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9 On behalf of Interested Party,
10 PARTNERSHIP FOR SOUND SCIENCE IN
11 ENVIRONMENTAL POLICY

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

14 HEARING ON 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 DIVERSION
19 FOR CALIFORNIA WATER FIX.

(1) RESPONSE TO CALIFORNIA
DEPARTMENT OF WATER
RESOURCES' OBJECTION TO POLICY
STATEMENT SUBMITTED BY THE
PARTNERSHIP FOR SOUND SCIENCE
IN ENVIRONMENTAL POLICY;

(2) PARTNERSHIP FOR SOUND
SCIENCE IN ENVIRONMENTAL POLICY
REQUEST THAT DECEMBER 6, 2017
SUBMITTAL BE ACCEPTED AS PUBLIC
COMMENT ON THE ASSOCIATED 401
CERTIFICATION APPLICATION.

20 **I.**
21 **INTRODUCTION**

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23 The Partnership for Sound Science in Environmental Policy ("PSSEP") is an
24 "Interested Party" in the above-captioned matter and has presented two Policy
25 Statements pursuant to the Hearing Rules in order to provide input on the implications of
26 the WaterFix proceedings. The most recent Policy Statement was submitted by PSSEP
27 on December 6, 2017, and focuses *solely* on the issue of monitoring for increased

1 selenium loading to San Francisco Bay associated with the construction and future
2 operation of the WaterFix. On January 11, 2018 – and without notice to PSSEP¹ - DWR
3 filed its “Objection to Policy Statement Submitted by Partnership for Sound Science in
4 Environmental Policy” (“DWR Objection”). In what would appear to be an
5 unprecedented step,² DWR seeks to have PSSEP’s December 6, 2017 Policy Statement
6 **excluded** from consideration in these matters, claiming that the Policy Statement was
7 offered as “evidence for the Board’s consideration as a proposed permit condition.”
8 (DWR Objection at p. 2, lines10-11.)³

9
10 For the reasons set forth below, PSSEP respectfully requests that the Hearing
11 Officers: (1) *deny with prejudice* DWR’s request to exclude PSSEP’s December 6 Policy
12 Statement; and (2) accept PSSEP’s December 6 submittal as a proper and timely “public
13 comment” on the WaterFix Project for purposes of the associated 401 Water Quality
14 Certification application filed by DWR on September 24, 2015.

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20 ¹ PSSEP only learned of DWR’s Objection by happenstance, and after receiving an email from a third party at mid-
21 day on January 11. In fact, the “Statement of Service” for the DWR Objection clearly states that email service was
22 transmitted **only** “upon the parties listed in Table 1 of the Current Service List for the California WaterFix Petition
23 hearing, dated January 2, 2018.” Because PSSEP is not a “Designated Party,” it is not a Table 1 entity to which
24 Notice of the DWR Objection was provided. Nevertheless, DWR had access to PSSEP’s email address as it is listed
25 as a Table 2 entity of “Interested Parties” who have filed an NOI to present Policy Statements. PSSEP does not know,
26 nor will it speculate as to DWR’s intent in failing to provide PSSEP notice of the DWR Objection, but we note that the
27 Part II Hearings commence in less than three business days from the date of this Response and Request.

24 ² Based on a thorough review of the publicly available administrative record compiled in this WaterFix Change Petition
25 Hearing process to date (https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/water_right_petition.shtml), it
26 appears there has been only one Objection and request to exclude an Interested Party’s Policy Statement. That
27 would be the present DWR Objection to PSSEP’s December 6 Policy Statement, which is the subject of this Response
28 and associated Request.

24 ³ PSSEP notes for the record that neither DWR, nor any other Designated Party, filed an Objection or request to
25 exclude PSSEP’s July 26, 2016 Policy Statement, which addressed the same issues of increased selenium loading to
26 the Delta and San Francisco Bay that are expected to occur from the WaterFix Project.

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**II.
ARGUMENT**

A. PSSEP’s December 6 Policy Statement Was Not Offered As Evidence, But Rather, to Provide Input on the Implications of the WaterFix Proceedings.

The “State Water Resources Control Board’s (State Water Board) practice is to allow policy statements during evidentiary hearings as a courtesy so that members of the public have the opportunity to participate and provide input on the policy implications of a proceeding.” (*State Water Board Hearing Officers’ Ruling on Policy Statements, Format of Petitioners’ Case-In-Chief and Clarification Regarding Motions for California WaterFix Hearing*, July 13, 2016 at p. 1.) That is precisely what PSSEP has done in presenting its two Policy Statements in these proceedings.

There are grave policy implications associated with the potential construction and operation of the WaterFix Project, not the least of which relate to potentially huge increases of selenium loading to the Delta and San Francisco Bay. These increased selenium loads have the potential of upsetting the carefully developed North San Francisco Bay Selenium TMDL, adopted by the San Francisco Regional Board on November 18, 2015⁴ and approved by the State Water Board on March 15, 2016.⁵

As the WaterFix Project co-proponent, DWR itself raised the issue of environmental impacts associated with increased selenium loading to the Delta and San Francisco Bay. According to the Final EIR/EIS for the WaterFix Project:

“Changes in source water fraction and net Delta outflow under [the Preferred Alternative], relative to Existing Conditions, are projected to

⁴ SFRWQCB Order No. R2-2015-0048.

⁵ SWRCB Res. No. 2016-0017.

1 cause the total selenium load to the North Bay to increase by 6-11%...”⁶

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3 Unfortunately, the Final EIR/EIS - - certified by DWR as the lead agency under
4 CEQA - - concludes that:

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6 “The estimated changes in selenium loads in Delta exports to San
7 Francisco Bay due to [the Preferred Alternative] are not expected to
8 result in adverse effects to beneficial uses or substantially degrade the
9 water quality with regard to selenium, or make the existing CWA
10 Section 303(d) impairment [for selenium] measurably worse.”⁷

11 As a result, the Final EIR/EIS calls for no mitigation measures to address the
12 projected increase of selenium loading to the Delta and San Francisco Bay, and worse,
13 no monitoring to determine if the Final EIR/EIS preparers’ modeling estimates will be
14 proven accurate. PSSEP believes, as a matter of **policy**, that if the State Water Board
15 were to approve the WaterFix Change Petition, it should also require – at a minimum –
16 that the project proponents undertake appropriate selenium monitoring in the Delta so
17 the public (and future State Water Board Members) can know what the real impacts of
18 the WaterFix Project are on Delta and San Francisco Bay water quality. Since DWR and
19 the other WaterFix Project proponents have failed to offer any kind of selenium
20 monitoring plan for the Delta - let alone a reasonable one - PSSEP has presented one
21 for the Hearing Officers’ consideration. This is hardly “evidence” of anything, contrary to
22 what DWR would have the Hearing Officers believe.

23 As such, DWR’s Objection should be overruled and its request to have PSSEP’s
24 December 6 Policy Statement excluded should be denied.

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26 ⁶ Final Environmental Impact Report/Environmental Impact Statement for the Bay Delta Conservation Plan/California
27 WaterFix—Volume I, Chapter 8 – Water Quality, p. 8-582, lines 36-38.

28 ⁷ Final Environmental Impact Report/Environmental Impact Statement for the Bay Delta Conservation Plan/California
WaterFix—Volume I, Chapter 8 – Water Quality, p. 8-583, lines 4-7.

1 **B. PSSEP’s Policy Statement Submitted in the Water Right Change Petition**
2 **Hearing Should Also Be Considered “Public Comments” on the Associated**
3 **401 Water Certification Application and Accepted by the Hearing Officers.**

4 In addition to the present water right Change Petition filed by DWR and its co-
5 applicants, DWR filed an application for 401 Water Quality Certification (“401
6 Certification”) of the WaterFix Project on September 24, 2015. There was some
7 question at the beginning of the water right Change Petition Hearing process whether
8 that 401 Certification process would follow or be processed simultaneously with the
9 Change Petition. Ultimately, the Hearing Officers ruled that the 401 Certification process
10 would follow the Change Petition process. (See, *State Water Board Hearing Officers’*
11 *Ruling on Pre-Hearing Conference Procedural Issues*, February 11, 2016 at pp. 7-8;
12 hereafter, “February 11 Ruling”.)

13
14 The State Water Board Hearing Officers also ruled that the hearing record for the
15 current water right proceedings “and any other information that may be appropriate for
16 consideration in the 401 [certification] Application decision” will be available to the State
17 Water Board’s Executive Director following the present Hearing. (February 11 Ruling at
18 p. 8.) In effect, and to promote efficiency, the Hearing Officers determined that the
19 present Hearing shall serve to inform both the WaterFix water right Change Petition and
20 the WaterFix 401 water quality certification application. (*Id.* “In order to ensure that
21 parties do not have to duplicate their participation in two proceedings with overlapping
22 issues, and to allow the decision on the 401 Application to be informed by the significant
23 information that will be produced in the hearing process, the Executive Director will not
24 issue a decision on the 401 Application until after the hearing record for the water right
25 petition closes.”)

1 Finally, the Hearing Officers ruled, "All of the information that the Executive
2 Director relies upon and any comments received in the 401 Application process will be
3 posted on the State Water Board's website, ensuring that all of the interested parties
4 have access to the information. **There is no close to the comment period on the 401**
5 **Application**, which will allow the Executive Director to consider information that may be
6 developed after parts of the hearing are complete, ensuring the most up to date
7 information may be relied upon. The standard 401 Application process also allows for
8 informal collaboration with agencies and interested persons, including those that may
9 not participate in the water right petition evidentiary hearing process." (February 11
10 Ruling at p. 8; emphasis added.)
11

12 Because the public comment period on the 401 Certification application filed by
13 DWR remains open, PSSEP – as any other individual or entity - is entitled to submit
14 public comments on that 401 Certification application. As such, PSSEP hereby requests
15 that its December 6 Policy Statement be accepted by the Hearing Officers as proper and
16 timely comments on the 401 Certification, in addition to a Policy Statement related to the
17 water right Change Petition. PSSEP has found no prohibition in the State Water Board
18 regulations governing water rights applications, change petitions, or 401 Certification
19 proceedings that would preclude the Hearing Officers from granting PSSEP's request.
20

21 Respectfully submitted,

22 PARTNERSHIP FOR SOUND SCIENCE IN
23 ENVIRONMENTAL POLICY, Interested Party

24
25 Date: January 12, 2018

26 By: 
27 Craig S.J. Johns
28 Program Manager

1 **STATEMENT OF SERVICE**

2 **CALIFORNIA WATERFIX PETITION HEARING**
3 **Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

4 I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

5 (1) RESPONSE TO CALIFORNIA DEPARTMENT OF WATER
6 RESOURCES' OBJECTION TO POLICY STATEMENT
7 SUBMITTED BY THE PARTNERSHIP FOR SOUND SCIENCE IN
8 ENVIRONMENTAL POLICY;

9 (2) PARTNERSHIP FOR SOUND SCIENCE IN ENVIRONMENTAL
10 POLICY REQUEST THAT DECEMBER 6, 2017 SUBMITTAL BE
11 ACCEPTED AS PUBLIC COMMENT ON THE AFFILIATED 401
12 CERTIFICATION APPLICATION.

13 to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the Current
14 Service List for the California WaterFix Petition hearing, dated January 12, 2018 posted
15 by the State Water Resources Control Board at:

16 http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

17 *Note: In the event that any emails to any parties on the Current Service List are*
18 *undeliverable, you must attempt to effectuate service using another method of service, if*
19 *necessary, and submit another statement of service that describes any changes to the*
20 *date and method of service for those parties.*

21 I certify that the foregoing is true and correct and that this document was executed on
22 January 12, 2018.

23 Signature: 

24 Name:

Craig S.J. Johns

25 Title:

Program Manager

26 Affiliation:

Partnership for Sound Science in Environmental Policy

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