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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

**CALIFORNIA DEPARTMENT OF WATER RESOURCES' RESPONSE IN OPPOSITION TO PROTESTANT SAVE THE CALIFORNIA DELTA ALLIANCE, ET AL.'s OBJECTIONS TO EVIDENCE AND JOINDER IN OBJECTIONS OF EVIDENCE SUBMITTED BY SACRAMENTO VALLEY WATER USERS, LOCAL AGENCIES OF THE NORTH DELTA ET AL., CENTRAL DELTA WATER AGENCY ET AL., COUNTY OF SAN JOAQUIN ET AL., PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS AND INSTITUTE FOR FISHERIES RESOURCES ET AL., CITY OF ANTIOCH, CONTRA COSTA COUNTY AND CONTRA COSTA WATER AGENCY, COUNTY OF SOLANO, AND NATURAL RESOURCES DEFENSE COUNCIL ET AL.**

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## I. INTRODUCTION

California Department of Water Resources ("DWR") files this response to objections filed by Save the California Delta Alliance et al. (SCDA) to proposed evidence in the hearing in the matter of DWR and U.S. Bureau of Reclamation's Request for a Change in Point of Diversion for California Water Fix. SCDA objects to the introduction of DWR's exhibits (SWRCB-3, SWRCB-4, SWRCB-5), and CALSIM II 2015 Version Modeling on various grounds. DWR opposes the objections on the grounds that the exhibits are relevant. DWR reserves the right to provide additional responses to these objections and to respond to other objections that may be raised later. DWR also refers to the Introduction to its Master Response to motions filed between July 8, 2016 and noon on July 12, 2016 in this proceeding.

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## II. Evidentiary Requirements FOR SWRCB HeARING

California Code of regulations sections 648.5.1 set forth the rules of evidence in this hearing:

"Adjudicative proceedings will be conducted in accordance with the provisions and rules of evidence set forth in Government Code section 11513. Hearsay evidence is admissible subject to the provisions of Government Code section 11513."

Government Code section 11513 provides liberal evidentiary rules for administrative hearings. Parties need not follow the technical rules of evidence used in courts. The standard for determining admissibility for evidence in an administrative hearing centers on relevancy. Specifically, Government Code section 11513, subdivision (c), provides:

"The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions."

To the extent a party wishes to oppose testimony, the party is entitled to "cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination . . . ." (Gov. Code sec. 11513(b).)

1 **III. DWR's exhibits Satisfy The Evidentiary Standard Set Forth in Government Code**  
2 **Section 11513, and should be admitted**

3 **A. SWRCB-3, SWRCB-4, SWRCB-5**

4 SCDA objects to DWR's introduction of the WaterFix environmental documents: the 2015  
5 RDEIR/SDEIS and comments (SWRCB-3), the 2013 Public Draft EIR/EIS (SWRCB-4), and the  
6 2013 Public Draft BDCP (SWRCB-5), arguing that these documents are scientifically inadequate  
7 and, therefore, inadmissible.

8  
9 SCDA's challenges to evidence based on the asserted inadequacy of DWR/USBR's  
10 CEQA/NEPA compliance, have already been rejected by the Board. In its February 11,  
11 2016 Ruling establishing the staged process for these proceedings, the Board  
12 acknowledged the relevance of these documents and distinguished the change petition  
13 hearings from DWR's CEQA compliance obligations:

14  
15 In our January 15, 2016 letter regarding the issues to be discussed at the pre-  
16 hearing conference, we explained that the State Water Board's role as a  
17 responsible agency under CEQA is limited, and for that reason the adequacy of  
18 the CEQA documentation for the WaterFix for purposes of CEQA is not a key  
19 hearing issue. Despite this admonition, several parties argued that the draft  
20 Environmental Impact Report (EIR) that DWR has prepared for the project is  
21 inadequate, and that an adequate document must be prepared before the State  
22 Water Board may hold a hearing on the change petition. Among other alleged  
23 inadequacies, the parties argued that the draft EIR does not include a reasonable  
24 range of alternatives that is adequate for purposes of the State Water Board's  
25 decision-making process.

26 We are not persuaded by the parties' arguments that the State Water Board must  
27 assume the role of the CEQA lead agency, or that any additional CEQA  
28 documentation must be prepared before conducting Part 1 of the hearing.  
[citations omitted] We recognize that ultimately the final EIR must be adequate to  
support the State Water Board's decision in this proceeding. DWR has evaluated  
a range of alternatives that DWR has determined will meet its project objectives. If  
during the course of this proceeding, the State Water Board determines that the  
range of alternatives evaluated by DWR is not adequate to support the Board's  
decision, then either DWR or the Board will need to prepare subsequent or  
supplemental documentation. [Citations omitted] At this point, however, it is  
uncertain whether any subsequent or supplemental documentation will be  
required. (Board Pre-Hearing Conference Ruling, Feb. 11, 2016, at p. 8-9).

1 In an effort to bolster their evidentiary objections, SCDA refers to environmental  
2 comments from the EPA (Letter of October 30, 2015) and the Delta Independent Science  
3 Board (Letter of September 30, 2015). Protestants selectively quote from the EPA letter,  
4 omitting important text and misrepresenting EPA's comments on the proposed project.  
5 When read in context, the EPA letter simply states that the Agency reserves any final  
6 conclusions on the proposed project, that Agency review will be ongoing as the WaterFix  
7 regulatory processes proceed and more information becomes available:

8 All of the above listed regulatory processes will develop new data and likely new  
9 compliance requirements beyond those provided in the SDEIS. EPA understands  
10 that these as yet incomplete regulatory requirements will be addressed through  
11 the pending actions by the State Water Resources Control Board, FWS, NMFS,  
12 and Corps of Engineers. These key decisions, and the analysis that will support  
13 them, are not yet done. Our statutory responsibility is to review the NEPA  
14 document that is in front of us at this time, however, the reality is that these future  
15 regulatory processes will have an important bearing on the project. Because  
16 these subsequent regulatory processes are likely to generate real world  
17 operational scenarios that are significantly different from the operations proposed  
18 in the SDEIS, the information is not yet available to reach definitive conclusions  
19 concerning the environmental impacts of the proposed project.

20 The tunnels that are discussed in detail in this draft NEPA document are an  
21 important improvement for water reliability, but the choices that will affect the  
22 operation of the tunnels, and thus the overall impacts of the project, will not be  
23 made until future regulatory actions are completed. *These future decisions will*  
24 *supply the missing pieces necessary to determine the environmental impact of the*  
25 *entire project. The unusual circumstances of this project mean that the*  
26 *information is not yet available for a complete evaluation of environmental impacts*

27 – and for that reason a rating of “3” (Inadequate) for the SDEIS is required – but  
28 EPA expects that the project will continue to move forward, with those necessary  
additional pieces to be supplied as the later regulatory processes proceed. Under  
the unique circumstances of this case, the additional data, analysis and public  
input associated with *these future regulatory processes are expected to provide*  
*the needed supplemental information to allow a full review of the environmental*  
*impacts without requiring another draft supplemental EIS* EPA will have the  
opportunity to support Reclamation, other federal agencies, and the State of  
California as they collectively continue to define an environmentally sound and  
effective project that would operate in a manner that simultaneously supports  
water supply reliability and enhances the Delta's ecosystem. ... (EPA Letter,  
October 30, 2015, p. 4) [Emphasis added.]

1 Finally, DWR is engaged in consultation with responsible agencies in compliance with  
2 CEQA and NEPA, and plans to address the comments from the EPA and the Delta  
3 Stewardship Council (the Council's comment letter of October 27, 2015 includes the ISB  
4 comments of September 30, 2015), including providing additional information, in the Final  
5 EIR/EIS. The Petitioners will file a final EIR/EIS with the State Water Board during the  
6 course of the public hearing for this Petition. A final decision on this Petition is not  
7 requested until Petitioners provide final environmental documents.

8  
9 **B. CALSIM II 2015 Version Modeling**

10 The CALSIM II 2015 Version Modeling is relevant and reliable. DWR also refers to its discussion  
11 of the reliability of the Modeling evidence relied upon in its Master Response to Objections filed  
12 between July 8, 2016 and noon on July 12, 2016 in this proceeding.

13  
14 **IV. CONCLUSION**

15 For the reasons stated herein and in DWR's general response to motions filed between July 8,  
16 2016 and noon on July 12, 2016 in this proceeding, the Board should rule against Protestants'  
17 objections to DWR's evidence, and find that the evidence is not precluded from admission.

18  
19 Dated: July 22, 2016

CALIFORNIA DEPARTMENT OF WATER  
RESOURCES

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21 

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