

1 Spencer Kenner (SBN 148930)
2 James E. Mizell (SBN 232698)
3 Robin McGinnis (SBN 276400)
4 **DEPARTMENT OF WATER RESOURCES**
5 Office of the Chief Counsel
6 1416 9th St., Room 1104
7 Sacramento, CA 95814
8 Telephone: 916-653-5966
9 E-mail: jmizell@water.ca.gov

10 Attorneys for California Department of Water
11 Resources

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

13 **HEARING IN THE MATTER OF CALIFORNIA**
14 **DEPARTMENT OF WATER RESOURCES**
15 **AND UNITED STATES BUREAU OF**
16 **RECLAMATION REQUEST FOR A CHANGE**
17 **IN POINT OF DIVERSION FOR CALIFORNIA**
18 **WATER FIX**

19 **CALIFORNIA DEPARTMENT OF**
20 **WATER RESOURCES' OPPOSITION**
21 **TO NATURAL RESOURCES**
22 **DEFENSE COUNCIL, ET AL. MOTION**
23 **TO STRIKE**

24 **INTRODUCTION**

25 California Department of Water Resources ("DWR") provides this opposition to the
26 motion to strike filed on September 13, 2017 by Natural Resources Defense Council, et al.
27 ("NRDC"). NRDC's motion is based on procedural rules that do not apply to this
28 proceeding and also mischaracterize Petitioners' information, and is therefore without merit.
For the reasons more fully stated below, DWR respectfully requests that the motion be
denied.

RESPONSE IN OPPOSITION

I. NRDC's Motion is Based on Procedural Rules that Do Not Apply to this Proceeding

This is an administrative hearing governed by Title 23 of the California Code of Regulations, sections 648-648.8, 649.6 and 760; Chapter 4.5 of the Administrative Procedure Act (commencing with Government Code § 11400); sections 801 to 805 of the Evidence Code; and section 11513 of the Government Code. (23 Cal. Code Regs. § 648(b).) Some, but not all, of the sections of the Code of Civil Procedure ("CCP") were

1 incorporated in the State Water Resources Control Board's ("Board") hearing procedures.
2 (e. g., Water Code § 1100.) Thus, parties are not necessarily permitted to submit motions
3 in Board proceedings, and are discouraged from filing unauthorized motions. (See Board
4 Order WR 2016-0015, p.11.)

5 The Board has some discretion when establishing hearing procedures. (23 Cal. Code
6 Regs §648.5.) Accordingly, in their February 11, 2016 and April 26, 2016 rulings, the
7 Hearing Officers indicated that parties could submit objections, but never indicated that the
8 parties could submit motions. (See February 11, 2016 Ruling, pp. 2-3; April 25, 2016
9 Ruling, pp. 4-5.)

10 NRDC's motion states that it is based upon Cal. Code of Civ. Proc. § 436(a), but this
11 provision of the CCP has not been specifically allowed by the Hearing Officers in this
12 hearing. Even if this provision were allowed, DWR submitted relevant, accurate and
13 responsive information to the Hearing Officers and NRDC's motion is unfounded and
14 without merit.

15 **II. NRDC's Motion Lacks Merit**

16 In response to the Hearing Officer's August 31 ruling, Petitioners submitted relevant
17 and responsive information explaining the terms Petitioners' believe the Hearing Officers
18 could impose on California WaterFix ("CWF") as conditions of a water rights order.
19 Petitioners' also provided information summarizing the operating criteria imposed on CWF
20 under the federal biological opinions and the state incidental take permit. (See paragraph 2,
21 page 1 and the attached Table of Petitioners' Sept. 8th letter.) While Petitioners' do not
22 believe it would be appropriate for the Hearing Officers to include the Endangered Species
23 Act ("ESA") and California Endangered Species Act ("CESA") permit terms as conditions of
24 Petitioners' water rights in a CWF water rights order, Petitioners did not suggest that these
25 permit terms were not legally binding. NRDC fails to recognize that Petitioners have
26 submitted in this hearing information consistent with the recognized distinction between the
27 water rights and ESA/CESA processes and describe the permit operating criteria for
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1 analysis of CWF effects and not as water rights conditions.¹ (NRDC motion, section 2.)
2 Petitioners' clearly intend that by discussing the modeling assumptions it will demonstrate
3 that the CWF would be operated to satisfy the Water Quality Control Plan objectives that
4 protect beneficial uses in the Delta. NRDC cannot assert that the Petitioners' information
5 should be stricken as confusing and misleading when NRDC incorrectly restates the
6 information.

7 Furthermore, to conflate the conditions of the ESA and CESA permits with the water
8 right permit conditions that will be imposed by the Hearing Officers is again to ignore the
9 differences between the legally distinct ESA, CESA and water rights hearing processes.
10 DWR and Reclamation presented to the Hearing Officers consistent information in this
11 regard and NRDC has not presented any compelling evidence as to why the Hearing
12 Officers are bound to restate requirements of the ESA and CESA permits as conditions of
13 Petitioners' water rights. DWR and Reclamation set forth a clear rationale for their position
14 explaining that including conditions of the ESA and CESA permits into the water right would
15 preclude an effective adaptive management process, which Petitioners' have suggested
16 the Hearing Officers incorporate in a water rights permit for CWF.

17 NRDC also asserts in its motion that DWR and Reclamation presented inconsistent
18 operating criteria for the Final EIR/EIS, the Biological Opinions and the 2081(b) Incidental
19 Take Permit. (NRDC motion, section 1.) DWR believes that issues related to
20 understanding the operating criteria and the role of the adaptive management process
21 should not be a basis for striking the information. This information should be available for
22 all parties to consider during the upcoming hearing. Furthermore, the information was
23 requested by the Hearing Officers and to limit the operational criteria discussion at this time
24 would be unresponsive to the Hearing Officers' request for an update on this topic.

25 ¹ As the Hearing Officers have recognized, the ESA and CESA permitting processes are not a
26 legally required component of this hearing. (August 31, 2017 ruling, p. 5.) The processes and
27 standards pursuant to ESA and CESA are distinct from those under consideration by the Hearing
28 Officers. Therefore, Petitioners' appropriately presented the CWF operating criteria in the Table of
their letter to clearly identify the criteria associated with the separate processes of the FEIR, the
ESA Biological Opinions and the CESA Incidental Take Permit.

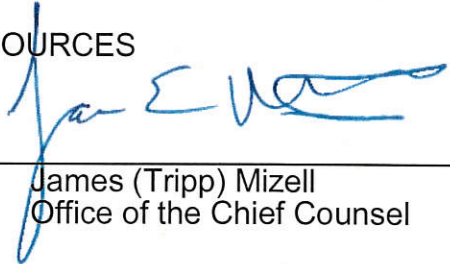
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CONCLUSION

For the foregoing reasons, DWR respectfully requests that NRDC's motion to strike the Petitioners' September 8, 2017 letter submitted in response to the Hearing Officers' request be denied.

Dated: September 14, 2017

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



James (Tripp) Mizell
Office of the Chief Counsel