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13 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

14 HEARING REGARDING PETITION
15 FILED BY THE DEPARTMENT OF
16 WATER RESOURCES AND U.S.
17 BUREAU OF RECLAMATION
18 REQUESTING CHANGES IN WATER
19 RIGHTS FOR THE CALIFORNIA
20 WATERFIX PROJECT

**PART 2 OPENING STATEMENT OF
PROTESTANTS PACIFIC COAST
FEDERATION OF FISHERMEN'S
ASSOCIATIONS AND INSTITUTE FOR
FISHERIES RESOURCES**

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TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES..... ii

3 I. INTRODUCTION..... 1

4 II. THE LEGAL PREMISES ON WHICH THE WATERFIX PETITION IS

5 BASED ARE CONTRARY TO LAW..... 2

6 III. THE DELTA IS DYING AND THE WATERFIX WILL MAKE MATTERS

7 WORSE. 5

8 IV. THE WATER QUALITY PROTECTIONS REQUIRED FOR LAWFUL

9 EVALUATION OF THE WATERFIX PETITION ARE ABSENT. 7

10 A. THE 1995 BAY DELTA PLAN HAS NOT BEEN UPDATED..... 8

11 B. THERE HAS BEEN NO COMPLIANCE WITH THE DELTA

12 REFORM ACT..... 9

13 C. THE WATERFIX/BDCP EIR/EIS IS INADEQUATE..... 11

14 D. THE BIOLOGICAL OPINIONS REQUIRED UNDER THE

15 ENDANGERED SPECIES ACT ARE INCOMPLETE 17

16 V. THIS BOARD SHOULD DISQUALIFY PETITIONERS’ WITNESSES

17 AND EXCLUDE THEIR TESTIMONY AND EXHIBITS. 18

18 VI. CONCLUSION 20

19

20

21

22

23

24

25

26

27

28

1 **TABLE OF AUTHORITIES**

2 **STATE CASES**

3 *Aengst v. Board of Medical Quality Assurance*
4 (1980) 110 Cal.App.3d 275 18

5 *County of Amador v. El Dorado County Water Agency*
6 (1999) 76 Cal.App.4th 931 14

7 *Friends of the Eel River v. Sonoma County Water Agency*
8 (2003) 108 Cal.App.4th 859 13

9 *Laurel Heights Improvement Assn. v. Regents of University of California*
10 (1988) 47 Cal.3d 376 15

11 *Habitat & Watershed Caretakers v. City of Santa Cruz*
12 (2013) 213 Cal.App.4th 1277 13

13 *Neighborhood Action Group v. County of Calaveras*
14 (1984) 156 Cal.App.3d 1176 11

15 *North Coast Rivers Alliance v. Kawamura*
16 (2015) 243 Cal.App.4th 647 12

17 *Resource Defense Fund v. County of Santa Cruz*
18 (1982) 133 Cal.App.3d 800 11

19 *Resource Defense Fund v. Local Agency Formation Com.*
20 (1987) 191 Cal.App.3d 886 15

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22 (2009) 170 Cal.App.4th 1186 15

23 *United States v. State Water Resources Control Board*
24 (1986) 182 Cal.App.3d 82 2

25 *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*
26 (2007) 40 Cal.4th 412 12

27

28

FEDERAL CASES

1

2 *Conner v. Burford*

3 848 F.2d 1441 (9th Cir. 1988) 6

4 *Pacific Coast Federation of Fishermen’s Associations v. U.S. Department*

5 *of the Interior*

6 2016 WL 3974183* 2, 3 (9th Cir. No. 14-15514, July 25, 2016) 12

7 *San Luis & Delta Mendota Water Authority v. Jewell*

8 747 F.3d 581 (9th Cir. 2014) 5

9 *San Luis & Delta Mendota Water Authority v. Locke*

10 776 F.3d 971 (9th Cir. 2014) 5

STATE STATUTES

11 Evidence Code

12 § 451(a) 7, 9, 10

13 § 452(a) 9

14 § 452(c) 10, 14

15 § 453 6, 9, 10

16 Fish and Game Code

17 § 2050 et seq 17

18 Government Code

19 § 11513(c) 20

20 Public Resources Code

21 § 21000 et seq. (California Environmental Quality Act) *passim*

22 § 21002 15

23 § 21002.1(b) 15

24 § 21069 14

25 § 21081 15

26 Water Code

27 § 1243 3, 17, 20

28 § 1243.5 3, 17, 20

 § 1257 4, 20

 § 1258 17, 20

 § 1701.2(d) *passim*

 § 1702 7, 20

 § 13050(j) 5

 § 13240 7

 § 13240-13246 4

 § 13247 4

 § 13377 7

1	§ 85000 et seq.	4
2	§ 85001 et seq.	7
3	§ 85020(c)	11, 17
4	§ 85021	10, 17
5	§ 85059	9
6	§ 85086(c)	11
7	§ 85086(c)(1)	4
8	§ 85086(c)(2)	8
9	§ 85225	11
10	§ 85302(e)(4)	10
11	§ 85308(b)	9

FEDERAL STATUTES

9	16 U.S.C.	
10	§ 1531 et seq.	6
11	§§ 1536(b)(3), (4)	18
12	33 U.S.C.	
13	§ 1313(1).....	16
14	§ 1313(c)	7
15	§ 1313(c)(2)(A)	16
16	§ 1341.....	7
17	42 U.S.C.	
18	§ 4321 et seq. (National Environmental Policy Act)	12, 17, 20

STATE REGULATIONS

18	14 California Code Regulations (CEQA Guidelines)	
19	§ 15091	15
20	§ 15091(a)	15
21	§ 15093	15
22	§ 15096	14, 15
23	§ 15096(e)	14
24	§ 15096(h)	15
25	23 California Code Regulations	
26	§ 648.2	7, 9, 10, 14
27	§§ 794(a)(6), (8), (9)	19

FEDERAL REGULATIONS

26	40 C.F.R.	
27	§ 131.6(a)	16
28	§ 131.6(c)	16
29	§ 131.6(d)	16

1	§ 131.12(a)	16
2	§ 131.20	16
3	50 C.F.R.	
4	§§ 402.12-402.14	18
5		
6		
7		
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14		
15		
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I. INTRODUCTION

Protestants Pacific Coast Federation of Fishermen’s Associations and the Institute for Fisheries Resources (collectively, “PCFFA”) hereby submit their Part 2 Opening Statement. The California WaterFix Change Petition submitted by the Department of Water Resources (“DWR”) and the U.S. Bureau of Reclamation (“Reclamation,” and together with DWR, “petitioners”) must be denied because petitioners have failed (1) “to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water” as required by Water Code section 1701.2(d), and (2) to demonstrate that the proposed change will not harm “fish and wildlife and recreational uses” of the affected waters, as required by this Board’s August 31, 2017 Ruling governing the scope of Part 2 of this proceeding. *Id.*, p. 12. Recognizing that their proposed removal of 9,000 second feet of water from the Sacramento River over a 40-mile stretch from Clarksburg to Clifton Court Forebay will indeed cause substantial harm to legal users of water, petitioners have not even attempted to make that plainly impossible showing. Instead, they have argued only that (1) the California WaterFix (“WaterFix”) will comply with this Board’s Bay-Delta Water Quality Control Plan adopted in 1995, Decision-1641 (“D-1641”), and (2) operation of the WaterFix as hypothetically delimited by “Boundary 1” and “Boundary 2” will not harm existing water quality conditions as represented by the “No Action Alternative.”

But petitioners’ argument requires this Board to indulge two false premises: First, petitioners ask this Board to assume that D-1641 adequately protects legal users of water. Manifestly, it has failed to do so. Second, petitioners ask this Board to assume that the No Action Alternative does not harm legal users of water. Again, it is indisputable that “existing conditions” are harming the water quality of both the Delta and its tributary rivers, including the Trinity River whose waters have been diverted to the Delta, and fish and wildlife in and recreational uses of these waters. For these reasons, as discussed below, this Board must deny and dismiss the WaterFix Change Petition.

1 **II. THE LEGAL PREMISES ON WHICH THE WATERFIX APPLICATION**
2 **IS BASED ARE CONTRARY TO LAW.**

3 The twin premises on which petitioners base their application are not only
4 demonstrably false as a matter of fact, but also plainly wrong as a matter of law. For
5 thirty years it has been settled law that neither petitioners – nor this Board – may rely
6 upon the “without project” conditions “as the measure of water flows necessary to
7 protect the existing water rights in the Delta against impairment by the [state and federal
8 water] projects.” *United States v. State Water Resources Control Board* (1986) 182
9 Cal.App.3d 82, 116. For the same reason, this Board may not rely on the “without
10 project” (i.e., existing) conditions “as the measure of water flows necessary to protect”
11 legal users, fish and wildlife and recreational uses of water under Water Code section
12 1701.2(d). As the Court of Appeal instructed this Board three decades ago, such an
13 approach is “fundamentally defective.” *Id.*

14 The Court of Appeal’s reasons for overturning this Board’s mistaken reliance on
15 this erroneous premise *then* remain fully applicable *today*. As the Court explained, this
16 Board’s statutory duties include the “reasonable protection” of all “beneficial uses” in the
17 Delta, not just water rights held by the large exporters:

18 The Board is obligated to adopt a water quality control plan
19 consistent with the overall statewide interest in water quality . . .
20 which will ensure “the reasonable protection of *beneficial uses*”
21 Its legislated mission is to protect the “quality of all the waters of the
22 state . . . for use and enjoyment by the people of the state.”

21 *Id.*

22 And, the governing statutes require an updated water quality plan by which this
23 Board determines the measures by which these beneficial uses will be protected. To
24 comply with this planning mandate, this Board is “currently developing updates to the
25 Bay-Delta Plan and its implementation through a phased process” that by law must
26 establish the water quality objectives that the WaterFix must implement. SWRCB Ruling
27 February 11, 2016, p. 4. Consequently, this Board may not pretend – as petitioners urge
28 – that the decades-old D-1641 is adequate, nor accept the petitioners’ claim that

1 compliance with its demonstrably inadequate water quality standards is sufficient to
2 show that legal users of water will not be harmed as PCFFA demonstrated in Part 1 of
3 these proceedings.

4 For the same reason, this Board may not give petitioners a pass on the
5 WaterFix’s adverse impacts on public trust resources including recreation and fish and
6 wildlife. The laws governing this Board’s approval of applications to appropriate water –
7 including changes in points of diversion such as the WaterFix – require this Board to give
8 particular attention to protecting *all* beneficial uses of water, including “[t]he use of water
9 for recreation and preservation and enhancement of fish and wildlife resources.” Water
10 Code §§ 1243, 1243.5. The Legislature has declared preservation and enhancement of
11 fish and wildlife to be “a beneficial use of water,” and directed this Board, “[i]n
12 determining the amount of water available for appropriation, to “take into account,
13 whenever it is in the public interest, the amounts of water needed to *remain in the source*
14 for protection of beneficial uses” Water Code § 1243.5 (emphasis added).

15 The Legislature placed such importance on these instream beneficial uses that it
16 mandated this Board’s consideration of the quantity of water required for their protection
17 *before* this Board may approve any appropriation of water:

18 In determining the amount of water available for appropriation for
19 other beneficial uses, the board *shall* take into account, whenever it
20 is in the public interest, the amounts of water required for recreation
and the preservation and enhancement of fish and wildlife
resources.

21 Water Code § 1243 (emphasis added). But contrary to this mandate, *petitioners have*
22 *made no showing of the amount of water needed for these instream uses*, let alone that
23 the WaterFix will not remove the very water needed for their protection as required by
24 the Water Code. This omission is fatal to their Petition.

25 Petitioners must also show that their Petition is consistent with applicable water
26 resource plans. The Legislature has directed that, in determining the “public interest” as
27 required for approval of an application to appropriate water, the Board “*shall give*
28 consideration to any general or co-ordinated plan looking toward the control, protection,

1 development, utilization, and conservation of the water resources of the State”
2 Water Code § 1256. There are two plans pertinent to this Board’s determination of the
3 “public interest” as required for approval of the WaterFix: the Board’s own Bay-Delta
4 Water Quality Control Plan (“WQCP”) adopted pursuant to Water Code sections 13050(j)
5 and 13240-13246, and the Delta Plan that the Delta Stewardship Council must adopt
6 pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009 (“Delta Reform Act”),
7 Water Code sections 85000 et seq. As shown below, because neither of these plans is
8 adequate, this Board may not consider the WaterFix for approval at this time.

9 Buttressing and expanding on section 1256’s planning mandate, the Legislature
10 has adopted twin statutory schemes that independently require this Board’s adherence
11 to a principled planning process intended to protect and restore the Delta’s environment.
12 With respect to the Bay-Delta WQCP, the Legislature has instructed that this Board, “in
13 carrying out activities which may affect water quality, shall comply with water quality
14 control plans approved or adopted by [this Board] unless otherwise directed or
15 authorized by statute” Water Code section 13247. And, with respect to the Delta
16 Plan prepared by the Delta Stewardship Council as required by the Delta Reform Act,
17 the Legislature has directed that this Board

18 *shall, pursuant to its public trust obligations, develop new flow*
19 *criteria for the Delta ecosystem necessary to protect public trust*
20 *resources. In carrying out this section, the board shall review*
21 *existing water quality objectives and use the best available scientific*
22 *information.*

23 Water Code § 85086(c)(1) (emphasis added).

24 Pursuant to the foregoing statutory direction, six years ago this Board found –
25 based on overwhelming, indisputable evidence – that the “best available science
26 suggests that *current [Delta] flows are insufficient to protect public trust resources.*”
27 SWRCB-25 at p. 2 (excerpted in PCFFA-4 at p. 1) (emphasis added). This finding was
28 compelled because, as this Board specifically determined, “[r]ecent Delta flows are

1 *insufficient* to support native Delta fishes for today’s habitats.” *Id.* at p. 5 (excerpted in
2 PCFFA-4 at p. 4) (emphasis added).

3 Thus, by this Board’s own authoritative determination as mandated by statute,
4 existing flows in the Delta under the *existing* WQCP – D-1641 – are “insufficient” to
5 protect the Delta’s beleaguered fisheries from harm. Indeed, it is indisputable that those
6 fisheries have been pushed to the brink of extinction. Hence petitioners’ claim that the
7 WaterFix will not *worsen* existing conditions merely confirms that the WaterFix will do
8 nothing to stem the Delta ecosystem’s ongoing collapse.

9 It follows from these indisputable facts and points of law that petitioners have
10 failed to demonstrate that the proposed change “will not injure any other legal user of
11 water,” fish and wildlife and recreational uses. Petitioners’ reliance on compliance with
12 D-1641 and the “No Action Alternative” to demonstrate the absence of harm ignores the
13 law. Applicable law does not allow this Board to use “without project” conditions “as the
14 measure of water flows necessary to protect” legal users of water. *United States v.*
15 *State Water Resources Control Board, supra*, 182 Cal.App.3d at 116. Accordingly, this
16 Board must deny and dismiss the WaterFix Petition.

17 **III. THE DELTA IS DYING AND THE WATERFIX WILL MAKE**
18 **MATTERS WORSE.**

19 Every state and federal agency that manages the Delta’s fish and wildlife agrees
20 that the Bay-Delta ecosystem is collapsing. The National Marine Fisheries Service
21 (“NMFS”) and the Fish and Wildlife Service (“FWS”) concluded in 2008 and 2009,
22 respectively, that continued operation of the Central Valley Project (“CVP”) and the State
23 Water Project (“SWP”) would jeopardize the existence of Delta smelt, winter-run Chinook
24 salmon, green sturgeon, and other imperiled fish species. *San Luis & Delta Mendota*
25 *Water Authority v. Jewell*, 747 F.3d 581, 592 (9th Cir. 2014) (quoting FWS’ Biological
26 Opinion); *San Luis & Delta Mendota Water Authority v. Locke*, 776 F.3d 971, 981 (9th
27 Cir. 2014) (quoting NMFS’ Biological Opinion). The Environmental Protection Agency
28 (“EPA”) agrees. As EPA stated in its comments on the Recirculated Draft

1 EIR/Supplemental Draft EIS (“RDEIR/SDEIS”) for the California WaterFix dated October
2 30, 2015, “[t]hese species have experienced sharp population declines in the last
3 decade and showed record low abundance over the last five years.” PCFFA-5 at 3.

4 Far from protecting those species, the WaterFix will *hasten their demise*. EPA
5 warned that “[i]nformation presented in the [RDEIR/SDEIS] shows that the WaterFix
6 project could reduce habitat conditions for Delta smelt, winter-run Chinook salmon,
7 green and white sturgeon, striped bass, and American shad, and result in a decline of
8 long fin smelt abundance.” *Id.* EPA cautioned further that the WaterFix will cause a
9 wholesale increase in salinity throughout the Bay-Delta, posing potentially catastrophic
10 impacts on both fish and wildlife and municipal uses. *Id.*

11 It gets worse. Not only is the Bay-Delta ecosystem in free fall, all four safety nets
12 that state and federal law require for protection of this dying estuary either confirm the
13 WaterFix’s harm to legal users of water, or have themselves been ruled inadequate to
14 prevent that harm. First, the Biological Assessment issued by Reclamation on August 2
15 concludes that the WaterFix is “likely to adversely affect” several fish species protected
16 under the Endangered Species Act, 16 U.S.C. section 1531 et seq. SWRCB-104 at p. 7-
17 36, Table 7-1. The Biological Opinions prepared by NMFS and FWS on June 26, 2017
18 ostensibly to address the adverse impacts of the WaterFix fail to do so because they
19 impermissibly defer analysis of its *operational* effects on threatened and endangered fish
20 and wildlife. *Conner v. Burford*, 848 F.2d 1441, 1453, 1458 (9th Cir. 1988) (consulting
21 agency must assess the impacts of the “entire agency action” that is “coextensive” with
22 its full extent and duration).

23 Second, EPA has given the RDEIR/SDEIS a failing grade of “3’ (Inadequate).”
24 PCFFA-5 at 4. The Final EIR/EIS failed to rectify the many deficiencies that plagued and
25 invalidated the drafts that preceded it.

26 Third, the Sacramento Superior Court has set aside the Delta Stewardship
27 Council’s Delta Plan – the very plan that the Legislature mandated to reverse the Delta’s
28 “crisis” – because it fails to prescribe measureable and enforceable targets for restoring

1 the Delta’s natural flows, reducing environmental harms and curtailing diversions of its
2 flows.¹

3 Fourth, and, most important of all, it is indisputable that the Bay-Delta Water
4 Quality Control Plan adopted by this Board in 1995 – D-1641 – is obsolete. As this
5 Board determined in 2010, “current [Delta] flows are *insufficient* to protect public trust
6 resources.” SWRCB-25 at p. 2 (excerpted in PCFFA-4 at p. 1) (emphasis added).
7 Because D-1641 allows reduced Delta flows that “are insufficient to support native Delta
8 fishes,” it has failed to protect the Delta’s fish and wildlife. *Id.* at p. 5 (excerpted in
9 PCFFA-4 at p. 4). That plan must therefore be updated to protect these beneficial uses
10 as required by the Clean Water Act, 33 U.S.C. sections 1313(c) (triennial review), and
11 1341 (section 401 certification), and Water Code sections 13240 and 13377.

12 The upshot? Unless and until all four of these fundamental gaps in the Delta’s
13 required protection are rectified, there is no regulatory regime in place to provide an
14 evidentiary basis for the Change Petition’s claim that compliance with D-1641 and
15 maintenance of “no project” conditions will prevent harm to legal users of water, fish and
16 wildlife, and recreational uses. Because there are no updated and valid Delta water
17 quality standards and plans in place, petitioners’ assurances that the WaterFix’s claimed
18 compliance with them satisfies Water Code sections 1701.2(d) and 1702 – and the
19 additional Water Code sections referenced above – ring hollow. Accordingly, this Board
20 must deny and dismiss the WaterFix Change Petition.

21 **IV. THE WATER QUALITY PROTECTIONS REQUIRED FOR LAWFUL**
22 **EVALUATION OF THE WATERFIX PETITION ARE ABSENT.**

23
24 ¹ Ruling on Submitted Matter: Petitions for Writ of Mandate, Bifurcated Proceeding on
25 Statutory Challenges filed May 18, 2016 (“Ruling”), in Delta Stewardship Council Cases
26 (Judicial Council Coordination Proceeding No. 4758) at 26, setting aside the Delta Plan
27 adopted by the Delta Stewardship Council in May, 2013 because it violates the Delta
28 Reform Act, Water Code sections 85001 et seq. PCFFA and IFR previously submitted
this Ruling to this Board on July 12, 2016 as Exhibit 1 to their Motion to Disqualify
Petitioners’ Witnesses and Exclude Their Testimony and Exhibits under 23 C.C.R.,
section 648.2, and official notice is respectfully requested again, consistent with
Evidence Code section 451(a) (decisional law of this state must be noticed).

1 Petitioners’ testimony and exhibits are neither relevant nor reliable because they
2 rest on the false premise that compliance with existing environmental standards will
3 prevent harm to other legal users of the Delta’s water. See, e.g., DWR-51 (Pierre
4 testimony) at p. 12 (“[t]erms imposed through D-1641” “will not change”). As detailed
5 below, the water quality protections required for lawful evaluation of the WaterFix
6 Petition are either invalid, not yet adopted, or show that the WaterFix will harm rather
7 than protect the Delta’s water flows and quality and the legal users, fish and wildlife, and
8 recreational uses that depend on them.

9 **A. THE 1995 BAY-DELTA PLAN HAS NOT BEEN UPDATED.**

10 The Water Quality Control Plan for the San Francisco Bay/San Joaquin-
11 Sacramento Delta Estuary (WQCP) (Water Rights Decision 1641, D-1641) was adopted
12 in 1995, and amended without substantive changes in 2006. “The State Water Board is
13 in the process of a periodic update of the WQCP, which is occurring in phases.” (DWR-
14 51 (Jennifer Pierre testimony) at p. 4 fn. 4 (emphasis added). Indeed, as this Board
15 recognized in its February 11, 2016, Ruling: “The appropriate Delta flow criteria will be
16 more stringent than petitioners’ current obligations and may well be more stringent than
17 petitioners’ preferred project.” *Id.* at 4. This Board further acknowledged “that the
18 WaterFix, if approved, would be a significant component of Delta operations, and it
19 would be preferable to have Phase 2 [of the Water Quality Control Plan update]
20 completed *prior to* acting on the change petition.” *Id.* at 4-5 (emphasis added).

21 Moreover, the Delta Reform Act mandates that any order by this Board approving
22 a diversion point change “shall include appropriate Delta flow criteria and shall be
23 informed by the analysis conducted pursuant to this section.” Water Code § 85086(c)(2).
24 But contrary to this express mandate of the Delta Reform Act, this Board has failed to
25 adopt appropriate Delta flow criteria before considering the Change Petition. This cart-
26 before-the-horse error is highly prejudicial to all of the protestants. Because this Board
27 must base its consideration of the Change Petition on “appropriate Delta flow criteria”
28 rather than the other way around, the Change Petition must be denied at this time.

1 Because existing standards are known to be inadequate, petitioners’ speculative
2 testimony that the WaterFix will comply with existing standards is not relevant.
3 Comprehensive and adequate Bay-Delta water quality planning needs to take place
4 before, not after, this Board may proceed with a hearing on the Change Petition.

5 **B. THERE HAS BEEN NO COMPLIANCE WITH THE DELTA**
6 **REFORM ACT.**

7 There is currently no valid Delta Plan in effect. On May 18, 2016, the Sacramento
8 Superior Court issued its 73-page ruling in the seven coordinated Delta Stewardship
9 Council Cases (Judicial Council Coordinated Proceeding No. 4758). In pertinent part,
10 the Ruling ordered that:

11 A peremptory writ shall issue from this Court to Respondent [the
12 Delta Stewardship Council, or “DSC”], ordering Respondent to
13 revise the Delta Plan and any applicable regulations to:

14 Include quantified or otherwise measurable targets associated
15 with achieving *reduced Delta reliance, reduced environmental*
16 *harm* from invasive species, *restoring more natural flows*, and
17 increased water supply reliability, in accordance with the Delta
18 Reform Act.

19 *Id.* at 26, 38. (emphasis added). This Board must take official notice of this Ruling under
20 23 C.C.R. section 648.2 because judicial notice would be mandatory under Evidence
21 Code sections 451(a), 452(a) and 453 as previously noted. The WaterFix’s compliance
22 with the Delta Plan is pivotal, because that plan is designated as “the comprehensive,
23 long-term management plan for the Delta as adopted by the [Delta Stewardship Council]
24 in accordance with this division.” Water Code § 85059.

25 As the Ruling explains, Water Code section 85308(b) “provides that the Delta
26 Plan shall ‘include quantified or otherwise measurable targets associated with achieving
27 the objectives of the Delta Plan’” including a numeric or otherwise specific and
28 identifiable standard. *Id.* at 8-9. Contrary to this mandate, “the Delta Plan fails to
‘include quantified or otherwise measurable targets associated with’ restoring more
natural flows as required by the Delta Reform Act.” *Id.* at 36. The Court held that Water

1 Code section 85302(e)(4) “provides [that] [t]he following sub goals and strategies for
2 restoring a healthy ecosystem *shall* be included in the Delta Plan... (4) Restore Delta
3 flows and channels to support a healthy estuary and other ecosystems.” *Id.* at 34
4 (emphasis added). The Court reasoned that “simply recommending the BDCP’s
5 completion does not promote any options” for better ways to achieve the Delta Reform
6 Act’s goals. *Id.* at 37. The Court emphasized that the Delta Plan must be “legally
7 enforceable.” *Id.* at 8-9.

8 On June 24, 2016, the Court issued a further Order in response to motions for
9 clarification, adhering to and expanding upon its earlier Ruling, and explaining that
10 “[s]pecifically, with regard to reduced Delta reliance, the Court found the Plan failed to
11 include targets that would ensure reduced reliance, as required by the Delta Reform
12 Act.”² The Court repeated its previous ruling that the Delta Plan must be revised “to
13 include quantified or otherwise measurable targets associated with achieving reduced
14 Delta reliance, . . . restoring more natural flows, and increased water supply reliability,”
15 and emphasized that “[t]o be clear, the Delta Plan is invalid and must be set aside until
16 proper revisions are completed.” *Id.*

17 As the Superior Court has repeatedly ruled, more stringent Delta flow criteria to
18 “restor[e] more natural flows” and reduce dependence on the Delta for water supply are
19 necessary. The Delta Reform Act requires measures to “[r]estore Delta flows and
20 channels to support a healthy estuary and other ecosystems,” Water Code §
21 85302(e)(4), and establishes State policy “to reduce reliance on the Delta in meeting
22 California’s future water supply needs through a statewide strategy of investing in
23 improved regional supplies, conservation, and water use efficiency.” *Id.* § 85021. The
24

25 _____
26 ² PCFFA and IFR submitted this further Ruling to this Board on July 12, 2016 as Exhibit 2
27 to their Motion to Disqualify Petitioners’ Witnesses and Exclude Their Testimony and
28 Exhibits, and hereby renew their request for official notice under 23 C.C.R. section 648.2
because judicial notice would be proper (indeed, mandatory) under Evidence Code
sections 451(a), 452(c) and 453.

1 primary purpose of this policy is to “[r]estore the Delta ecosystem, including its fisheries
2 and wildlife, as the heart of a healthy estuary and wetland ecosystem.” *Id.* § 85020(c).

3 For these reasons, the status quo of a dying Delta under assault by
4 unsustainable, excessive diversions does not satisfy the Delta Reform Act. Instead,
5 reliance on the Delta by consumptive users must be *reduced*, and more natural Delta
6 flows must be *restored*. Consequently, petitioners’ testimony that the WaterFix will
7 maintain existing conditions requires denial and dismissal of their Petition.

8 Like the Delta Stewardship Council, this Board will be sent back to the starting
9 line for violating the law if it continues to consider the Change Petition without first
10 adopting flow criteria sufficient to protect and *restore* public trust resources and to
11 *reduce* exports as required by the Delta Reform Act, Water Code section 85086(c). In
12 the absence of a valid Delta Plan, both the Delta Stewardship Council and this Board are
13 powerless to make the required determination that the WaterFix is consistent with the
14 statutorily-mandated Delta Plan. In the analogous context of the parallel requirement
15 that local land use projects must be consistent with the applicable general plan, it has
16 been settled law for over three decades that the absence of a valid general plan
17 precludes any land use approval that requires a finding of general plan consistency.
18 *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184;
19 *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806.

20 So too here, since there is no valid Delta Plan, neither this Board nor the Delta
21 Stewardship Council can find that the WaterFix is consistent with that plan as required
22 by Water Code section 85225. That section requires a written certification of
23 consistency by both this Board and the Delta Stewardship Council before either may
24 approve the WaterFix. Until that plan’s deficiencies noted by the Superior Court are
25 rectified, this required certification of consistency cannot be made.

26 **C. THE WATERFIX/BDCP EIR/EIS IS INADEQUATE.**

27 It is axiomatic that this Board may not lawfully consider the WaterFix Petition
28 unless it is accompanied by an adequate environmental impact report (“EIR”) as required

1 by the California Environmental Quality Act (“CEQA”), Public Resources Code Section
2 21000 et seq. “The EIR’s function is to ensure that government officials who decide to
3 build or approve a project do so with a full understanding of the environmental
4 consequences and, equally important, that the public is assured those consequences
5 have been taken into account.” *Vineyard Area Citizens for Responsible Growth, Inc. v.*
6 *City of Rancho Cordova* (2007) 40 Cal.4th 412, 449. Contrary to this mandate,
7 petitioners have not approved an adequate Final EIR/EIS for the WaterFix.

8 Under CEQA, an EIR must consider a reasonable range of alternatives and
9 “*should not approve* projects as proposed if there are feasible alternatives or feasible
10 mitigation measures available which would substantially lessen the significant
11 environmental effects of such projects.” *North Coast Rivers Alliance v. Kawamura*
12 (2015) 243 Cal.App.4th 647, 666 (emphasis added). Likewise under the National
13 Environmental Policy Act (“NEPA”), federal agencies must consider a reasonable range
14 of alternatives that would reduce a project’s environmental impacts, including reducing
15 water diversions where, as here, they harm the Delta. *Pacific Coast Federation of*
16 *Fishermen’s Associations v. U.S. Department of the Interior* (“PCFFA”), PCFFA-18 at p.
17 6, ___ Fed. Appx. ___, 2016 WL 3974183* 2, 3 (9th Cir. No. 14-15514, July 25, 2016
18 (not selected for publication)).

19 Contrary to both laws, the Final EIR/EIS fails to do so. Its range of alternatives is
20 improperly and artificially curtailed by the petitioners’ project objectives, and fails to
21 consider feasible alternatives that would reduce exports and restore natural flows. The
22 Ninth Circuit’s recent ruling rejecting Reclamation’s refusal to consider reducing Delta
23 exports to protect its fisheries, requires that Reclamation “give full and meaningful
24 consideration to the alternative of a reduction in maximum water quantities.” PCFFA-18
25 at 6; PCFFA *2. Its failure to do so here is likewise “an abuse of discretion.” *Id.*

26 Instead of complying with CEQA and NEPA, petitioners’ Final EIR/EIS fails to
27 study any alternative that would “give full and meaningful consideration to the
28 alternative” that would, consistent with the Delta Reform Act, reduce diversions by the

1 SWP and CVP – despite multiple comments requesting such an analysis. The
2 Environmental Water Caucus prepared one such alternative, which was attached to the
3 January 21, 2016, letter to this Board submitted by Friends of the River, *et al.*, but this
4 alternative was dismissed from consideration. Petitioners’ summary rejection of this
5 alternative violates both CEQA and NEPA. CEQA does not permit a lead agency to
6 dismiss from consideration “any alternatives that feasibly might reduce the
7 environmental impact of a project on the unanalyzed theory that such an alternative
8 might not prove to be environmentally superior to the project.” *Habitat & Watershed*
9 *Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1305 (emphasis omitted).
10 “The purpose of an EIR is to provide the facts and analysis that would support such a
11 conclusion so that the decision maker can evaluate whether it is correct.” *Id.* Omission
12 of this discussion “fail[s] to satisfy the informational purpose of CEQA.” *Id.*

13 CEQA requires an accurate description of the project in the context of the
14 baseline environment. *County of Amador v. El Dorado County Water Agency* (1999) 76
15 Cal.App.4th 931, 952-956. In the context of water diversion projects, an EIR must show
16 how reservoir lake levels are correlated with downstream river flows, and explain the
17 resulting impacts to “fisheries, river habitat, and recreational users.” *Id.* at 954-955.
18 Similarly, a water project EIR must show precisely how “existing supplies can meet
19 future demands for water” in the context of “minimum streamflow requirements,” since
20 the latter “are designed in part to ensure the health of species in the river.” *Friends of*
21 *the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 871. In
22 particular, the cumulative impacts of the project on river flows and the dependent
23 fisheries, together with other ongoing diversions, must be included in an accurate and
24 comprehensive cumulative impacts analysis. *Id.* at 871-872.

25 Contrary to these requirements, the Final EIR/EIS fails to provide this critical
26 information. EPA’s October 30, 2015 letter reviewing the similarly flawed RDEIR/SDEIS³

27 _____
28 ³ The October 30, 2015 EPA letter was attached to the November 24, 2015, letter to this Board submitted by protestants California Sportfishing Protection Alliance,

1 gave the RDEIR/SDEIS a rating of “3’ (*Inadequate*).” *Id.* p. 4. Its criticism that the
2 RDEIR/SDEIS lacked essential information echoes this Board’s October 30, 2015,
3 comment that the RDEIR/SDEIS reveals “a large degree of uncertainty regarding the
4 exact effects of the project due to a number of factors.” *Id.* p. 2.

5 This Board cannot sidestep its CEQA responsibilities on the grounds it is only
6 acting as a “responsible agency.” The Board has taken the position that because it is
7 only a “responsible agency” rather than the “lead agency” under CEQA, it need not
8 consider whether the RDEIR/SEIS – even assuming it were a final document – is
9 adequate. The Board stated in its WaterFix Notice issued January 15, 2016 that

10 As a general rule, a responsible agency must assume that the CEQA
11 document prepared by the lead agency is adequate for use by the
12 responsible agency. (Cal. Code of Regs., tit. 14, § 15096, subd. (e).)
13 *Accordingly, the adequacy of DWR’s EIR for the WaterFix Project for
14 purposes of CEQA compliance is not a key hearing issue, and the parties
15 should not submit evidence or argument on this issue.*

16 *Id.* at p. 2. This position overlooks several important duties owed by responsible
17 agencies under CEQA that impact these hearing procedures. As the Board
18 acknowledges, it must examine “the potential effects of the water right change petition
19 on other legal users of water.” Those effects necessarily include the *environmental*
20 impacts of the WaterFix. And, those impacts must be understood before the Board can
21 make an informed determination of the availability of water for the project, and the terms
22 and conditions governing its operation, including those needed to protect the
23 environment, that should be imposed should the project be approved. *Id.*

24 The Board is the principal responsible agency for the project and cannot make
25 these essential determinations before CEQA review is complete. Where, as here, the
26 Board acts as a “responsible agency” under CEQA, Public Resources Code (“PRC”)
27 section 21069 and CEQA Guidelines [14 California Code of Regulations (“CCR”)] section

28 _____
Environmental Water Caucus, Friends of the River, and Restore the Delta. Pursuant to
23 C.C.R. section 648.2 and Evidence Code section 452(c), protestants hereby request
official notice of the contents.

1 15096, the Board “must independently make its own findings and conclusions” in writing
2 and “accompanied by a supporting statement of facts.” *Resource Defense Fund v. Local*
3 *Agency Formation Commission* (1987) 191 Cal.App.3d 886, 896 (citing CEQA
4 Guidelines §§ 15091 and 15096).

5 Thus, contrary to this Board’s disavowal of any duty to address the adequacy of
6 the WaterFix EIR, it must fully participate in the environmental review process,
7 *independently assess the adequacy of the final environmental impact report*, “make the
8 findings required by [CEQA Guidelines] Section 15091 for each significant effect of the
9 project and . . . make the findings in Section 15093 [i.e., a statement of overriding
10 considerations] if necessary.” CEQA Guidelines § 15096(h). CEQA directs that “no
11 public agency shall approve or carry out a project for which an EIR has been certified
12 which identifies one or more significant environmental effects of the project unless the
13 public agency makes one or more written findings for each of those significant effects,
14 accompanied by a brief explanation of the rationale for each finding.” CEQA Guidelines
15 § 15091(a). This prohibition applies fully to responsible agencies such as the Board.
16 *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1207.

17 CEQA’s findings requirement enforces its mandate “that public agencies should
18 not approve projects as proposed if there are feasible alternatives or feasible mitigation
19 measures available which would substantially lessen the significant environmental
20 effects of such projects.” PRC § 21002. Where a project poses significant effects on the
21 environment, “[e]ach public agency shall mitigate or avoid the significant effects on the
22 environment of projects that it carries out or approves whenever it is feasible to do so.”
23 PRC §§ 21002.1(b), 21081; CEQA Guidelines §§ 15091, 15093. “[A]s with a lead
24 agency . . . , [b]efore approving the project, the [responsible] agency . . . must . . . find
25 either that the project’s significant environmental effects identified in the EIR have been
26 avoided or mitigated, or that unmitigated effects are outweighed by the project’s
27 benefits.” *Id.* at 1207 (quoting *Laurel Heights Improvement Assn. v. Regents of*
28 *University of California* (1988) 47 Cal.3d 376 at 391).

1 Thus, the Board’s position that “a responsible agency must assume that the
2 CEQA document prepared by the lead agency is adequate” is in error, and “the
3 adequacy of DWR’s EIR for the WaterFix Project” is a “key hearing issue” that should be
4 addressed prior to the Water Board’s review of the potential effects of the WaterFix on
5 legal users of water. And, as explained below, the Board must determine the adequacy
6 of the environmental impact report/statement prior to the Clean Water Act section 401
7 certification that this Board must approve for the WaterFix.

8 As PCFFA noted in Attachment 1 to its Protest submitted to the Board on January
9 5, 2016, and incorporates herein by reference, the Board has a duty under the federal
10 Clean Water Act (“CWA”) to (1) designate beneficial uses (33 U.S.C. § 1313(c)(2)(A); 40
11 C.F.R. § 131.6(a)) of the Sacramento/San Joaquin River Delta and San Francisco Bay
12 (“Bay-Delta”), (2) establish water quality criteria (33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §
13 131.6(c)) sufficient to protect those uses, and (3) adopt an anti-degradation policy
14 sufficient to identify and prevent degradation of the water quality mandated for a
15 particular water body (40 C.F.R. §§ 131.6(d), 131.12(a)). The Board must submit its
16 water quality criteria to EPA for review to confirm their adequacy for protection of
17 designated uses, and must also review the adequacy of its water quality objectives (in
18 federal parlance, “standards”) to assure that all designated uses are protected. 33
19 U.S.C. § 1313(1); 40 C.F.R. § 131.20. The Board has failed to complete this required
20 review in a timely manner.

21 The current Bay-Delta Plan – D-1641 – was adopted over two decades ago. It
22 does not protect fish, wildlife, and other public trust uses of the Bay-Delta. As a result of
23 the Board’s past and continuing authorization of excessive diversions of freshwater
24 flows, the Bay-Delta’s ecological system is, as explained previously, collapsing. This
25 imminent ecological crisis must be addressed *before* this Board may take any action on
26 this project. In addition, the Board has neglected its duties under the California
27 Constitution to avoid unreasonable uses of water (Art. 10 § 2), and under the California
28 Water Code to (1) take into account the amount of water required for fish, wildlife, and

1 recreation (Water Code §§ 1243, 1243.5), (2) reduce reliance on the Delta (Water Code
2 §§ 85020(c), 85021), and (3) fully consider fish and wildlife and other public trust uses
3 that must be protected by a water quality control plan (Water Code §§ 1257, 1258).

4 In summary, designation of beneficial uses, water quality criteria, unreasonable
5 uses of water, amounts need for fish, wildlife, and recreation, updating of the Bay Delta
6 Water Quality Control Plan and other applicable water quality control plans to protect
7 beneficial uses, and the neglected state and federal triennial reviews of the Bay-Delta
8 Plan under CWA section 303(c) are all *key hearing issues* that must be addressed *prior*
9 to any examination of the potential effects of the WaterFix’s water right change petition
10 on legal users of water and prior to a Clean Water Act 401 certification for the project.

11 As PCFFA pointed out above and in its January 22, 2016 letter to this Board, to
12 date the Board has neglected to take into account fundamental constitutional, statutory,
13 and regulatory requirements. These issues are, indeed, the principal hearing issues that
14 must be addressed prior to any consideration and determination of (1) the WaterFix’s
15 potential injury to existing water rights, (2) the creation of new water rights, or (3) the
16 required Clean Water Act section 401 certification. As explained above, NEPA, CEQA,
17 ESA, the California Endangered Species Act (“CESA”) (Fish and Game Code section
18 2050 et seq.), the California Constitution, and relevant provisions of the Water Code all
19 require protection for fish, wildlife, recreation and other public trust uses, and these
20 protections must be determined after – not before – informed environmental review.
21 Because that required review and updated water management planning has not
22 occurred, this Board must deny and dismiss the WaterFix Petition.

23 **D. THE BIOLOGICAL OPINIONS REQUIRED UNDER THE ENDANGERED**
24 **SPECIES ACT ARE INCOMPLETE.**

25 As noted above, the Delta’s threatened and endangered species, including
26 winter- and spring-run chinook salmon, Central Valley steelhead, green sturgeon and the
27 Delta smelt, are in sharp decline due to excessive diversions of fresh water flows from
28 the Delta. The WaterFix does not propose to reduce these diversions. Instead, it

1 proposes to maintain – and most likely, increase – this unsustainable level of excessive
2 exports. Consequently, it is undisputed that the WaterFix project requires preparation of
3 Biological Opinions by the NMFS (which has jurisdiction over anadromous fisheries such
4 salmon and steelhead) and FWS (which has jurisdiction over “inland” fisheries such as
5 the Delta smelt). 16 U.S.C. § 1536(b)(3), (4); 50 C.F.R. §§ 402.12-402.14. However, as
6 previously explained, the Biological Opinions issued last June fail to address the *entire*
7 *action* posed by the Change Petition. Most notably, they fail to assess the operational
8 impacts of the WaterFix. Because they are incomplete, this Board may not lawfully rely
9 on them.

10 **V. THIS BOARD SHOULD DISQUALIFY PETITIONERS’ WITNESSES**
11 **AND EXCLUDE THEIR TESTIMONY AND EXHIBITS.**

12 As noted, the legal predicates for petitioners’ testimony and exhibits are absent,
13 since the 1995 Bay-Delta Plan is obsolete, the 2013 Delta Plan has been invalidated by
14 the court, there is no adequate EIR/EIS for the WaterFix Project, and there are no
15 adequate Biological Opinions. Absent valid, updated and adequate environmental
16 standards against which to measure the impacts of the WaterFix, there is no basis for
17 petitioners’ witnesses’ claims that the WaterFix will not harm legal users of water, fish
18 and wildlife and recreational uses because it will conform to applicable environmental
19 standards. Accordingly, petitioners have failed to provide evidence that identifies the
20 specific impacts of the WaterFix on legal users of water, fish and wildlife, and
21 recreational uses. As shown below, despite this Board’s clear instruction that petitioners
22 must provide this specific information, they have failed to do so. Accordingly, their
23 witnesses, testimony and exhibits should be excluded, and their Petition must be denied
24 and dismissed.

25 As PCFFA and IFR noted in their previous objections to petitioners’ evidence,
26 “even in [administrative] proceedings, with the relaxed standards of admissibility, the
27 evidence must be relevant and reliable.” *Aengst v. Board of Medical Quality Assurance*
28 (1980) 110 Cal.App.3d 275, 283. In recognition of this fundamental principle of

1 administrative law, this Board has repeatedly instructed petitioners to make sure that
2 their witnesses and evidence provided sufficient specificity based on fact rather than
3 assumptions to demonstrate that other legal users of water would not be harmed by the
4 Project. The Board’s October 30, 2015 Notice of Petition, for example, required that all
5 “[e]xhibits based on technical studies or models shall be accompanied by sufficient
6 information to clearly identify and explain the logic, assumptions, development, and
7 operation of the studies or models.” *Id.* at 33. Further, the Board warned that “[e]xhibits
8 that rely on unpublished technical documents *will be excluded* unless the unpublished
9 technical documents are admitted as exhibits.” *Id.* at 34, emphasis added.

10 Petitioners failed to comply with this direction. Consequently, in its February 11,
11 2016 Pre-Hearing Conference Ruling, this Board warned petitioners that “the available
12 information” – upon which petitioners had based their petition and which included many
13 of the exhibits petitioners have now submitted as proposed evidence –

14 lack[ed] clarity in several ways, including whether operation criteria are
15 intended to constrain project operations or are identified for modeling
16 purposes only, areas where a specific operational component or mitigation
17 measure is not yet chosen or identified, operational parameters that are not
18 defined and deferred to an adaptive management process, and lack of
19 clarity concerning some mitigation measures.

20 *Id.* at 6. Because of this lack of clarity, the Board directed petitioners to provide “the
21 information required by section 794 of our regulations in a succinct and easily identifiable
22 format. The other parties will then be able to more accurately assess whether the
23 proposed changes would cause injury.” *Id.* at 7. Among other information deemed vital
24 to a petition for change in point of diversion, section 794 requires “the proposed division,
25 release and return flow schedules,” “any effects of the proposed change(s) on fish,
26 wildlife, and other instream beneficial uses,” and “identification in quantitative terms of
27 any projected change in water quantity, water quality, timing of diversion or use,
28 consumptive use of the water, reduction in return flows, or reduction in the availability of
water within the streams affected by the proposed change(s).” 23 C.C.R. § 794(a)(6),

1 (8), (9). Contrary to this Board's direction, petitioners have failed to provide this
2 essential information.

3 In summary, petitioners' witnesses have failed to demonstrate that the modeling
4 on which they rely is "the sort of evidence on which responsible persons are accustomed
5 to rely in the conduct of serious affairs." Government Code § 11513(c). Petitioners have
6 failed to provide a sufficient foundation for their modeling to demonstrate its reliability
7 and accuracy. And, most importantly, petitioners have failed to demonstrate that the
8 methodology employed in their modeling is generally accepted by the relevant scientific
9 community as required under the *Kelly* standard. Accordingly, all of petitioners'
10 testimony and exhibits that are based on the CalSim II and DSM2 models must be
11 excluded, and petitioners' Change Petition must be denied and dismissed.

12 VI. CONCLUSION

13 For the foregoing reasons, petitioners have failed to "demonstrate a reasonable
14 likelihood that the proposed change will not injure any other legal user of water," let
15 alone fish and wildlife and recreational uses. Water Code §§ 1701.2(d), 1702, 1243,
16 1243.5, 1256, 1257, 1258. Their Change Petition is premature because it precedes,
17 rather than follows, compliance with CEQA, NEPA, ESA, CESA, the Delta Reform Act,
18 the Water Code and the Clean Water Act. And, all of petitioners' proffered witnesses,
19 testimony and exhibits are objectionable because the modeling on which they are
20 premised is based on false and undisclosed assumptions, inaccurate, inconsistent and
21 unreliable. Accordingly, petitioners' Change Petition should be denied and dismissed.

22 Dated: November 30, 2017

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