

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 **OBJECTION TO POLICY
20 STATEMENT SUBMITTED BY
21 PARTNERSHIP FOR SOUND
22 SCIENCE IN ENVIRONMENTAL
23 POLICY**

24 **INTRODUCTION**

25 California Department of Water Resources (“DWR”) requests that the Hearing
26 Officers issue an order excluding the policy statement submitted by non-party, Partnership
27 for Sound Science in Environmental Policy (“PSSEP”), on the grounds that the policy
28 statement improperly seeks to offer evidence into the record of the proceeding.

LEGAL STANDARD

The State Water Resources Control Board (“Board”) is providing an opportunity for
interested persons who are not parties participating in the proceeding to present non-
evidentiary policy statements or comments concerning the subject matter of the
proceeding. (23 CCR §648.1(d); October 30, 2015 Hearing Notice, p. 32.) Persons
presenting non-evidentiary policy statements are not subject to cross examination. (*Id.*)
The Board stated: “A person or entity that appears and presents only a policy statement is
not a party and will not be allowed to make objections, **offer evidence**, conduct cross

1 examination, make legal argument or otherwise participate in the evidentiary hearing.” (*Id.*
2 [emphasis added].) “A person or entity that is not a party does not gain party status by
3 appearing and presenting a policy statement, and will not be allowed to make objections,
4 offer evidence, conduct cross-examination, make legal argument or otherwise participate in
5 the evidentiary phases of the proceeding.” (August 31, 2017 Ruling, p. 11.)

6 **OBJECTIONS**

7 PSSEP is not a designated party in either Part 1 or Part 2 of the current proceeding and
8 therefore may not offer evidence with regards to the California WaterFix proceeding.

9 PSSEP’s policy statement submitted on December 6, 2017, improperly seeks to offer a
10 plan for Delta selenium monitoring by consultant Tetra Tech as evidence for the Board’s
11 consideration as a proposed permit condition, which seeks to determine “whether
12 construction and/or future operation of the California WaterFix results in the expected
13 increase of selenium load to San Francisco Bay.” (Tetra Tech’s *Plan for Enhanced*
14 *Selenium Monitoring in the Delta to Track Future Loading Changes Associated with the*
15 *California WaterFix Project* dated December 1, 2017, p. 1.) Tetra Tech’s plan provides
16 data and expert opinion on selenium concentrations in the Delta, potential impacts of the
17 California WaterFix and recommends specific selenium monitoring and compliance
18 schemes.

19 Policy statements are an improper vehicle for the submission of evidence regarding
20 potential impacts of the California WaterFix on selenium concentrations and potential
21 permit conditions addressing such impacts. If accepted as a policy statement, DWR will
22 not have the opportunity to lodge an evidentiary objection to the proposed selenium
23 monitoring plan, nor subject a sponsoring witness to cross examination regarding the plan
24 prepared by Tetra Tech proposed by PSSEP as a permit condition. If PSSEP had wanted
25 to participate in the evidentiary hearing, it needed only to follow the Board’s noticed
26 procedures for becoming a party to the proceeding. For these reasons, DWR objects that
27 the policy statement submitted by PSSEP, attaching and incorporating Tetra Tech’s
28

1 selenium monitoring plan for the California WaterFix, goes far beyond the proper scope
2 allowable for a policy statement and respectfully requests that the Board reject the policy
3 statement in its entirety, or, at minimum, the attached Tetra Tech selenium monitoring plan.
4

5
6 Dated: January 11, 2018

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



James "Tripp" Mizell
Office of the Chief Counsel

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28