed a Memorandum of Understanding (“MOU”) regarding Reinitiation of  
23 Consultation on Long Term Operations on December 19, 2016. The California Department of  
24 Water Resources signed the MOU on December 29, 2016.

25 On December 29, 2017, Reclamation issued a Notice of Intent to Prepare an EIS, stating  
26 that Reclamation would be considering the following:

1 Modified operations of the CVP and SWP with and without new or proposed facilities  
2 including possible requests to modify environmental and regulatory requirements, and  
3 sharing of water and responsibilities in the Delta.

4 Meeting notes from Reclamation's February 14, 2017 stakeholder meeting on Reclamation's  
5 Reinitiation of Consultation stated,

6 Q: How does the scope of this ROC fit with the on-going ESA consultation for California  
7 Water Fix?

8 R: Reclamation has not defined the exact approach to this ROC, however there is a basic  
9 assumption that if the project period extends to 2070, then Water Fix may be operable and  
10 this project would have to consider/model according to Water Fix impacts on CVP/SWP.  
11 (p. 2.)

12 The screen on the next page, from Reclamation's poster for Reclamation's February 14, 2017  
13 stakeholder meeting on Reclamation's Reinitiation of Consultation, shows the proposed process.

14 There is no indication that Reclamation is planning to rely on the WaterFix Final EIR/EIS.  
15 Instead the poster refers the WIIN act and enabling "Reclamation and DWR to satisfy their  
16 contractual obligations to the fullest extent possible."

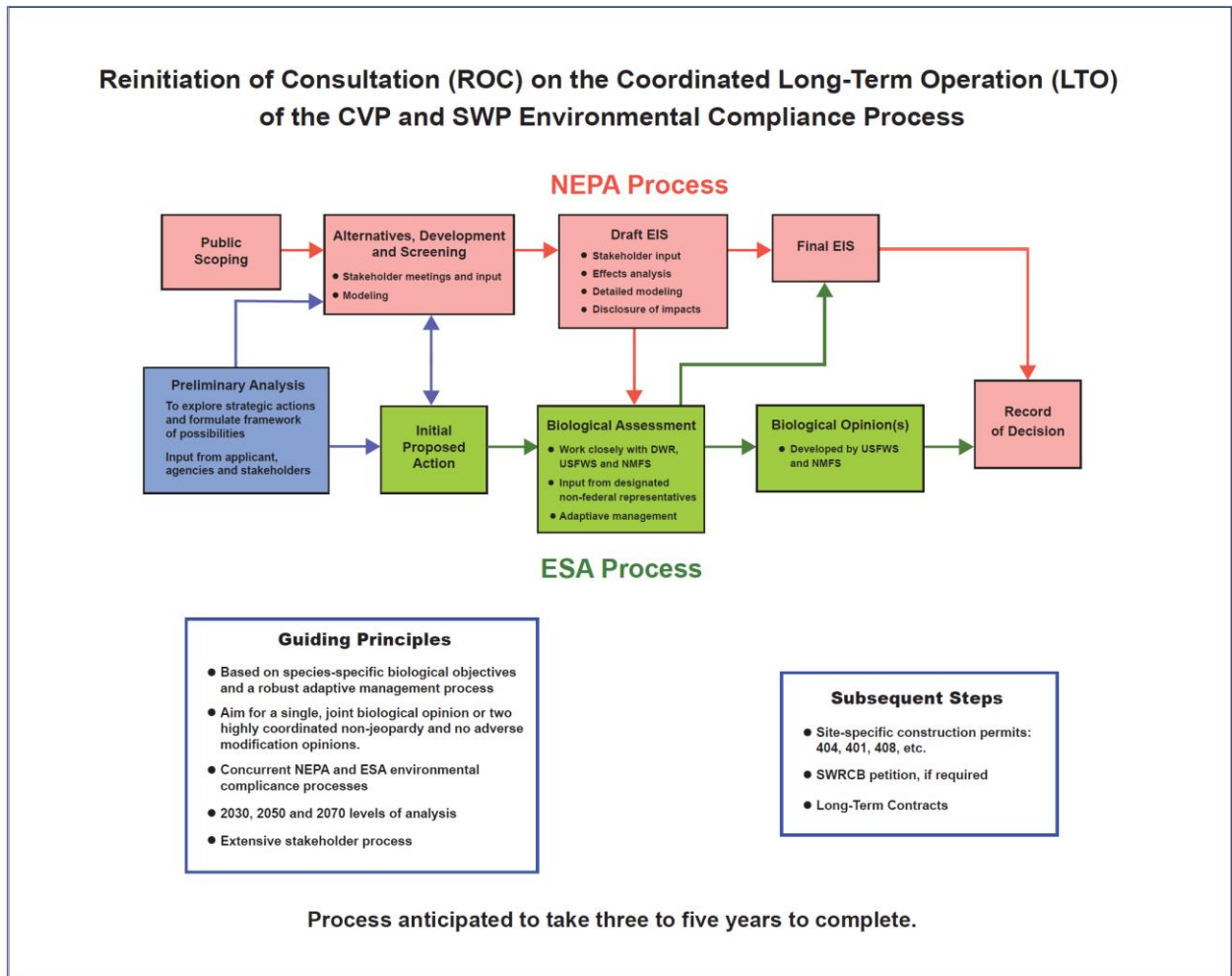
17 The February 14, 2017 meeting notes also state:

18 Q: Is Reclamation planning to incorporate a CEQA process?

19 R: CEQA compliance is required to support CDFW permit issuance as it relates to the  
20 SWP, but it's an open question as to how it will be addressed

21 Thus there is a federal NEPA process to determine long-term operations of the  
22 Central Valley Project and State Water Project with no CEQA process, and a CEQA process for  
23 the WaterFix, with what appears to be an abandoned NEPA process.

24 Reclamation has provided no witnesses to testify on Reclamation's planned operations, and  
25 the California Department of Fish and Wildlife, which is in consultation with Reclamation on  
26 Reclamation's new NEPA process, has withdrawn as a party for Part 2.



#### IV. Department of Fish and Wildlife

With regard to the relationship to CDFW’s CESA permits, Meeting notes from Reclamation’s February 14, 2017 stakeholder meeting on Reclamation’s Reinitiation of Consultation stated that the NEPA and CESA processes would be concurrent, and “should have meaningful interplay.”

Q: CDFW is developing permits for SWP CESA operations; the current consistency determination is satisfied by complying with the existing BOs, but the existing permit expires in 2018. DFW will evaluate re-doing species’ authorizations as well as issuing a permit for delta smelt, winterrun, and spring-run Chinook salmon versus doing another consistency determination. CESA requires full mitigation of negative effects. The CESA process will consider Water Fix, address adaptive management, and rely on peer review.

1 NEPA and CESA should have meaningful interplay, and the processes will be  
2 concurrent.

3 Since the Department of Fish and Wildlife is not presenting any witnesses for the Hearing, there  
4 is no testimony on what “meaningful interplay” means.

5  
6 **V. Concealment from Discovery**

7 The Natural Resources Defense Council sought to subpoena witnesses from the National  
8 Marine Fisheries Services (NMFS) and the United States Geological Survey as part of NRDC’s  
9 Case in Chief in Part 1. The Department of Interior (“DOI”) asserted on November 14, 2017 that  
10 under the Department’s “Touhy” act regulations at 43 C.F.R. section 2.280 et. seq., none of the  
11 agencies in the Department of Interior are required to comply with a subpoena for witnesses or  
12 for records in the WaterFix hearing, unless approved by DOI under DOI’s “Touhy” act  
13 regulations. The California Department of Fish and Wildlife withdrew as a party to the hearing  
14 and objected to a subpoena for DFW witnesses.

15 I swear under penalty of perjury that the foregoing is true and correct to the best of my  
16 knowledge.

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20 Deirdre Des Jardins  
21 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 **JOINDER IN MOTION OF NATURAL RESOURCES DEFENSE COUNCIL ET.  
AL. TO CONTINUE HEARING**

9 to be served by Electronic Mail (email) upon the parties listed in the Current Service List  
10 for the California Water Fix Petition Hearing, dated January 24, 2018, posted by the  
11 State Water Resources Control Board at  
12 [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

13 *Note: In the event that any emails to any parties on the Current Service List are*  
14 *undeliverable, you must attempt to effectuate service using another method of service, if*  
15 *necessary, and submit another statement of service that describes any changes to the*  
16 *date and method of service for those parties.*

17 I certify that the foregoing is true and correct and that this document was executed on  
18 February 7, 2018.

19 

20 Signature:

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

23 Party/Affiliation:  
24 Deirdre Des Jardins

25 Address:  
26 145 Beel Dr  
27 Santa Cruz, California 95060