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8
9 BEFORE THE STATE WATER RESOURCES CONTROL BOARD

10 HEARING IN THE MATTER OF
CALIFORNIA DEPARTMENT OF
11 WATER RESOURCES AND UNITED
STATES BUREAU OF
12 RECLAMATION REQUEST FOR A
CHANGE IN POINT OF DIVERSION
13 FOR CALIFORNIA WATERFIX
14

**MOTION FOR STAY OF PART II OF THE
HEARING DUE TO ANTICIPATED
CHANGES IN THE PROPOSED PROJECT**

1
2 The Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute hereby
3 request that the State Water Resources Control Board (“SWRCB”) grant a stay or continuance of
4 Part II of this hearing due to the significant changes to the California WaterFix project that is the
5 subject of this proceeding.

6 We understand that Petitioners intend to change the proposed project by indefinitely delaying
7 the construction of one tunnel and one intake, proceeding instead with construction of a single tunnel
8 and two intakes. As compared to the three intake, two tunnel, and 9,000 cfs capacity project that
9 DWR approved in its Notice of Determination and that is the subject of modeling, analysis and
10 written testimony in this proceeding, until such time that the full project is constructed, a project
11 with a single tunnel and two intakes will necessarily result in significant changes to the project’s
12 potential impacts to water quality, water supply, flows in the Delta, fish and wildlife, and other water
13 rights holders. Because the “appropriate Delta flow criteria” are initial operating criteria for the
14 WaterFix project that are subject to change over time, the SWRCB’s consideration of this petition
15 and adoption of flow criteria must relate to the initial stage of construction, with appropriate flow
16 criteria for a subsequent phase addressed in a subsequent water rights hearing.

17 Given the significant changes to the project that Petitioners are contemplating, proceeding
18 with the water rights hearing is not in the public interest, would prejudice Protestants by providing
19 them with inadequate time to analyze the impacts of the new proposed Project, and would waste the
20 time and money of Protestants, SWRCB staff and the hearing team.

21 In addition, because the project has significantly changed from that which was originally
22 noticed, and because these changes in the Project have the potential to cause additional harm to fish
23 and wildlife and injury to water rights, the SWRCB must re-notice the hearing for an amended
24 petition, once such an amended petition is submitted to the SWRCB. *See* Cal. Code Regs., tit. 23, §
25 795.

1 **I. The SWRCB Should Stay or Continue the Hearing to Require Submission of New**
2 **Testimony, Modeling and Analysis of a Revised Single Tunnel, Two Intake Project**

3 Proceeding with the current hearing would prejudice Protestants because the written
4 testimony, modeling, ESA and CESA permits, and CEQA findings all evaluate and analyze the
5 effects of construction and operation¹ of two tunnels and three intakes (each 3,000 cfs), which the
6 FEIS estimated would be fully constructed around the year 2029. *See, e.g.*, FEIS/FEIR, Appendix
7 22B, Table 22B-1 (showing that construction of all conveyance facilities would be completed prior
8 to or in the year 2029). Similarly, the written testimony of DWR’s witnesses in Part 2 of this hearing
9 solely discuss a 9,000 cfs, twin tunnel project with specific operating rules. *See, e.g.*, DWR-1010,
10 Testimony of Gwendolyn Buchholz, at 2 (“My testimony summarizes the Adopted Project, CWF
11 Alternative 4A with operational scenario H3+ (CWF H3+) as detailed in the July 2017 Certified
12 Final Environmental Impact Report (2017 Certified FEIR), Findings of Fact and Statement of
13 Overriding Considerations, Mitigation Monitoring and Reporting Program, and Notice of
14 Determination (NOD). (collectively, Exhibits SWRCB-102, SWRCB-108, SWRCB-109, SWRCB-
15 110, SWRCB-111, and SWRCB-112.)”).²

16 Petitioners now intend to indefinitely delay construction of one tunnel and one intake,
17 proposing to instead construct only one tunnel and two intakes in the near future. None of the
18 permits, modeling or written testimony analyzed the effects of this revised project (the construction
19 and operation of a single tunnel and two intakes, with the operational provisions previously adopted
20 by DWR) on water quality, water supply, or fish and wildlife. Most of these permits only analyzed
21 potential impacts on water quality and fish and wildlife in the near future, and they generally
22 required new permits for long term operations. For instance, CDFW’s incidental take permit
23 authorized operations through 2042, whereas the NMFS biological opinion generally requires the
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25 ¹ The U.S. Fish and Wildlife Service biological opinion for the California WaterFix Project does not
26 analyze operational impacts, or authorize operations of the facility.

27 ² In addition, we understand that Petitioners will be filing notices describing necessary additional
28 environmental review for a revised project pursuant to CEQA (and likely NEPA). DWR’s final
CEQA findings explicitly conclude that a single tunnel alternative and any alternative smaller than
9,000 cfs is not feasible. *See* SWRCB-110 (DWR CEQA Findings at 70-72).

1 reinitiation of consultation on the operations of WaterFix by 2030, and both generally relied on
2 CALSIM modeling that only considers climate change effects through 2025. In contrast, the
3 proposed project would indefinitely delay construction of one of the tunnels and one of the intakes,
4 resulting in very different effects on water quality and fish and wildlife for the duration of these
5 permit terms.

6 Unless and until such unspecified time that a second tunnel and third intake are constructed,
7 the revised project will necessarily have significantly different effects on Delta inflows, Delta
8 outflow, Old and Middle River (“OMR”) flows, water supply, water quality, and resulting effects on
9 fish and wildlife. For instance, by eliminating one of the intakes until some unspecified time, the
10 project would necessarily result in either: (1) increased frequency of pumping from the remaining 2
11 intakes in the North Delta, with potentially greater impacts to migrating salmon and other fish and
12 wildlife; (2) increased pumping in the South Delta, with more negative OMR flows and greater
13 impacts to fish and wildlife; (3) a combination of (1) and (2); or (4) a reduction in exports.

14 Modeling is necessary to determine what these effects would be, for instance, the extent to which
15 there will be increased pumping in the South Delta, greater reverse OMR flows, and greater impacts
16 on fish and wildlife. Moreover, if WaterFix becomes a State Water Project only project, modeling is
17 necessary to determine whether a single tunnel, 2 intake project under the operating rules described
18 in the existing permits and environmental documents would cause an injury to the water rights of the
19 U.S. Bureau of Reclamation and harm the water supply of its contractors.

20 It would be arbitrary to assume that simply because the facility is smaller, the environmental
21 impacts of WaterFix will be lessened. As the example above shows, and as DWR’s CEQA findings
22 indicate, a two intake project could result in more negative OMR flows in the South Delta and could
23 have greater impacts on fish and wildlife. *See also* SWRCB-110 at 70-72. WaterFix requires less
24 negative OMR in wetter years, and modeling used in the FEIS/FEIR and other permits assumed that
25 OMR would generally be more positive as a result of diversions from the three NDD intakes. *See,*
26 *e.g.,* NRDC-20 at 70, 179, 196 n. 46. There may indeed be ways in which a smaller project would
27 have reduced impacts on fish and wildlife, depending upon how it is operated, just as a smaller
28 project could have more adverse impacts on fish and wildlife, depending upon how it is operated.

1 However, in order to determine the potential impacts of a two intake project, DWR and USBR must
2 submit to the Board and Protestants new modeling and analysis that evaluates a two intake project.
3 Simply assuming that a smaller project would have less environmental impacts lacks any evidentiary
4 support.

5 The Hearing Officers have explained that this proceeding will establish appropriate flow
6 criteria that will govern initial operations of the California WaterFix project, which would be subject
7 to modification over time. *See* February 11, 2016 Ruling at 4; March 4, 2016 Ruling Letter at 5; Cal.
8 Water Code § 85086(c)(2). It would be incongruous for the State Water Resources Control Board to
9 evaluate and potentially condition this water rights petition on initial operating rules and
10 “appropriate Delta flow criteria” not for the initial phase of this project, but for a subsequent phase
11 of the project, given that these criteria are subject to modification over time. Instead, these initial
12 criteria must relate to the initial phase of this project: a single tunnel and two intakes.

13 The Hearing Officers have previously concluded that an inadequate project description
14 would prejudice Protestants. For instance, in 2016, the Hearing Officers ruled that, “We also agree
15 that an adequate project description is necessary for parties to prepare a case in chief in Part 1,” and
16 that “We also agree with some of the parties that, absent a more complete and succinct submittal of
17 information by petitioners, project opponents will not be able to fully-develop their cases in chief,
18 and much substantive content will be deferred to the rebuttal stage of the hearing.” *See* Ruling dated
19 February 11, 2016 at 5, 6. In that Ruling the Hearing Officers approved a staggered submission of
20 testimony and that petitioners must provide the information required by section 794(a) of the
21 SWRCB’s regulations. *Id.* In April 2016, the Hearing Officers rejected a motion to dismiss the
22 petition for failure to provide an adequate project description, stating that,

23 Rather than supplement the petition, the petitioners are expected to provide more
24 information concerning project operations and potential effects on legal users of
25 water during the petitioners’ case in chief.... SJTA asserted that allowing petitioners
26 to present additional information during the hearing will place an undue burden on
27 protestants, who should have had the opportunity to review a complete petition
28 before deciding whether and to what extent to participate in the hearing. Petitioners
are required, however, to provide their written testimony and exhibits before Part 1A
of the hearing begins.... Accordingly, protestants and other parties will have ample
opportunity to review the additional information that petitioners are expected to

1 present before the hearing begins and before participants in Part 1B of the hearing
2 have to prepare their own cases in chief.

3 April 25, 2016 Ruling at 3.

4 DWR apparently seeks to continue with Part 2 of the hearing to present testimony regarding
5 the effects of a three intake, twin tunnel project on water quality and fish and wildlife, despite the
6 fact that construction of the second tunnel and third intake likely will be delayed indefinitely.³
7 Contrary to the April 25, 2016 ruling, Protestants will have not had “ample opportunity” to review
8 testimony, modeling and analysis of the effects of a revised project on water quality and fish and
9 wildlife before Part 2 of the hearing begins and before Protestants have to prepare their case in chief.
10 What has changed from these prior rulings is that they were issued before DWR and other project
11 proponents submitted written testimony for Part 2 of the Hearing. DWR has now submitted
12 testimony for Part 2, without disclosing the modeling and analysis relating to the effects of a single
13 tunnel, two intake project on fish and wildlife and water quality. NRDC et al and other Protestants
14 would be prejudiced unless the Hearing Officers delay or continue the hearing to require DWR to
15 submit updated testimony, modeling, and analysis for a revised project. Now that DWR is revising
16 the project, requiring Protestants to expend their limited time and resources to participate in this
17 water rights hearing on a twin tunnel, three intake project is not in the public interest.

18 In addition, the SWRCB cannot approve a water rights petition with an unspecified date for
19 construction of all of the facilities. *See, e.g.*, Cal. Water Code §§ 1396-97. The SWRCB’s Standard
20 Permit Term 9 requires that,

21 Construction work and complete application of the water to the authorized use shall
22 be prosecuted with reasonable diligence and completed by December 31, 20XX,”
23 where “December 31 of the fifteenth year following the issuance of the permit or the
24 previous completion date, except where use is for municipal or other purposes which
25 require a longer time to develop full use after construction is completed. The time
26 period must not exceed the period evaluated in the environmental document(s).

27 SWRCB, Standard Term 9, available online at:

28 https://www.waterboards.ca.gov/waterrights/water_issues/programs/permits/terms/term009.docx.

³ Should DWR propose any changes to the operations that were analyzed and modeled in the permits and testimony, at a minimum that would necessarily require a delay of the hearing and submission of revised testimony and exhibits. *See also* Nov. 8, 2017 ruling at __.

1 Similarly, the SWRCB’s regulations prohibit granting an extension of time for completion of a water
2 right when “(a) the applicant does not intend to initiate construction of the works required for the
3 contemplated use of water within a reasonable time and thereafter diligently prosecute the
4 construction and use of water to completion, or (b) the applicant will not be able to proceed within a
5 reasonable time, either because of absence of a feasible plan, lack of the required financial resources,
6 or other cause.” Cal. Code Regs., tit. 23, § 840. Lack of finances does not constitute grounds for
7 granting an extension of time. *Id.* at § 844. Indeed, the SWRCB’s regulations require separate water
8 rights applications where a project with multiple diversions would construct those diversions at
9 different times. *See* Cal. Code Regs., tit. 23, § 687.

10 The clear intent of these regulations is to require that construction of facilities associated with
11 water rights must be diligently prosecuted and cannot be delayed indefinitely. *See also California*
12 *Trout v. State Water Resources Control Board*, 207 Cal.App. 3d 585, 619 (1989) (“the statutory
13 requirement of diligence does not allow the Water Board to countenance a scheme placing water
14 rights in ‘cold storage’ for future use.”). For similar reasons, the SWRCB cannot approve new or
15 changed water rights that would indefinitely delay construction of one or more of those proposed
16 points of diversion or rediversion. This is particularly true where the reason for the failing to
17 diligently construct the full project was a lack of financial resources.

18 Similarly, State law also prohibits the initiation of construction of the California WaterFix
19 until the project beneficiaries have made arrangements or entered into contracts to pay for the full
20 cost of the project. Cal. Water Code § 85089(a). This statutory provision does not allow the
21 beneficiaries to begin constructing portions of the project without entering into contracts or other
22 arrangements to pay for the full project. It would be unlawful for DWR to pretend that construction
23 of a two tunnel, three intake project was being phased in for purposes of this water rights hearing
24 and to simultaneously claim that a single tunnel, two intake project was all that was being
25 constructed for purposes of this statutory provision.

26 In addition, the notice for this proceeding stated that Part 2 of the Hearing would not begin
27 “until at least 30 days after the CEQA, ESA, and CESA processes have been completed such that the
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1 associated documents for these processes can be included as exhibits.” See October 30, 2015 notice
2 at 2. However, we understand that the revisions to the project are likely to require new or amended
3 permits under CESA, CEQA and ESA. Proceeding with Part 2 of the hearing in the absence of these
4 new permits is inconsistent with the hearing notice and would prejudice Protestants.

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6 Finally, the SWRCB’s regulations require specific information to be included in a petition for
7 a change in point of diversion. Cal. Code Regs., tit. 23, § 794. This required information would
8 necessarily be different for a single tunnel, two intake project. For instance, a revised petition would
9 have different information regarding the points of diversion and rediversion (subpart (a)(4)), the
10 diversion flow schedules (subpart (a)(6)), and effects on fish and wildlife (subpart (a)(8)). It is
11 unlawful and unjust to continue with the hearing without a revised petition to correspond with the
12 revised project. See also *Central Delta Water Agency v. SWRCB*, 124 Cal.App.4th 245 (2004).

13 In light of the forthcoming revisions to the California WaterFix project, proceeding with Part
14 2 of this water rights hearing would prejudice NRDC et al and other protestants, and is not in the
15 public interest. Accordingly, we request that the Hearing Officers delay or continue the hearing.

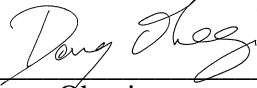
16 **II. The SWRCB Must Re-Notice an Amended Petition for this Proceeding**

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18 Due to the anticipated revisions to the proposed project, the SWRCB must also re-notice the
19 petition for change. The existing notice was for a petition to add three new points of diversion or
20 rediversion. See October 30, 2015 notice at 2-4. The existing petition likewise was to add three new
21 points of diversion, for a total of 9,000 cfs capacity for diversion and rediversion, in the North Delta.
22 See, e.g., Supplemental Information for Petition for Change in Point of Diversion at 8, 13. Neither
23 the Notice nor the Petition made any reference to indefinitely delaying construction of one tunnel
24 and one intake, effectively resulting in a single tunnel and two intakes for the near future. As
25 discussed above, the revisions to the project are likely to result in changes to instream flows, water
26 quality, and effects on fish and wildlife, and it would be unlawful for the SWRCB to approve a
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1 change petition that would indefinitely delay the initiation and construction of a second tunnel and
2 third intake. As such, the SWRCB must renotece the petition. *See* Cal. Code Regs., tit. 23, § 795.
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4 Dated: January 31, 2018

Natural Resources Defense Council

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6 _____
Doug Obegi

7 On behalf of the Natural Resources Defense Council,
8 Defenders of Wildlife, and the Bay Institute
9