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Party to the WaterFix Hearing  
Principal, California Water Research

**BEFORE THE**  
**CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

HEARING IN THE MATTER OF  
CALIFORNIA DEPARTMENT OF  
WATER RESOURCES AND UNITED  
STATES BUREAU OF  
RECLAMATION  
REQUEST FOR A CHANGE IN POINT  
OF DIVERSION FOR CALIFORNIA  
WATER FIX

MOTION FOR RECONSIDERATION

Due process requires that protestants be fully apprised of all evidence supporting the  
Petition before submitting their cases in chief. For this reason, I respectfully request that the  
Hearing Officers reconsider the denial of the request for an extension of 30 days for protestants  
to submit their cases in chief to allow Petitioners to finish presentation of their Case in Chief.

1 Assessment of whether the information provided by the Petitioners meets the following statutory,  
2 and regulatory requirements has been deferred by the Hearing Officers to allow Petitioners to  
3 complete their Petition: Water Code § 1701.2, Title 23 CCR § 794.

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5 I respectfully bring these issues to the attention of the Hearing Officers, to request that  
6 they ensure that all information required by statute or regulation has been provided by  
7 Petitioners, prior to deadlines for submittal of the cases in chief. Due process requires that all  
8 information required by statute or regulation be available to protestants to fully examine, prior to  
9 submittal of their cases in chief.

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11 **ISSUES OF ADEQUACY OF INFORMATION**

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13 The issue of incompleteness of information submitted in support of the Petition was  
14 raised at the Pre-Hearing Conference. The February 11, 2016, Pre-conference Hearing Ruling  
15 stated that the Hearing Officers believed that requiring Petitioners to submit and present their  
16 Case in Chief before protestants submitted their response would fill in the information gaps:

17  
18 This approach will give petitioners the opportunity to fully explain their proposed project  
19 and should give the other hearing parties the ability to better evaluate how their interests  
20 may be affected before they begin their cases. *If petitioners fail to adequately describe  
their project, it also gives the State Water Board the opportunity to make course  
corrections.* (p. 2, emphasis added)

21 Given the lack of detailed information on the project impacts on reservoir levels,  
22 Sacramento River and Delta flows, and Delta water quality in the Petitioners' exhibits, it is  
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1 important to ensure that the project has been adequately described. Specifically, the Petitioners  
2 need to meet requirements of Water Code § 1701.2 and Title 23 CCR § 794.

3 Water Code § 1701.2 (c) and (d) provide that

4 A petition for change in a permit or license shall meet all of the following requirements:

5 *(c) Include all information reasonably available to the petitioner, or that can be*  
6 *obtained from the Department of Fish and Wildlife, concerning the extent, if any,*  
7 *to which fish and wildlife would be affected by the change, and a statement of*  
8 *any measures proposed to be taken for the protection of fish and wildlife in*  
*connection with the change.*

9 *(d) Include sufficient information to demonstrate a reasonable likelihood that*  
10 *the proposed change will not injure any other legal user of water.*

11 (emphasis added)

12 The February 11, 2016 Pre-Hearing Conference Ruling noted that the procedures under  
13 Water Code §§ 1701 et. seq were skipped at the request of the Petitioners:

14 The lack of information concerning project operations and potential effects is due in part  
15 to the fact that, at the petitioners' request, the State Water Board skipped the protest  
16 resolution process that would normally precede a hearing on a water right change  
17 petition. The petition process under Water Code sections 1701 et seq. includes various  
18 procedures designed to supply supporting information and narrow issues prior to any  
19 Board hearing or decision. A petition for change must include detailed information and  
20 the State Water Board may request additional information reasonably necessary to  
21 clarify, amplify, correct, or otherwise supplement the information submitted by a  
22 petitioner. Similarly, any protests to the petition must include specific information and  
23 the State Water Board may request additional information reasonably necessary to  
24 supplement the information submitted by protestants. The State Board may request  
25 additional information from petitioners or protestants to attempt to resolve a protest. The  
26 State Board may cancel a petition or a protest if requested information is not provided.  
27 (Wat. Code, §§ 1701.4; 1703.6.) This type of information exchange would have served  
to fill information gaps, narrow the focus of hearing issues, and increase the efficiency of  
the hearing. (p. 6)

1 The February 11, 2016 Pre-Hearing Conference ruling also responded to concerns  
2 expressed at the Pre-Hearing Conference that Petitioners had failed to provide evidence  
3 mandated under Title 23 CCR § 794. The Feb 11, 2016 Pre-Hearing Conference ruling stated:

4 Suspending the due date for other parties to submit written testimony and exhibits until  
5 after petitioners present their cases in chief will address the need for an adequate project  
6 description. *The petitioners' cases in chief must, to the extent possible, contain the*  
7 *information required by section 794 of our regulations in a succinct and easily*  
8 *identifiable format.* The other parties will then be able to more accurately assess whether  
9 the proposed changes would cause injury. (p. 7, emphasis added)

10 A request for dismissal was filed on March 29, 2016 by Planning and Conservation  
11 League et. al. The request stated in part:

12 Water Code sections 1701.1 and 1701.2 and Title 23 of the California Code of  
13 Regulations section 794 (among other provisions) describe the contents of a complete  
14 change petition. The Hearing Officers previously acknowledged that the Petition was  
15 incomplete, but continued with the hearing process with the expectation that the Petition  
16 would be subsequently completed, first by March 1st, and then by March 30th. Now  
17 Petitioners are unable to meet the current deadline and are again asking for more time.  
18 (p. 2)

19 And continued:

20 Among other deficiencies, the Change Petition: (1) does not adequately describe the  
21 changes sought; (2) fails to attempt to demonstrate a reasonable likelihood that the  
22 change will not injure any other legal user of water; and (3) fails to describe the extent of  
23 impacts to fish and wildlife. As a result of these and other deficiencies, the full nature and  
24 extent of injuries to legal users of water and significant adverse impacts to fish and  
25 wildlife uses have not been identified and analyzed. (p. 2)

26 In the April 25, 2016 Ruling, the Hearing Officers responded:

27 The request to dismiss the petition is denied. Parties raised similar concerns about  
petition completeness during the pre-hearing conference, and this issue was addressed in  
our February 11, 2016 ruling. Rather than supplement the petition, *the petitioners are*  
*expected to provide more information concerning project operations and potential effects*  
*on legal users of water during the petitioners' case in chief.* (p. 3, emphasis added)

1           Petitioners have not yet finished presentation of their Case in Chief, so requiring  
2 Protestants to file their own Cases in Chief before that presentation is concluded, means that  
3 Protestants may not have adequate information available concerning project operations and  
4 effects on legal users of water. Many protestants submitted objections to the adequacy of the  
5 information in the exhibits on July 12, 2016. The Hearing Officers stated in the July 22, 2016  
6 ruling on Evidentiary Objections and Other Procedural Matters, that it was not necessary to  
7 address these issues prior to the start of the Hearing, and that those concerns should be raised in  
8 the hearing process.  
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10           While the other parties still have specific and various criticisms of petitioners' evidence  
11 and testimony, we disagree with those parties who contend that petitioners' case-in-chief  
12 is insufficient to allow parties to meaningfully participate in Part 1 of the hearing.

13           We recognize that petitioners bear the burden of establishing that the proposed changes  
14 will not injure other legal users of water. As we stated in our February ruling, however,  
15 not all uncertainties can or need to be resolved before beginning the hearing. In fact, the  
16 purpose of this hearing is to resolve some of the issues concerning how the proposed  
17 project would be operated. At this point, any remaining uncertainty concerning the  
18 proposed project and its effects should be raised in the hearing process, *including but not*  
19 *limited to cross-examination*, and the protestants' cases in chief. (p. 2, emphasis added)  
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21           To the extent that testimony and cross-examination is not finished, and particularly that of the  
22 Water Rights panel, it is clear that "any remaining uncertainty about the project" may not have  
23 been resolved. I respectfully raise these concerns, and request that the Hearing Officers  
24 reconsider the decision to deny the requests for a 30 day extension of the deadline for Protestants  
25 to submit their cases in chief. Approval of this request will allow the Water Rights panel to  
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1 testify and cross-examination to finish, so that information from the cross-examination will be  
2 available prior to filing of cases in chief.

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