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4 **CALIFORNIA DEPARTMENT OF WATER**
5 **RESOURCES**

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

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

21 **CALIFORNIA DEPARTMENT OF**
22 **WATER RESOURCES' OBJECTION TO**
23 **PATRICK PORGANS/ASSOCIATES'**
24 **SUPPLEMENTAL NOTICE OF INTENT**
25 **TO APPEAR**

26 Pursuant to Code of Civil Procedure sections 2017.020, 2019.030, and 2025.420,
27 Government Code section 11450.30, subdivision (b), and California Code of
28 Regulations, title 23, section 648.5, subdivision (a), California Department of Water
Resources ("DWR") requests that the Hearing Officers strike the portions of the
October 12, 2017 Supplemental Notice of Intent to Appear ("Supplemental Notice") filed
by Patrick Porgans/Associates ("P/A") that are based on direct reliance upon
(Supplemental Notice Attachment, p.3.) and a near recitation of the San Joaquin River
Exchange Contractors Water Authority ("SJREC") Supplemental Notice and those that
indicate P/A will be calling DWR Witnesses to testify at the hearing.

29 **I. STATEMENT OF FACTS**

30 Nine days after San Joaquin River Exchange Contractors Water Authority filed its
31 Supplemental Notice and one day after DWR filed its objection to SJREC's
32 Supplemental Notice, P/A filed its Supplemental Notice seeking to compel up to five

1 DWR employees and consultants (“DWR Witnesses”) to testify on matters beyond the
2 scope of this hearing. The information entered in the “Subject of Proposed Testimony”
3 field of P/A’s Supplemental Notice is almost the same as SJREC’s Supplemental Notice.
4 In the Attachment to its Supplemental Notice, P/A inserted verbatim SJREC’s description
5 of witnesses and proposed testimony. The factual assertions included in P/A’s
6 Attachment to its Supplemental Notice, on topics such as “Delta Master Levees” and
7 Senate hearings conducted in the 1990s, do not appear to be topic areas that P/A
8 intends to explore with DWR Witnesses. Even if P/A included this information because it
9 intends to question DWR Witnesses on these topics, they are outside the scope of the
10 current proceeding.

11 After two similar attempts by SJREC and motions for protective orders by DWR,
12 the Hearing Officers ruled that requiring DWR to provide a witness to testify on the
13 *potential effects of the California WaterFix Project* on funding for levee maintenance
14 would be unreasonable and inefficient. (December 8, 2016 Ruling, at p. 3.) The Hearing
15 Officers explained that the need for funding for levee maintenance and repair in order to
16 maintain *the existing ability* to convey water through the Delta was not relevant, being an
17 issue that will exist regardless of whether the WaterFix change petition is approved.
18 (*Ibid.*) Importantly, the Hearing Officers explained that SJREC did not seek to explore
19 any connection between the WaterFix change petition and the need for funding for levee
20 maintenance and repair. (*Ibid.*) The Hearing Officers also indicated that SJREC had not
21 shown how the need for funding *of existing* levee maintenance and repair is relevant to
22 the potential impacts of the California WaterFix Project, and SJREC’s theory that the
23 California WaterFix Project will reduce present or prospective funding for levee
24 maintenance and repair is highly speculative and uncertain. (March 16, 2017 Ruling, at
25 p. 3.) P/A’s Supplemental Notice is an attempt to join in SJREC’s effort to bring up
26 topics that do not fit within the scope of this hearing as previously determined by the
27 Hearing Officers.

1 **II. ARGUMENT**

2 The Hearing Officers may issue an order to protect the parties or witnesses from
3 unreasonable or oppressive demands. (Gov. Code, § 11450.30, subd. (b).) For good
4 cause shown, an order may be issued if required in the interests of justice to protect the
5 party or deponent from “unwarranted annoyance, embarrassment, or oppression, or
6 undue burden and expense.” (Code Civ. Proc., § 2025.420, subd. (b).) Similarly, a
7 protective order may be issued if the information sought is “unreasonably cumulative or
8 duplicative, or is obtainable from some other source that is more convenient, less
9 burdensome, or less expensive.” (Code Civ. Proc., § 2019.030, subd. (a)(1); see also
10 Code Civ. Proc., § 2017.020, subd. (a).) The Board’s regulations give the Hearing
11 Officers discretion to conduct the hearing in a manner most suitable for securing relevant
12 information expeditiously without unnecessary delay and expense. (Cal. Code Regs., tit.
13 23, § 648, subd. (a).)

14 **A. It is unnecessary for a DWR witness to testify about an alternate project**
15 **selected and described by P/A.**

16 Requiring DWR Witnesses to appear at the hearing to be cross examined on the
17 indicated topics would cause undue burden and expense, because the indicated topics
18 are not relevant in this proceeding. Although the March 16, 2017 ruling indicated that it
19 may be appropriate for parties to present evidence concerning the potential effects of *the*
20 *California WaterFix Project* on funding for levee maintenance and repair in Part 2, P/A’s
21 Supplemental Notice indicates that it plans to ask DWR witnesses about a different
22 project all together. Under the guise of the quote “‘dual path’ delivery system April thru
23 July of each year at or above 3,000 CFS,” P/A attempts to make the Hearing Officers
24 believe that reducing reliance upon the south Delta pumps is, instead, proposing to
25 introduce new reliance upon the flood protection system. This is not the CWF Project.
26 P/A also proposes to question DWR witnesses about the feasibility of its described
27 project if financing is not established for Delta levee preventive maintenance and repair
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1 and if an immediate action plan for the possibility that levee failures will occur is not
2 funded. DWR has already provided links to the documents that evaluate these topics in
3 connection with the actual California WaterFix Project, and also provided excerpts. (See
4 Exhibit D to DWR's March 10, 2017 Motion for Protective Order.)

5 **B. P/A questioned DWR witnesses about levee maintenance during Part 1.**

6 P/A had the opportunity to question, and did in fact question, DWR's engineering
7 and operations Witnesses on these topics.¹ The engineering panel answered questions
8 about flood control criteria and the contingency plan for flood control during construction.
9 P/A did not ask the operations panel any questions related to the CWF Project, instead
10 focusing on topics such as current project operations, compliance record, water
11 deliveries during previous drought periods, and the environmental water account that
12 existed during the 2000s. The Hearing Officers should reject P/A's Supplemental Notice,
13 because it seeks information that P/A could have obtained when he was asking
14 questions of the appropriate witnesses during Part 1. Requiring DWR Witnesses to
15 return to the hearing because P/A has now decided it wants to ask questions on these
16 topics would cause DWR undue burden and expense, and this information was available
17 from more convenient and less burdensome sources.

18 **C. Additional filings by SJRECWA do not support PA NOI**

19 On November 2, 2017, SJREC filed with the Hearing Officers a response to
20 DWR's objection to its use of DWR witnesses for the same purposes as proposed by
21 PA. SJREC's response repeated its claims but provided no further explanation as to
22 why, after repeated rulings against exploring the general aspects of Delta levees
23 unassociated with the project but instead based upon the status quo, its position carries
24 merit. Thus, SJREC's November 2, 2017 response has not provided any additional
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26 ¹ P/A questioned the Engineering panel on August 9, 2016 and the Operations panel on August
27 19, 2016. Transcripts of the hearing are available here:
28 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/transcripts.shtml.

1 basis upon which to grant PA's similar request for DWR employees to appear and testify
2 on the existing state of levees or funding mechanisms for those existing levees.

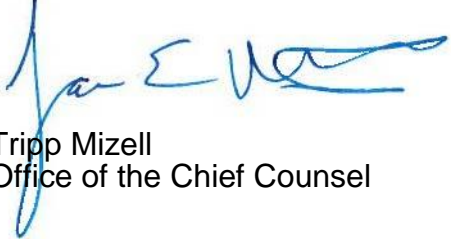
3 **III. CONCLUSION**

4 P/A's Supplemental Notice would cause undue burden and expense, and the
5 information it seeks was available from more convenient, less burdensome sources.
6 DWR, therefore, respectfully requests that the Hearing Officers strike the portions of
7 P/A's Supplemental Notice that are based on SJREC's Supplemental Notice and those
8 that indicate P/A will be calling DWR Witnesses to testify at the hearing.

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Dated: November 3, 2017

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



Tripp Mizell
Office of the Chief Counsel