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4 **DEPARTMENT OF WATER RESOURCES**

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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 **DEPARTMENT OF WATER**
20 **RESOURCES CONSOLIDATED**
21 **OPPOSITION TO THE NATURAL**
22 **RESOURCES DEFENSE COUNCIL'S,**
23 **DEFENDERS OF WILDLIFE'S AND**
24 **THE BAY INSTITUTE'S RENEWED**
25 **MOTION TO STAY PART II OF THE**
26 **HEARING DUE TO ANTICIPATED**
27 **CHANGES IN THE PROPOSED**
28 **PROJECT AND JOINDERS**
THERETO;

AND RESPONSES TO QUESTIONS
FROM THE HEARING OFFICERS

California Department of Water Resources ("DWR") submits its Consolidated Opposition to the Motion of the Natural Resources Defense Council, Defenders of Wildlife and the Bay Institute (collectively "NRDC") for Stay of Part II of the Hearing Due to Anticipated Changes in the Proposed Project ("Motion") and joinders thereto.¹ Additionally,

¹ Joinders to the Natural Resource Defense Council et al.'s Motion were filed by the following protestants: County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority; Local Agencies of the North Delta; Bogle Vineyards / Delta Watershed Landowner Coalition, Diablo Vineyards and Brad Lange / Delta Watershed landowner Coalition, Stillwater Orchards / Delta Watershed Landowner Coalition; Restore the Delta; City of Antioch; California Water Research; California Sportfishing Protection Alliance, California Water Impact Network, and AquaAlliance; North Delta Cares; Carter Mutual Water Company, El Dorado Irrigation District, El Dorado Water and Power Authority, Howald Farms Inc., Maxwell Irrigation District, Natomas Central Mutual Water Company, Meridian Farms Water Company, Oji Brothers Farm Inc., Oji Family Partnership, Pelger Mutual Water Company,

1 DWR submits its answers to the questions posed by the Hearing Officers in their email of
2 February 8, 2018.

3 Protestants' motions are fundamentally based on two incorrect assertions – (1) that
4 DWR has definitively decided to implement a reduced California WaterFix alternative, and
5 (2) that any such decision requires significant modification and delay of the present
6 proceeding. Protestants, throughout this hearing and in the Motion, have attempted to turn
7 this entire hearing on its head. NRDC asserts a requirement for certainty of participation,
8 financing, construction and permitting before the State Water Resources Control Board
9 ("State Water Board") can process this petition. This is not a legal requirement or the State
10 Water Board's past practice, as was recognized in previous rulings by the Hearing Officers
11 on virtually identical demands. (August 31, 2017 ruling.) Instead, the opposite of NRDC's
12 claim is true -any major water project has to obtain refinement and certainty through the
13 regulatory process first, so that public water agencies can decide whether to participate and
14 how to implement the project.

15 That is exactly what DWR is seeking to do in the present petition addressing the
16 California WaterFix. In parallel to the change petition process, DWR and public water
17 agencies throughout this state are analyzing and negotiating ways of implementing
18 California WaterFix. After several important decisions by public water agencies this fall, it
19 became apparent that focusing on consideration of the option of staged construction of
20 California WaterFix was worth significant effort by DWR and public water agencies.
21 Recently, DWR Director Karla Nemeth sent a memo to the public water agencies that

22
23 _____
24 Pleasant-Grove Verona Mutual Water Co., Princetonodora-Glenn Irrigation District;
25 Provident Irrigation District, Reclamation District 108, Sacramento Municipal Utility District,
26 Henry D. Richter et al., River Garden Farms Company, South Sutter Water District, Sutter
27 Extension Water District, Suter Mutual Water Company, Tisdale Irrigation and Drainage
28 Company, Windswept Land and Livestock Company, North Delta Water Agency,
Reclamation District 999, Reclamation District 2060, Reclamation District 2068, Brannan-
Andrus Levee Maintenance District, Reclamation District 407, Reclamation District 2067,
Reclamation District 317, Reclamation District 551, Reclamation District 563, Reclamation
District 150, Reclamation District 2098, Reclamation District 800 (Baron Tract), Tehama-
Colusa Canal Authority; Patrick Porgans; County of Yolo.

1 contract for State Water Project (“SWP”) deliveries making consideration of the option of
2 staged construction official, and describing actions and information to provide a path
3 forward for that option. It appears that NRDC requests that DWR be punished for providing
4 that transparency and facilitating parallel consideration and development of an additional
5 construction option. But exploring options and continuing negotiations does not modify the
6 project or the petition. Now public water agencies choosing to fund this project have an
7 additional option – considering a modified way of constructing California Water Fix that
8 they may present to their boards and publicly consider decisions to fund this project. And,
9 should DWR move forward with that option upon obtaining a change to its permit, they are
10 commencing the planning work now to anticipate the inevitable (albeit meritless) claims that
11 any staged implementation is not within the scope of the certified EIR or any regulatory
12 permits, including the permit sought in this hearing. To be sure, preliminary analysis and
13 modelling has been conducted on the option of staged construction and it indicates no
14 additional (or even a reduction in) environmental impacts from California WaterFix H3+.
15 Again, to further transparency and public discussion, DWR has shared that information with
16 the parties and State Water Board and is preparing a supplement to the EIR, even though
17 an addendum to the present EIR would suffice. If it becomes more certain that construction
18 will be staged and any party feels the need to contest that point or argue for modification of
19 these proceedings, they can attempt to do so. But to seek additional time now is unfairly
20 punishing DWR for doing what every Board petitioner does – seeking permission for a
21 major change, amidst complex regulatory processes and within a highly politically charged
22 set of negotiations – all while exploring various way of implementing the project.

23 To repeat, California WaterFix has not changed. It remains the same project defined
24 in the certified EIR/S and for which DWR and Reclamation received environmental permits.
25 The Department is preparing a draft supplemental EIR, expected to be released in June
26 2018 with a final expected in October 2018. Doing so exceeds the legal minimums for
27 public review stated by Local Agencies of the North Delta (“LAND”) in oral argument on
28

1 February 8, 2018. In fact, such transparency is nothing new to DWR or this process. DWR
2 has released Administrative Draft Environmental Impact Reports throughout the
3 development of the Final EIR, a practice that is novel and not required by the law. The
4 additional information developed for the California Environmental Quality Act (“CEQA”) will
5 also be used to supplement the Endangered Species Act, Section 7 and California
6 Endangered Species Act, Section 2081 record. DWR does not expect substantial change
7 to the Biological Opinions or Section 2081 Incidental Take Permit issued in 2017.

8 Preliminary modeling indicates that there are no new environmental issues related to
9 staging the implementation. Based on the information currently available, DWR expects no
10 changes in impact determinations and no changes to mitigation. Preliminary modeling
11 results are available on the California WaterFix website, as announced in an email to all
12 parties on February 8, 2018. Again, that website is
13 <https://www.californiawaterfix.com/staged-project-implementation/>.

14 DWR is not modifying its petition and rejects other parties’ attempts to do so
15 unilaterally, and urges the Hearing Officers to reject those attempts as well.

17 **I. DWR’S RESPONSE TO NRDC ET AL.’S MOTION AND JOINDERS**

18 **A. DWR is not Proposing a Change to its Petition Filed on August 26, 2015,** 19 **Currently Pending Before the State Water Board.**

20 DWR is not proposing any changes to the petition before the State Water Board. As
21 is often the case with large water projects, the requested permit will cover the whole project
22 but it may ultimately be constructed in stages. While DWR remains committed to fully
23 implementing the California WaterFix as proposed, while exploring a potential option to
24 construct the project in stages. This option would allow the Department and local water
25 agencies the flexibility to move forward with construction of the first 6,000 cubic-feet per
26 second (cfs) of California WaterFix, including one tunnel, two intakes, an intermediate
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1 forebay, and one pumping station. Additional construction will follow where a third intake,
2 second tunnel, and second pumping station will be built that will complete the project.

3 In its February 7, 2018 memorandum, DWR confirmed to public water agencies
4 participating in California WaterFix that DWR will pursue the project as planned. Most
5 recently, Director Nemeth provided this same confirmation to the Hearing Officers, stating
6 DWR is “not modifying the project or the change requested in our petition.” (Director
7 Nemeth, Part 2 Policy Statement.) Indeed, when asked to clarify by Hearing Officer Doduc
8 that DWR is not intending to change the petition before the State Water Board, Director
9 Nemeth stated “that’s correct.” (Rough Transcript February 8, 2018, pg. 12:18-22.)
10 Consistently throughout this proceeding where the issue of project description has arisen,
11 DWR has firmly stated that the Petition remains unchanged.

12 Though DWR is considering the option of staged construction, it continues to pursue
13 implementation of the full project. Therefore, the evidence Petitioners submitted supporting
14 the California CWF H3+ scenario in Part 2 is the relevant modeling for this proceeding,
15 precisely because DWR continues to seek implementation of the full project. To be
16 transparent, DWR released preliminary modeling runs for a staged construction approach.
17 Aside from informing project planning, the public, and the public water agencies
18 considering participation, this preliminary modeling also indicates that staged
19 implementation will result in no additional (or even a reduction in) environmental impacts.
20 Despite this likely conclusion, DWR has announced it is nevertheless preparing a
21 supplement to the EIR. DWR is undertaking this effort now and sharing it because of the
22 inevitable (yet meritless) legal challenges that will arise if it obtains a change permit as
23 currently requested, yet decides to implement California WaterFix in stages.

24 **B. There is no legal authority to support NRDC’s Motion**

25 The case law, statutes and regulations cited by NRDC do not support its motion.
26 NRDC further relies on unsubstantiated assumptions regarding future compliance with due
27 diligence requirements.

1 In fact, much of the cited authority is inapplicable to the pending petition for change
2 pursuant to Water Code Sections 1700 et seq. NRDC conflates the requirements for water
3 right permit applications and the requirements for a petition for change to an existing
4 permitted water right. These erroneous citations include Water Code Sections 1396 and
5 1397 and State Water Board regulations section 687, which are not applicable in this
6 proceeding. (October 30, 2015 Notice, pp. 3, 31.)

7 Once again, NRDC argues that DWR has not provided a legally sufficient project
8 description. As the Hearing Officers have repeatedly ruled (most recently in their August
9 31, 2017 ruling) the project description provided by Petitioners is adequate under the
10 requirements of California Code of Regulations, title 23, section 794, to allow participants to
11 meaningfully participate. In their August 31, 2017 ruling, the Hearing Officers stated that
12 “[n]ot all uncertainties need to be resolved for an adequate project description, and one of
13 the purposes of this proceeding is to hear evidence and argument concerning proposed
14 operating conditions.” Because DWR has not modified its petition, this ruling directly
15 addresses NRDC’s assertions.

16 NRDC asserts, without evidence, that DWR will not diligently pursue the California
17 WaterFix.² facts reveal the But DWR has, on numerous occasions, indicated it will
18 diligently pursue California WaterFix and fully comply with the Delta Reform Act
19 requirements should this project be permitted. And, as explained above, it turns water
20 permitting on its head to require an application to first obtain full financing and commit to
21 detailed implementation of a project before it can apply for a permit. Nonetheless, as to the
22 requirements to exercise due diligence, raised by State Water Board regulations 840 and
23 844, the *California Trout v. State Water Resources Control Board* case generally, and State
24 Water Board standard permit term 9, claims based upon these are premature. The
25 conditions are meant to be implemented when a permit is issued, not during the hearing for

26 _____
27 ² It is presumed under the law that DWR will adhere to whatever permit conditions are included in
28 its permit, including due diligence. The burden of proof to show otherwise is with NRDC. Evidence
code 664; *People v. Martinez* (2000) 22 Cal.4th 106, 125.

1 a change in a water right. It is not logical or appropriate to assume due diligence with
2 respect to project construction begins before a permit is even issued.

3 Finally, before the Hearing Officers, Mr. Obegi asserted that the State Water Board
4 lacked the legal authority to grant a change petition for a project that would be constructed
5 in stages, but provided no legal authority or citation for that assertion. (Rough Transcript,
6 February 8, 2108, pg. 15:18-20.) NRDC provided no authority for its statement because
7 the law does not support NRDC's view. Large water projects that are subject to State
8 Water Board authority are often implemented in stages. Examples include the 30 plus year
9 implementation of the Central Valley Project, the more recent San Joaquin River
10 Restoration Program, and the capacity increases to the Contra Costa Water District's Los
11 Vaqueros project.³ NRDC relies entirely upon inapplicable law and incorrectly asserts that
12 the legal framework for a new water right applies to a change petition. (Rough Transcript,
13 February 8, 2018, pg. 15:22-25.) The legal framework for a new water right is distinct from
14 that of a change petition. NRDC's interpretation fails to give effect to the clear differences
15 in statutory and regulatory language between these different types of actions.

16 **II. DWR'S RESPONSE TO THE STATE WATER BOARD'S QUESTIONS**

17 On February 8th, the State Water Board released its questions to be answered by
18 DWR in this filing. As a preliminary matter, DWR reiterates the prematurity of inquiries
19 about the specificity of staged implementation. It continues to seek the permit, as planned,
20 while also doing supplemental work to facilitate consideration of an additional way of
21 implementing California WaterFix. Finally, to reiterate, DWR will be publically exploring and
22 developing that proposal, to anticipate the potential that it will be implemented.

23 DWR's specific answers are:

- 24 1. Does the certified final Environmental Impact Report (EIR) address all potential
25 impacts if the WaterFix Project is constructed and operated in stages? In the
26

27 ³ The San Joaquin River Restoration Program involves changes to Bureau of Reclamation water
28 rights permits that include petitions for changes in points of diversion and rediversion.

1 supplement to the EIR, what additional analyses will be performed and what
2 specific environmental issues will be evaluated?

3 *The EIR certified in July 2017 covers the impacts associated with the California WaterFix*
4 *as it is reflected in the petition for the change of point of diversion, which remains the*
5 *project. The option of implementing construction and operation of California WaterFix in*
6 *stages is generally covered within this analysis. Recently, DWR modelled this option*
7 *extensively and the construction and operation of California WaterFix in stages is not*
8 *anticipated to involve new significant environmental effects or cause the increase in the*
9 *severity of previously identified significant impacts (as shown in the preliminary modeling*
10 *made available to the public on February 7, 2018). As described in Director Nemeth's*
11 *policy statement, there was a need to more formally explore a potential option for staged*
12 *construction so that the participating water agencies can present to their boards and*
13 *publicly consider a decision on that proposal. As a part of the development of this*
14 *information, the Department recognizes that it likely could address its obligations under*
15 *CEQA through the preparation of an addendum to the previously certified EIR (see CEQA*
16 *Guidelines Section 15162, 15164). However, the process for adoption of an addendum*
17 *provides for no public or agency review and input. Therefore, consistent with the*
18 *Department's practice in the development of California WaterFix and the previously*
19 *proposed BDCP (and in light of the highly litigious nature of CEQA compliance for*
20 *California WaterFix), DWR asserts it is important to address the specific issues of the*
21 *potential option for staged construction in a supplement to the EIR. The process for a*
22 *supplement to the EIR will allow for DWR to issue a draft to the public and agencies with a*
23 *comment period, which will result in a final document that will include formal responses to*
24 *those comments. Completion of the supplemental EIR process on the option for staged*
25 *construction this year will provide the flexibility to immediately implement a first stage (after*
26 *all necessary environmental review and permits are obtained) and not delay the significant*
27 *benefits of that effort, if full funding is not available for the entire project when construction*

1 of California WaterFix is ready to begin. In order to confirm that the potential option for
2 staged construction of California WaterFix does not cause new significant environmental
3 effects or increase the severity of previously identified significant impacts, the supplemental
4 EIR will necessarily review each resource topic originally presented in the certified EIR.
5 This will include analysis consistent with the preliminary modeling made available to the
6 public February 7, 2018.

- 7
- 8 2. If DWR constructs and operates the WaterFix Project in stages, to what extent
9 would Reclamation participate during the first stage? Would the WaterFix Project
10 be operated differently if Reclamation does not participate?

11 *DWR and Reclamation continue to be joint petitioners. As stated in prior testimony and*
12 *repeated here, DWR and Reclamation do, and will continue to, coordinate operations in the*
13 *Delta. This coordination process is no different under the California WaterFix full*
14 *implementation or under any staged construction approach.*

- 15
- 16 3. If the WaterFix Project is intended to be constructed and operated in stages, is
17 an amendment to the change petition or any additional supporting information
18 under Water Code sections 1701.1, 1701.2, and 1701.3 necessary? Why or why
19 not?

20 *DWR is not modifying the petitioned project. Sections 1701.1, 1701.2 and 1701.3 relate to*
21 *the information requirements for petitions. Importantly, section 1701.1 does not apply to*
22 *the change petition filed by Petitioners. This section applies to applications for water rights*
23 *before the granting of the water right. Evidence to this fact is that section 1701.2, which*
24 *applies to petitions for existing permits or licenses, is nearly identical. This repetitiveness*
25 *indicates that the sections were intended to address different situations. An appropriate*
26 *reading of the initial sentences of each identifies that 1701.1 addresses changes in*
27 *applications (which is not our situation) and 1701.2 addresses changes in permits or*

1 licenses.

2
3 However, DWR recognizes that other parties may have a different understanding of the
4 law. Thus, this answer provides a response to 1701.1 and 1701.2. This does not change
5 DWR's position that 1701.1 is inapplicable to this process.

6
7 Sections 1701.1, 1701.2 and 1701.3 were met earlier in this process, as determined by the
8 Hearing Officers. In fact, at this time this Petition has survived repeated attempts to
9 dismiss due to concerns over compliance with the informational requirements. Because
10 DWR is not changing the petitioned project, there are no new grounds upon which to
11 challenge its sufficiency. As recognized by the Hearing Officers, the point of the current
12 hearing is to further explore components of the requirements set forth in sections 1701.1,
13 1701.2 and 1701.3.

14
15 In fact, section 1701.1(a) continues to be the Department of Water Resources and the U.S.
16 Bureau of Reclamation, reachable at the addresses on file with the State Water Board.

17
18 Section 1701.1(b) continues to be satisfied because the Department of Water Resources
19 and the U.S. Bureau of Reclamation signed the submitted petition and both remain
20 petitioners.

21
22 Section 1701.1(c) continues to be satisfied through the filed petition. Section 1260(a)
23 remains the Department of Water Resources and the U.S. Bureau of Reclamation at the
24 addresses on file. Section 1260(b) remains the sources of water identified in the existing
25 permits and licenses of the Department of Water Resources and the U.S. Bureau of
26 Reclamation as stated in the filed petition. Section 1260(c) remains the nature and amount
27 of proposed use identified in the existing permits and licenses of the Department of Water
28

1 *Resources and the U.S. Bureau of Reclamation as stated in the filed petition. Section*
2 *1260(d) remains the location and description of the proposed three intake locations on the*
3 *Sacramento River and the associated pipelines and forebays necessary to convey diverted*
4 *water south to Clifton Court Forebay in the south Delta. These facilities were identified in*
5 *the filed petition and remain the facilities proposed. A staged construction approach does*
6 *not modify the facilities proposed. Section 1260(e) remains the proposed three additional*
7 *places of diversion at three locations on the Sacramento River. These places of diversion*
8 *were identified in the filed petition and remain the proposed additional points of diversion.*
9 *A staged construction approach does not modify the proposed addition of three points of*
10 *diversion because the Petitioners continue to seek and will diligently pursue the full*
11 *California WaterFix project. As explained above, there is no requirement that an applicant*
12 *for a major water project be able to commit to the Board that the resources for immediate*
13 *construction of every element of the proposed project is readily available. That is the*
14 *reverse of how the process works. Section 1260(f) remains the place of use identified in*
15 *the existing permits and licenses of the Department of Water Resources and the U.S.*
16 *Bureau of Reclamation as stated in the filed petition. Section 1260(g) remains consistent*
17 *with prior testimony in that the Department of Water Resources will begin construction of*
18 *the California WaterFix when the legally required conditions for such construction have*
19 *been met. Because many of the legally required conditions involve regulatory or permitting*
20 *processes it is beyond the Department of Water Resources’ control as to the timing of*
21 *when those conditions are fulfilled. Section 1260(h) remains that the Department of Water*
22 *Resources will diligently pursue construction and completion of the proposed California*
23 *WaterFix in compliance with all regulatory requirements and subject to modifications in*
24 *those regulatory requirement that can be anticipated under any revision to the Water*
25 *Quality Control Plan or future endangered species act permitting. Section 1260(i) remains*
26 *contingent upon section 1260(h), but the Department of Water Resources is committed to*
27 *fully exercising its existing permits and any new points of diversion while remaining*

1 compliant with regulatory requirements. Section 1260(j) was satisfied repeatedly
2 throughout this hearing process and continues to be met because when new information
3 that is reasonably informative becomes available it is provided to the public and the
4 Hearing Officers and Hearing Team. The Department of Water Resources continues to
5 release information as it is compiled and will continue to do so as this hearing proceeds.
6 Section 1260(k) remains that the Department of Water Resources and the U.S. Bureau of
7 Reclamation are not seeking any new water not already permitted for diversion under the
8 existing water rights permits listed in the filed petition. A new determination under section
9 1260(k) is unnecessary because Petitioners are not increasing the appropriation amount
10 currently permitted.

11
12 Section 1701.1(d) continues to be satisfied through the filed petition. The impacts of a
13 staged construction approach, should it be implemented, are not materially different from
14 the information provided in the Petition and submitted by the Department of Water
15 Resources and U.S. Bureau of Reclamation in testimony for Parts 1 and 2. Additional
16 inquiry into this section is the purpose of the ongoing hearing process.

17
18 Section 1701.1(e) continues to be satisfied through the filed petition.

19
20 Section 1701.2(a) continues to be the Department of Water Resources and the U.S.
21 Bureau of Reclamation, reachable at the addresses on file with the State Water Board.

22
23 Section 1701.2(b) continues to be satisfied as the Department of Water Resources and the
24 U.S. Bureau of Reclamation signed the submitted petition and both remain petitioners.

25
26 Section 1701.2(c) continues to be satisfied through the filed petition, the FEIR, the
27 Biological Opinions and the Incidental Take Permit. The impacts of a staged construction
28

1 *approach would not be materially different from the information provided in the Petition and*
2 *submitted by the Department of Water Resources and U.S. Bureau of Reclamation in*
3 *testimony for Parts 1 and 2. Additional inquiry into this section is the purpose of the*
4 *ongoing hearing process.*

5
6 *Section 1701.2(d) continues to be satisfied through the filed petition. The impacts of a*
7 *staged construction approach would not be materially different from the information*
8 *provided in the Petition and submitted by the Department of Water Resources and U.S.*
9 *Bureau of Reclamation in testimony for Parts 1 and 2. Additional inquiry into this section is*
10 *the purpose of the ongoing hearing process.*

11
12 *Section 1701.2(e) continues to be satisfied through the filed petition. The impacts of a*
13 *staged construction approach would not be materially different from the information*
14 *provided in the Petition and submitted by the Department of Water Resources and U.S.*
15 *Bureau of Reclamation in testimony for Parts 1 and 2. Additional inquiry into this section is*
16 *the purpose of the ongoing hearing process.*

17
18 *Section 1701.3 continues to be satisfied through the ongoing filings in response to*
19 *information requested by the Hearing Officers, Hearing Team, parties to the hearing, or*
20 *information submitted by or on behalf of the Petitioners throughout Parts 1 and 2.*

- 21
22 4. If the WaterFix Project is considered and operated in stages, are there potential
23 impacts to legal users of water, fish and wildlife, the public interest, or
24 consideration of appropriate Delta flow criteria that would warrant revisiting any
25 Part 1 or Part 2 key hearing issues? Which issues?

26 *Whether there are potential impacts to legal users of water, fish and wildlife, the public*
27 *interest and consideration of appropriate Delta flow criteria for this Project, are the subject*

1 of this hearing and require evidence to be submitted. DWR and Reclamation have
2 submitted evidence for all of these questions for the full project. In order to be responsive
3 to the needs for the public water agencies who have chosen to fund the project at this time,
4 DWR has assessed an option to construct the Project in stages. As noted above, it has
5 also provided that information to parties who will unfortunately and inevitably attempt to
6 challenge it. If and when DWR does make a final determination about staged
7 implementation and parties seek to contest it, they can attempt to do so. At that time DWR
8 would submit testimony that there are not additional impacts within the issues of the State
9 Water Board's jurisdiction and that evidence can be tested through cross examination.
10 Until then, DWR and USBR still seek to permit the project as petitioned and that the
11 evidence already submitted for Part 2 is relevant and necessary.

- 12 5. If a supplement to the EIR is entered into the administrative record, what is the
13 most efficient way to address any new information included in the supplement?

14 *See previous answer.*

- 15 6. Would any conditions necessary to adequately protect the rights of legal user,
16 fish and wildlife, or the public interest be different if the *California WaterFix*
17 Project were constructed in stages? Would appropriate Delta flow criteria be
18 different? Why or why not?

19 *No. The potential of a staged construction approach to the California WaterFix does not*
20 *alter the underlying basis of right for any claims of injury from legal users of water.*

21 *Conditions to protect legal users of water are not contingent upon the pace at which DWR*
22 *constructs the California WaterFix. Conditions necessary to reasonably protect fish and*
23 *wildlife or the public interest should also not be different under a staged construction*
24 *approach. This, however, is the fundamental question of Part 2 of the hearing and should it*
25 *come to light through the hearing that the biological permits require meaningful changes or*
26 *the supplemental EIR demonstrates the need for additional conditions, the Hearing Officers*
27 *continue to have the ability to adequately condition the requested changes. DWR is*

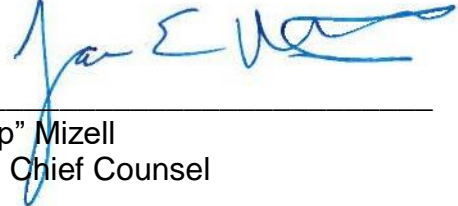
1 *unaware of what appropriate Delta flow criteria the Hearing Officers intend to place on the*
2 *California WaterFix and therefore it is premature to state whether or not that criteria would*
3 *be different under a staged construction approach. Fundamentally, DWR believes that*
4 *because it continues to seek a petition for the full California WaterFix, there is no basis to*
5 *modify the approach to appropriate Delta flow criteria. As explained in response to*
6 *Question 4, parties to this proceeding can attempt to argue to the contrary if and when is it*
7 *appropriate to attack any decision by DWR to undertake staged implementation.*

8
9 **III. CONCLUSION**

10 For these reasons, DWR respectfully requests that the Hearing Officers deny the
11 pending motions to stay the Part 2 hearings scheduled to commence on Thursday,
12 February 22, 2018.

13
14 Dated: February 9, 2018

CALIFORNIA DEPARTMENT OF WATER
RESOURCES



James "Tripp" Mizell
Office of the Chief Counsel