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14 **BEFORE THE**

15 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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

**RESPONSE OF SAN JOAQUIN COUNTY  
ET AL. TO DWR'S OPPOSITION TO  
MOTION OF NRDC ET AL. TO STAY OR  
CONTINUE HEARING PENDING  
COMPLETION OF SUPPLEMENTAL EIR  
ON A PHASED TUNNELS PROJECT;  
RESPONSES TO QUESTIONS FROM THE  
HEARING OFFICERS**

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1 **I. INTRODUCTION**

2 Protestants County of San Joaquin, San Joaquin County Flood Control and Water  
3 Conservation District, the Mokelumne River Water and Power Authority, Local Agencies of the  
4 North Delta, Bogle Vineyards, Diablo Vineyards, Stillwater Orchards, Friends of Stone Lakes  
5 National Wildlife Refuge, Save Our Sandhill Cranes, Environmental Council of Sacramento,  
6 the Environmental Justice Coalition for Water, County of Yolo, County of Contra Costa, Contra  
7 Costa County Water Agency, County of Solano, City of Antioch, South Delta Water Agency,  
8 and Central Delta Water Agency (“Protestants”) hereby respond to the Department of Water  
9 Resources’ (“DWR’s”) Consolidated Opposition to NRDC et al.’s Renewed Motion to Stay Part  
10 II (“DWR Opposition”), filed on February 9, 2018. This submission also includes Responses to  
11 the Questions posed by the Hearing Officers on February 8, 2018.

12 **II. BACKGROUND**

13 In preparation for Part 2 of the Hearing, Protestants have been diligently reviewing all of  
14 the Cases in Chief submitted for Part 2. A large portion of that time has been spent examining  
15 the relationship between, and preparing for cross examination with regard to, the previously  
16 presented operating scenarios, H3 and H4, and the newer version just presented on  
17 November 30, 2017 (referred to as CWF H3+). To proceed with the Hearing and include  
18 discussion of a new alternative with a “surprise” operating scenario whereby Stage 1 is  
19 constructed first and Stage 2 is *potentially constructed* at a later unspecified time, would be  
20 neither efficient nor fair.

21 In its February 7, 2018, email to the CWF service list, DWR claimed that it was  
22 providing its letter to the water contractors regarding the phased approach to the parties as  
23 part of an effort to keep everyone “informed of the most current thinking with regard to  
24 construction.” Yet DWR has consistently failed to keep the Hearing Officers and the parties  
25 apprised of the status of the petitioned project. For instance, the 90 modeling files<sup>1</sup> posted on  
26 the afternoon of February 7, 2017 and served on the CWF Hearing list the following morning,

27 \_\_\_\_\_  
28 <sup>1</sup> Within the 90 links, there appear to be 2,200 files distributed in 380 directories once they are all unzipped to download and run.

1 likely took months to create. According to our initial review, the CALSIM II output zip file is  
2 dated November 21, 2017 and the main operations DSS data file is also dated November 21,  
3 2017. The corresponding DSM2 water quality output zip file for 15-minute EC is dated  
4 November 30, 2017, as is the DSS inside the zip file.<sup>2</sup> Thus, DWR had information relating to  
5 the effects of phased implementation prior to submittal of Part 2 testimony, yet chose not to  
6 advise the Hearing Officers and the parties.

7 In December 2017, the State Water Project Analysis Office within DWR also extended  
8 its contract with the Hallmark Group for three months, at a cost of \$696,000, in part to begin  
9 preparation of a Supplemental EIR:

10 Additional time and money are needed for continued planning, coordination and  
11 oversight of the program. Recent meetings with fish and wildlife agencies have  
12 triggered additional planning and permitting activities such as **the development  
of a supplemental EIR/EIS.**

13 (See Exhibit A, Agreement Summary (December 18, 2017), bold added.) It is thus likely that  
14 prior to the submittal of testimony on November 30, 2017, DWR already planned to prepare  
15 the Supplemental EIR/S. Despite this, DWR formally advised the Board and parties about the  
16 change in the project and the planned additional analysis *only one day before* the start of Part  
17 2 on February 8, 2018.

18 DWR has knowingly withheld critical information from the Hearing Officers and the  
19 parties regarding its plans to pursue a different alternative than analyzed in the Final EIR/S or  
20 presented in the Petition. At the same time Protestants were preparing their Part 2 Cases in  
21 Chief to address Alternative 4A, Operational scenarios H3+ and H4, DWR was already working  
22 on modeling of both CWF H3+ as well as the modeling for the first phase of the phased  
23 implementation approach (referred to as “CWF H3+ 6,000 cfs”).

24  
25 <sup>2</sup> For Part 2 on November 30, 2017, and again on February 7, 2018, DWR posted what  
26 was effectively surprise modeling results, and only provided the DSM2 water quality data as  
27 15-minute data. Previously, DWR had also provided daily-averaged data to make it easier for  
28 stakeholders to process and analyze daily and monthly changes in Delta water quality. The 15-  
minute data sets are ninety-six times larger than daily data sets. DWR has thus decreased  
“transparency” by making processing and review of these water quality simulations much more  
time consuming and cumbersome.

1 The inclusion of a staged project alternative is *yet another major change* from other  
2 scenarios we have studied in this Hearing, including H3, H4, BA H3+ and the recently provided  
3 scenario CWF H3+ information. Rather than keeping the Board and Protestants apprised of  
4 changes to the Petition that affect this water rights proceeding, DWR has unreasonably  
5 withheld information. Moreover, DWR's Opposition Brief filed February 9, 2018 ("DWR Opp."),  
6 fails to competently answer the reasonable questions posed by the Hearing Officers, and fails  
7 to justify its insistence to proceed in what has become an irreconcilably flawed Hearing. The  
8 Hearing Officers have in the past granted DWR extraordinary latitude with respect to the lack  
9 of specificity in the Petition based on a finding that the parties could still participate  
10 meaningfully in the hearing despite critical missing and changing information. Additional  
11 latitude in the context of the previously rejected and newly presented alternative of staged  
12 construction cannot be justified and would be extremely prejudicial to the parties.

### 13 **III. ARGUMENT**

#### 14 **A. A Supplemental EIR Is Prepared Only When Substantial Changes Must Be** 15 **Addressed, and Reclamation Has Not Spoken with Respect to Its Role in a** 16 **Phased Tunnels Alternative**

17 In a straightforward attempt to determine the scope and depth of the additional  
18 information that may affect the content and conduct of the Hearing, the Hearing Officers asked  
19 two questions of DWR:

20 *Question 1: "Does the certified final Environmental Impact Report (EIR) address all potential*  
21 *impacts if the WaterFix Project is constructed and operated in stages? In the supplement to*  
22 *the EIR, what additional analyses will be performed and what specific environmental issues will*  
23 *be evaluated?"<sup>3</sup>*

24 *Question 2: "If DWR constructs and operates the WaterFix Project in stages, to what extent*  
25 *would Reclamation participate during the first stage? Would the WaterFix Project be operated*  
26 *differently if Reclamation does not participate?"*

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27 <sup>3</sup> The Hearing Officers addressed Questions No. 1 and No. 2 to DWR only. As later  
28 explained: "Questions one and two were directed to the petitioners because answers to those  
questions depend on information which only the petitioners may have, but all parties may  
respond to those questions as well. The subsequent deadline allows the other parties to  
address the questions directed to the petitioners either by responding directly or in the context  
of their response to petitioners' submittal." (Email from CWF Hearing Team to Deirdre Des  
Jardins, February 9, 2018.)

1 The Hearing Officers' questions reasonably attempted to test DWR's representations  
2 with respect to the effect of the newly announced staged implementation of the Delta Tunnels.  
3 Rather than responding specifically to these inquiries, DWR reiterated that any inquiry into the  
4 specifics of the "staged implementation" is premature and that the certified EIR "covers" the  
5 impacts of the Tunnels project as described in the Petition for Change. That, says DWR,  
6 "remains the project." (DWR Opp., p. 8.)

7 These hollow representations evade the Hearing Officers' questions. As acknowledged  
8 by the State Water Board, only DWR has access to the relevant facts on this question. (CWF  
9 Hearing Team Email, February 9, 2018.) Yet DWR provided literally *no information* about the  
10 focus or content of the Supplemental EIR under preparation since December 2017 (or earlier).  
11 Rather, DWR blandly states that it will review "each resource topic originally presented in the  
12 certified EIR." (DWR Opp., p. 9.) Moreover, DWR states that "construction and operation of  
13 the California WaterFix in stages is not anticipated to cause any new significant environmental  
14 effects or cause the increase in the severity of previously identified significant impacts,"  
15 referring to the preliminary modeling released on February 7, 2018. (DWR, Opp., p. 8; cf.  
16 Exhibit B.) Yet DWR makes no effort to describe the results of the preliminary modeling.  
17 Moreover, the modeling just made public does not appear to address Hearing issues outside of  
18 impacts to water supply, aquatic resources, water quality and similar topics.

19 Though the large volume of new modeling files has prevented anything beyond a very  
20 preliminary analysis, the phased construction alternative indicates a significant change to the  
21 distribution of flows diverted from the north and south Delta. On average, it appears there is  
22 an approximate 30 percent reduction in diversion from the proposed new north delta intakes  
23 relative to two tunnel scenarios analyzed over past two years of these proceedings. This  
24 reduction would undoubtedly have to be made up through diversions from the south Delta.  
25 Such changes in the mix of diversions will alter flow patterns and flow rates through Delta  
26 channels. Accordingly, Head of Old River ("HORB") and other operations will require significant  
27 adjustment. However, preliminary analysis of the new modeling files shows no change to the  
28 structure or operation of the HORB. Similarly, preliminary analysis shows very little change to

1 Delta Cross Channel operations, yet flow and diversion patterns are significantly different  
2 under the new one tunnel-phased construction scenario. The impacts from such changes  
3 were not analyzed in the final EIR.

4 DWR's vapid and dismissive responses to the Hearing Officers' questions omit any  
5 responsible discussion of the effect of the change in project approach on other topics relevant  
6 to the State Water Board's Hearing. For instance, DWR provides no information regarding the  
7 effect on the overall duration of project construction if a Phased alternative is pursued. (*Cf.*  
8 SWRCB-102, FEIR/S, Appendix 3C, Construction Assumptions for Water Conveyance  
9 Facilities; see also Appendix 22B, Air Quality Assumptions.) As discussed in the Final EIR/S,  
10 it is reasonably foreseeable that two separate mobilization periods would increase the duration  
11 of construction, with commensurate additional noise, traffic, air quality and other impacts,  
12 which would affect both wildlife and communities. (See, e.g., SWRCB-102, FEIR/S, Appendix  
13 3A, p. 94; see also SWRCB-110, DWR CEQA Findings, pp. 53, 70-72.) Land characterized as  
14 being "temporarily" used by DWR for construction of Alternative 4A in the FEIR/S may also  
15 remain inaccessible and unusable for a longer period, in anticipation of eventual construction  
16 of Stage 2. Long periods of delay can lead to crime, blight and other problems. (See, e.g.,  
17 SWRCB-102, FEIR/S, Appendix 3A, p. 94; see also Exhibit B.)

18 Also conspicuous by its omission is any meaningful information pertaining to the role of  
19 the Bureau of Reclamation ("Reclamation") in the project or Reclamation's plan to finish the  
20 still incomplete National Environmental Policy Act (42, U.S.C., § 4321 ["NEPA"]) review. In  
21 response to Question No. 2, DWR reiterated that "DWR and Reclamation continue to be joint  
22 petitioners" and continue to "coordinate operations in the Delta." (DWR Opp., p. 9.) According  
23 to DWR, that coordination process "is no different under the California WaterFix full  
24 implementation or under any staged construction approach." (*Ibid.*) Yet Reclamation has not  
25 submitted anything in response to the Hearing Officers' questions, nor has it joined in DWR's  
26 Opposition brief or the recent notices and materials referring to staged implementation. As  
27 Reclamation itself has stated nothing, this brief responds to DWR only and does not address  
28 the issue of the still pending and undefined NEPA review.

1 According to DWR, it could have fulfilled all of its obligations under CEQA merely by  
2 preparing an Addendum, but, in the interest of transparency and public participation in the  
3 process, DWR elected to prepare a Supplemental EIR. (DWR, Opp., p. 8.) This claim is  
4 inconsistent with the requirements of the California Environmental Quality Act (Pub. Resources  
5 Code, §§ 21000 et seq. [“CEQA”].) CEQA Guidelines Section 15164, subdivision (a), provides  
6 that the lead agency “**shall** prepare an addendum to a previously certified EIR if some  
7 changes or additions are necessary but none of the conditions described in Section 15162  
8 calling for preparation of a Subsequent EIR have occurred.” (CEQA Guidelines, § 15164,  
9 subd. (a), bold added; see also Pub. Resources Code, § 21166.)

10 No subsequent or supplemental EIR is required unless:

11 (a) Substantial changes are proposed in the project which will require major  
12 revisions of the previous EIR . . . due to the involvement of new significant  
13 environmental effects [<sup>4</sup>] or a substantial increase in the severity of previously  
14 identified significant effects; or

15 (b) Substantial changes occur with respect to the circumstances under  
16 which the project is undertaken which will require major revisions of the  
17 previous EIR . . . due to the involvement of new significant environmental  
18 effects or a substantial increase in the severity of previously identified  
19 significant effects; or

20 (c) New information of substantial importance, which was not known and  
21 could not have been known with the exercise of reasonable diligence at the  
22 time the previous EIR was certified as complete . . . shows any of the following:

- 23 (i) The project will have one or more significant effects not discussed  
24 in the previous EIR or negative declaration;
- 25 (ii) Significant effects previously examined will be substantially more  
26 severe than shown in the previous EIR;
- 27 (iii) Mitigation measures or alternatives previously found not to be  
28 feasible would in fact be feasible, and would substantially reduce  
one or more significant effects of the project, but the project  
proponents decline to adopt the mitigation measure or alternative;  
or

---

<sup>4</sup> The CEQA Guidelines define “significant effect on the environment” as a “substantial or potentially substantial adverse change in any of the physical conditions within the area affected by the project.” (CEQA Guidelines, § 15382.)

- 1  
2 (iv) Mitigation measures or alternatives which are considerably different  
3 from those analyzed in the previous EIR would substantially reduce  
4 one or more significant effects on the environment, but the project  
5 proponents decline to adopt the mitigation measure or alternative.

6 (CEQA Guidelines, § 15162, subd. (a); see also Pub. Resources Code, § 21166.) Moreover, a  
7 lead agency may choose to, and often does, circulate an EIR addendum for public review and  
8 comment. Though DWR claims that there will be no significant effects (or other circumstances  
9 that would warrant preparation of a Supplemental EIR), DWR offers no information in support  
10 of this proposition.

11 With no additional information provided by DWR, we must focus on what is known:

- 12 • DWR has already determined that it must prepare a **Supplemental EIR**, rather than  
13 relying on the previously certified EIR or preparing an Addendum to the EIR.
- 14 • Director Nemeth’s February 8, 2018, Policy Statement explains that the Supplemental  
15 EIR was necessary for “participating water agencies [to] present to their boards and  
16 publicly consider a decision on that proposal.”
- 17 • DWR’s preparation of a Supplemental EIR indicates that there are significant  
18 differences between the environmental impacts associated with the proposed project—  
19 Alternative 4A—that was the subject of the Petition filed with the SWRCB in 2015, and  
20 the new staged alternative now being considered.

21 If the changes really would have no import to the issues in the SWRCB CWF Hearing as DWR  
22 alleges, then certainly DWR would not be taking an additional seven months to analyze this  
23 different, phased alternative.

24 This change cannot be passed off, as DWR suggests, as simply keeping up with “the  
25 most current thinking with regard to construction.” (See DWR email to Hearing Officers,  
26 February 7, 2018.) If the “participating water agencies” cannot rely on the certified Final EIR/S  
27 and need a Supplemental EIR to “publicly consider a decision” on a phased alternative, how  
28 can the State Water Board and the other parties to this Hearing continue to rely on the now  
incomplete and outdated analysis in the Final EIR/S and the heretofore submitted Hearing  
evidence? While CEQA requirements differ from the applicable Water Code provisions,  
implementing regulations, and other authorities pertaining to water rights, CEQA impact  
analyses and mitigation are highly relevant to Petitioners’ burden to show no injury to water

1 users, no unreasonable impacts to fish and wildlife and that the petition is in the public interest.  
2 (See SWRCB-1, SWRCB-2 [citing RDEIR/S *passim*].)

3 **B. DWR’s Excuses Notwithstanding, the Pursuit of a New Alternative Renders the**  
4 **Petition for Change Inadequate and Continuation of Any Proceeding Based on**  
5 **That Petition Impracticable**

6 The mantra repeated throughout DWR’s Opposition consists of statements to the effect  
7 of “California WaterFix has not changed” and “DWR is not proposing any changes to the  
8 petition.” (See DWR Opp., pp. 2-5.) Says DWR: “Though DWR is considering the option of  
9 staged construction, it continues to pursue implementation of the full project.” (DWR Opp., p.  
10 5.)

11 Nonsense. DWR’s admission that a draft Supplemental EIR will soon be circulated, its  
12 February 7, 2018, release of new modeling information, and other information that has  
13 surfaced in connection with DWR’s single tunnel/“staged implementation” announcement, belie  
14 the cavalier “*move along, nothing to see here*” theme of DWR’s Opposition. The Petition’s  
15 project description of CWF Alternative 4A—which Protestants have long contended is  
16 incomplete and inadequate—is now obsolete and, at a minimum, must be substantially revised  
17 in order to disclose the true nature of the project and to afford other participants a meaningful  
18 opportunity to respond.

19 Making these changes to the project, without revisiting Part 1 and Part 2, would  
20 seriously impede protestants’ ability to “participate meaningfully” in the Hearing. (See, e.g.,  
21 Exhibit B [listing evidence impacted by change].) Protestants understand that the Hearing  
22 Officers have previously ruled that Petitioners could proceed even without what many  
23 protestants argued was adequate information regarding the proposed change under  
24 California Code of Regulations, title 23, section 794. (See, e.g., July 22, 2016 Ruling [Part 1]  
25 and August 31, 2017 Ruling [Part 2].) According to the Hearing Officers, “[N]ot all  
26 uncertainties need to be resolved for an adequate project description, and one of the  
27 purposes of this proceeding is to hear evidence and argument concerning proposed operating  
28 conditions.” (July 27, 2017 Ruling, p. 2.)

1           Shortly after, however, the Hearing Officers required that petitioners provide an  
2 updated summary of operating criteria that makes explicit whether particular criteria are  
3 proposed conditions of operation or are set forth solely as modeling assumptions. (August  
4 31, 2017 Ruling, p. 7.) This directive from the Hearing Officers came in response to  
5 “legitimate questions concerning whether some of the proposed operating criteria have  
6 changed.” (*Ibid.*) DWR submitted a two-page letter in response on September 8, 2017,  
7 setting the stage for DWR’s current position: that even a radical transformation to the  
8 operating criteria is not a “change” to the project. In the letter, DWR declined to offer any  
9 operating criteria as proposed conditions, continuing to refer to the extremely broad  
10 operational range of “B1 to B2”, and relying on “adaptive management” as an excuse for  
11 failing to explain in concrete terms what the project does and does not include. (September  
12 8, 2017 DWR Letter, p. 2.) Now, those operating criteria are, again, outdated (for the second  
13 time since just November 30, 2017) and new operating criteria have not yet been provided.

14 **C. Beyond Any Reasonable Quibble, Petitioners are Now Seeking a Permit That**  
15 **Would Allow Unlawful “Cold Storage” of Water Rights**

16           DWR repeatedly insists that notwithstanding its “staged” implementation announcement  
17 it “is not proposing any changes to the petition [for change].” (DWR Opp., p. 4.) Dismissing its  
18 announcement as a non-issue for purposes of this Hearing, DWR states: “the requested permit  
19 will cover the whole project but it may ultimately be constructed in stages.” (*Ibid.*) In other  
20 words, in this water rights adjudication DWR persists in requesting a permit to commence one  
21 of the largest water infrastructure projects in California history, even though it may not  
22 commence a major portion of that project for years, decades, or . . . for that matter, ever.

23           Based upon the amorphous project description in the Petition, as fleshed out through  
24 Petitioners’ Part 1 testimony, protestants in this proceeding have observed that issuance of the  
25 permit, as requested, would allow “cold storage” of water rights (which protestants argue  
26 already expired long ago) in violation of California law and policy. (See, e.g., SJC-76R2,  
27 Written Testimony of Marc Del Piero, pp. 9-10; CSPA-4, Testimony of Chris Shutes, p. 4.)  
28 Now, in the wake of DWR’s “staged implementation” announcement, issuance of the

1 requested permit would unquestionably allow DWR to hold water rights in “cold storage” in  
2 violation of California law and policy.

3 The problems with issuing a right to construct and operate a Stage 2 of the Tunnels at  
4 some future time have been described in prior State Water Board Orders and applicable case  
5 law. (See FOTR-2, p. 22.) For instance, proceedings resulting from Bella Vista Water  
6 District’s application for a right to divert water at the Reclamation’s Cow Creek Canal intake  
7 developed this concise description of cold storage (Order WR 90-04, p. 13):

8 The applicants’ apparent intention to acquire a water right permit now to be  
9 utilized at some indefinite future time is contrary to the fundamental requirement  
10 of California water law that appropriative water rights be perfected with due  
11 diligence. One cannot acquire a water right permit to be placed on a shelf in “cold  
12 storage” and utilized at some future unspecified time. (*California Trout, Inc. v.*  
*State Water Resources Control Board* (1989) 207 Cal.App.3d 585, 255  
Cal.Rptr.184, 204.)

13 Quoting from a rule promulgated by the Water Board itself, the court added: “. . . the Water  
14 Code does not allow the [Water Board] to countenance any attempt to place rights in cold  
15 storage where there is no intent to proceed promptly with development.” (207 Cal.App.3d at p.  
16 619, quoting former Cal. Admin. Code, tit. 23, § 778, as promulgated in 1945.)

17 The public interest against cold storage of major water permits was also described in  
18 the order revoking Reclamation’s water rights for Auburn Dam (Order WR 2009-0011, p. 2):

19 Our order explained that the requirement that an appropriation of water be  
20 completed within a reasonable time with the exercise of due diligence is a long-  
21 standing principle of California water law designed to protect the public interest  
22 by preventing the “cold storage” of water rights. For purposes of discussion, we  
23 defined “cold storage” to mean a situation where an appropriation is initiated, so  
24 that the water subject to appropriation is not available to other parties who could  
potentially put it to beneficial use, but the appropriator is not diligently pursuing  
development of the water supply, so the water remains unused, contrary to the  
public interest.

25 Thus, “a water right permit is not a proper instrument to reserve water for development at  
26 some future time.” (Board Order WR 82-5, at p. 7; see also Board Decision D. 1083 (1963), at  
27 p. 5 [noting that every water right applicant bears the burden of providing information that the  
28 State Water Board can rely on when setting the time periods for completion of construction and

1 application of water to beneficial use in the water right permit[.]) Here, a Petition should not be  
2 granted for a project alternative DWR has already rejected as infeasible (see SWRCB-110,  
3 DWR CEQA Findings, pp. 53, 70-72), and that has not yet been described in evidence within  
4 the Hearing.

5 DWR has now doubled down on its contention that it should be allowed to shelve water  
6 rights indefinitely in “cold storage.” If granted, the requested permit with a staged alternative  
7 would allow Petitioners to sit on water rights for years, decades, perhaps forever, without  
8 completing the infrastructure it claims it needs to put those rights to beneficial use.

9 For this reason, too, DWR’s newly hatched “staged” implementation scheme should be  
10 flatly rejected as a basis for proceeding in this Hearing.

11 **D. The Petition Is Inadequate, and the Change to a Phased Project Exacerbates**  
12 **Those Deficiencies (Question 3)**

13 *“If the WaterFix Project is intended to be constructed and operated in stages, is an*  
14 *amendment to the change petition or any additional supporting information under Water Code*  
15 *sections 1701.1, 1701.2, and 1701.3 necessary? Why or why not?”*

16 Since its submittal in August 2015, Protestants have contended that the Petition is  
17 insufficient for a host of reasons, including that fact that it lacks a stable and complete project  
18 description and is predicated on water rights that have expired, i.e., that it amounts to an  
19 application for a new water right.<sup>5</sup> That said, certainly Water Code sections 1701.1, 1701.2,  
20 and 1701.3 all require that the Petition identify the petitioner(s) and include the information  
21 needed to demonstrate that the change will not injury any other legal user of water. Under  
22 section 1701.3, the Board may also request information from the petitioner sufficient to  
23 demonstrate compliance with CEQA and other laws protective of the environment.

24 As a threshold matter, DWR’s “staged” implementation announcement and DWR’s  
25 Response to the Hearing Officers’ Questions—coupled with the fact that the Reclamation has

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26  
27 <sup>5</sup> See, e.g., the August 31, 2015 Joint Local Agencies of the North Delta/Central Delta  
28 Water Agency letter to Tom Howard, Executive Director of the SWRCB, describing some of the  
Petition’s deficiencies. DWR’s later submission of DWR-324 failed to remedy these  
inadequacies.

1 not yet certified the EIS—raise a serious question about who the petitioners really are.  
2 Although Reclamation is a nominal petitioner and nominal participant in this proceeding, its  
3 silence on the question of a staged implementation is deafening. DWR’s Response purports to  
4 speak for the Reclamation as well, but the Reclamation is perfectly capable of speaking for  
5 itself. The absence of a certified EIS, already a serious impediment for approval of the  
6 proposed project, now assumes a deeper significance, raising myriad questions about  
7 Reclamation’s commitment to, and participation in, the proposed project. Protestants have  
8 steadfastly maintained that the Petition is effectively an application for a new water right;  
9 without Reclamation’s participation, the truth of that position becomes even clearer. Without  
10 Reclamation’s participation, DWR’s rights are simply not sufficient to support the project.

11 Since the beginning of this proceeding, protestants have complained about the lack of a  
12 stable and complete project description, without which protestants have been required to  
13 expend substantial public and private resources responding to a moving target, an amorphous  
14 and yet constantly morphing chimera. DWR’s new “staged” implementation announcement  
15 further exacerbates that problem. The information required by the above-referenced Water  
16 Code provisions is set forth in greater detail in Title 23 of the California Code of Regulations,  
17 section 794, subsection (a).<sup>6</sup> Subsection (d) is critical: “The petition for change(s) will not be  
18 accepted for filing unless it contains all of the information required by subdivision (a) . . . .”

19 Whether characterized as a shell game or a bait-and-switch, throughout this  
20 proceeding, DWR has played a cynical game in evading the requirement that the Petition be  
21 complete when filed. DWR’s reliance on a so-called “boundary” approach so broad as to be  
22 virtually useless as a basis for analysis and response, its deferring of critical decisions to the  
23 uncertainties of future “adaptive management” and other decision-making processes, and its  
24 nonchalant and unapologetic submission of new modeling in Part 2 (not the modeling upon  
25

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26 <sup>6</sup> E.g., 23 CCR, section 794, subd. (9) provides that a change petition must include  
27 “information identifying any effects of the proposed change(s) on other known users of water,  
28 including identification in quantitative terms of any projected change in water quantity, water  
quality, timing of diversion or use, consumptive use of the water, reduction in return flows, or  
reduction in the availability of water within the streams affected by the proposed change(s).”

1 which parties based their Part 1 testimony and cross-examination), among other maneuvers—  
2 all evidence a dismissive approach to the requirements of 23 CCR section 794.

3 Doubling down on this manifest disrespect for the law governing this proceeding, for the  
4 rights and interests of the protestants, and for the processes of the Board itself, DWR now tells  
5 us that the project described—however vaguely and inadequately—in the Petition is not really  
6 the project it intends to build after all.

7 Enough is enough. Protestants have expended two years and substantial amounts of  
8 public money in responding to what have become a moving and shape-shifting target. Surely  
9 DWR has now gone far beyond the breaking point of any Board deference or indulgence.  
10 DWR’s mantra—“just trust us”—was never credible, and now the already tattered fig leaf  
11 disguising the truth underlying this project has fallen off altogether.

12 Furthermore, Water Code section 1701.3, subd. (b)(3), refers to assurances that the  
13 proposed project complies with CEQA. DWR’s announcement of preparation of a  
14 Supplemental EIR accomplishes just the opposite: It is an explicit admission that CEQA  
15 review of the project DWR plans to construct and operate.

16 **E. New Information in the Supplemental EIR Will Substantively Impact Both Part 1**  
17 **and Part 2 Testimony (Question 4)**

18 *“If the WaterFix Project is constructed and operated in stages, are there potential*  
19 *impacts to legal users of water, fish and wildlife, the public interest, or consideration of*  
20 *appropriate Delta flow criteria that would warrant revisiting any Part 1 or Part 2 key hearing*  
21 *issues? Which issues?”*

22 **1. Substantive Impacts to Part 1 and Part 2**

23 In response to this important question, DWR admits that evidence would still need to be  
24 submitted to answer these questions. (DWR Opp., p. 14.) Yet, rather than provide any helpful  
25 information to the Hearing Officers regarding the scope or depth of the impacts to the various  
26 parties and interests at issue in the hearing, DWR refers to submitting testimony subject to  
27 cross examination in some later proceeding challenging staged implementation. (DWR Opp.,  
28

1 p. 14.) This response fails to relate to the present Hearing process and is entirely non-  
2 responsive to the Hearing Officers' reasonable question.

3         Though Protestants have had insufficient time and information to conduct a complete  
4 analysis of these questions, we do have information responsive to the question as follows:

5         With respect to Part 1 and Part 2 testimony that has already been submitted, we have  
6 prepared Exhibit B: Partial List of Testimony Impacted by Phased Implementation of the CWF  
7 Tunnels. This table lists example testimony, from Part 1 and Part 2 of the Hearing that is  
8 subject to change under the phased implementation approach. Testimony throughout Part 1,  
9 and submitted for Part 2, was based on various assumptions and operation models. None of  
10 the assumptions made or model results used by DWR relied on or considered a phased  
11 alternative. By phasing implementation of the Tunnels, which would likely necessitate multiple  
12 mobilization periods, the overall length of construction would be extended, and impacts to  
13 water users, water supplies, and fish and wildlife, would change or intensify. (See also,  
14 SWRCB-102, FEIR/S, Appendix 3A, p. 94.)

15         Conclusions regarding water levels, groundwater movement, soil salinity, and reverse  
16 flows were drawn by analyzing operational scenarios depicted in previously submitted  
17 evidence, such as DWR-514 and DWR-515. Conclusions regarding reverse flows, salinity,  
18 and groundwater movement that were analyzed based on this information would be different  
19 under a phased implementation plan.

20         Furthermore, phased implementation of the tunnels project will necessarily lengthen the  
21 overall period of construction from what has been previously disclosed. (See SWRCB-102,  
22 FEIR/S, Appendix 3C—Construction Timeline; see also LAND-207.) For example, legal water  
23 users' property would be temporarily converted, used as staging areas, and subject to  
24 disruptions from construction. Phased implementation could result in multiple staging periods  
25 and subject the property, and its owners, to multiple, and longer, periods of disruption,  
26 compared to the project originally proposed. (See Exhibit B.)

27         Moreover, lengthening the overall project by phasing implementation could exacerbate  
28 impacts to wildlife and wildlife habitat. Extending the project construction could further impact

1 wildlife connectivity and subject wildlife to construction-related disturbances such as light and  
2 truck traffic. Increased traffic could worsen construction-related noise, prolong the inability of  
3 wildlife to use habitats adjacent to roadways, and increase wildlife mortality due to collisions.  
4 (See Exhibit B.) Protestants have also conducted a very preliminary review of the Preliminary  
5 Modeling files prepared in November 2017 and released on February 7, 2018. As one  
6 example of the potentially serious water quality implications of a phased approach, as  
7 compared to the No Action Alternative as well as previously proposed operational scenarios  
8 (H3, H4, BA H3+ and CWF H3+), Exhibit C indicates that the simulated single tunnel salinities  
9 (CWF H3+ 6,000) on Old River at Bacon Island rise to a peak EC well above the NAA as well  
10 as the CWF H3+ salinities.<sup>7</sup> The single tunnel (CWF H3+ 6,000) peak EC of 3,228  $\mu\text{S}/\text{cm}$  is  
11 equivalent to a chloride concentration of 870  $\text{mg}/\text{L}$ .<sup>8</sup> This is well in excess of the SWRCB's  
12 daily D-1641 Municipal and Industrial standard in this area of 250  $\text{mg}/\text{L}$  (at the intake to the  
13 Contra Costa Canal). (See, e.g., CCC-SC-3.) Water quality simulations that correspond to  
14 significant exceedances of the daily D-1641 chloride standard at the nearby Contra Costa  
15 Canal intake should not be relied on for water rights decision making.<sup>9</sup>

16 In addition to unacceptable water quality changes in some years/months, preliminary  
17 modeling results provided by DWR show that under a phased alternative, in 61 months of the  
18 16-year simulation period, the monthly average flow rate exported from the South Delta would  
19 be greater in new scenario CWF H3+ 6,000 than in all other WaterFix project scenarios,

20 \_\_\_\_\_  
21 <sup>7</sup> Exhibit C was developed using DSM2 modeling data provided by DWR. For the Part 1  
22 version of the project, DWR only provided EC data for water years 1976 through 1991  
23 (Alternative 4A, Scenarios H3 and H4). Exhibit C also shows the simulated salinities for the  
24 Draft Biological Assessment version of WaterFix (BA H3+) which, like Scenarios H3 and H4,  
25 had very different operating criteria in October and November than CWF H3+ and the new  
26 single-tunnel alternative.

27 <sup>8</sup> Conversion of EC to chloride concentration is calculated using the seawater intrusion  
28 equation in DWR-509.

<sup>9</sup> DWR has argued that even if their absolute simulations of water quality are inaccurate,  
the relative change in salinity from the No Action Alternative base case can be used to inform  
decision making. (See, e.g., the footnotes to the water quality graphs in DWR-513, stating:  
"Model results are used for comparative purposes and not for predictive purposes.") If this  
were indeed the case, then the example in Exhibit C would suggest that the more recent  
single-tunnel alternative would result in a maximum daily degradation of 469  $\mu\text{S}/\text{cm}$  in  
November 1926 whereas CWF H3+ would cause a significant daily improvement in salinity of  
as much as 1,710  $\mu\text{S}/\text{cm}$ .

1 including both B1 and B2, which DWR has claimed represents the outer limits, or “bookends”  
2 of potential operational impacts. (See, e.g., DWR-1008, slide 7.) In addition, the annual  
3 average export flow rate from the South Delta is greater for CWF H3+ 6,000 than for all other  
4 project scenarios in three (3) of the 16 years.<sup>10</sup>

5 Thus, very preliminary analyses of just released new information regarding a completely  
6 new alternative suggest the new single-tunnel alternative could have greater adverse impacts  
7 in some periods than earlier versions of the proposed project. These examples make clear that  
8 additional analysis, testimony and evidence must be required of DWR to support consideration  
9 of a phased alternative in the Hearing. In addition, the differences between the previously  
10 disclosed and analyzed scenarios and the just-presented phased alternative are substantive,  
11 require more time and analysis, and cannot be adequately addressed in a cross-examination  
12 process within Part 2.

13 **2. Due Process Requires That Protestants Be Afforded a Meaningful**  
14 **Opportunity to Review the Supplemental EIR and Other “Staging” Related**  
15 **Material Before Cross-Examining Petitioners’ Witnesses and Preparing**  
16 **Their Own Cases in Chief; for the Same Reason, Due Process Requires**  
17 **That Part 1 Be Re-Opened**

18 DWR appears to argue that Protestants should analyze the new preliminary modeling  
19 information provided regarding phased construction at the same time as Protestants  
20 participate in Part 2 of the Hearing. According to DWR, it “has assessed an option to construct  
21 the Project in phases.” (DWR Opp., p. 14.) As the Supplemental EIR is not expected until  
22 June 2018, this is apparently a reference to the 90 preliminary modeling files released on  
23 February 7, 2018.

24 At an undefined later time “DWR would submit testimony that there are not additional  
25 impacts within the issues of the State Water Board’s jurisdiction and that evidence can be  
26 tested through cross examination.” (DWR Opp., p. 14.) It is not clear, however, when this  
27 would occur if Part 2 of the Hearing marches forward unabated. DWR and Protestants have

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28 <sup>10</sup> See Declaration of Susan Paulsen, Ph.D., P.E., in Support of Sacramento County et al.’s Response to DWR’s Consolidation Opposition to NRDC et al.’s Renewed Motion to Stay Part 2 of Waterfix Hearing Due to Changes in Proposed Project, February 13, 2018.

1 already submitted their Cases in Chief for Part 2. These Cases in Chief do not address a  
2 phased construction of the Tunnels. (See Exhibit B.) Without an opportunity to revisit Part 1  
3 and Part 2 Testimony in light of this new alternative, Protestants’ due process rights would be  
4 violated.

5 Due process requires, at a minimum, that San Joaquin County et al. and other  
6 protestants be afforded an opportunity to develop their cases in chief and to cross-examine  
7 Petitioners’ witnesses with respect to the project actually being proposed. However,  
8 Petitioners’ Part 1 witnesses—most of whom are not scheduled to reappear in Part 2—never  
9 testified about a staged implementation. They testified about another project, however vaguely  
10 defined. Nor were protestants given the opportunity to conduct analysis of the impacts of a  
11 staged implementation or to develop testimony in their cases in chief or rebuttal and sur-  
12 rebuttal cases that would address a staged implementation.

13 This goes far beyond the ordinary “flexibility” that is reasonably accorded agencies  
14 responsible for developing large and complex projects. DWR’s latest bait-and-switch  
15 maneuver, if allowed, would deprive protestants of their most basic due process rights in this  
16 proceeding. If allowed, the result will be a proceeding that is unlawful on its face and which  
17 makes a mockery of this Board’s rules and processes.

18 **F. New Information in the Preliminary Modeling and the Supplemental EIR Must Be**  
19 **Addressed in Due Course in the Hearing (Question 5)**

20 *“If a supplement to the EIR is entered into the administrative record, what is the most*  
21 *efficient way to address any new information included in the supplement?”*

22 In keeping with its ongoing denial that the change to a still-under-development phased  
23 approach to construction and operation is any change at all, DWR declined to provide any  
24 suggestions as to how a Supplemental EIR should be addressed at the Hearing. (DWR Opp.,  
25 p. 14.) DWR’s willful disregard for the practical effect of its decision to pursue a phased  
26 construction and operation of the largest water project in this century is unconscionable.  
27 DWR’s cavalier disregard for the integrity of this proceeding is stunning. Having participated  
28 in more than two years of the Hearing, DWR is well-aware of the subjects that would need to

1 be addressed in light of the new project approach in order to carry its burdens with respect to  
2 the Hearing. Hearing issues impacted by a staged approach would include, for instance:  
3 effects on water quality, water levels, groundwater, construction timeline, wildlife, fish and  
4 communities. The preliminary modeling released to the public on February 7, 2018, is no  
5 substitute for the analysis that will be contained in the yet-to-be prepared Supplemental EIR.

6 While there are likely several possible approaches, we outline one approach below for  
7 the Hearing Officers' consideration:

8 First, the Hearing must be stayed while DWR conducts the extensive analysis DWR and  
9 its contractors have determined is warranted to properly consider a phased alternative. In  
10 recognition of the importance of the analysis contained within the project's environmental  
11 analysis, Part 2 of this hearing was specifically scheduled around the DWR's completion of  
12 CEQA documents. (Notice of Public Hearing, October 30, 2015, p. 11 ["The State Water  
13 Board staff does not propose to begin the second part of the hearing or act on the Petition until  
14 the ESA, CESA and CEQA processes are complete."].) Now, DWR has announced that it  
15 would issue a draft supplemental environmental impact report in June 2018 and a final  
16 supplement in October 2018. DWR has also indicated modifications to endangered species  
17 permitting by the state and federal agencies may also be necessary. In accordance with the  
18 Notice of Public Hearing, this Hearing must, at a minimum, be stayed pending completion of  
19 the new CEQA process DWR is now undertaking.

20 Second, DWR should provide updated Part 1 and Part 2 Case in Chief testimony that  
21 includes information pertaining to the staged implementation it now wishes to pursue for review  
22 by Protestants.

23 Third, Protestants would need the opportunity to review this new information from the  
24 Petitioners and their own revise Part 1 and Part 2 testimony (Case in Chief, rebuttal, and sur-  
25 rebuttal) to respond to information contained in the Final Supplemental EIR and DWR's revised  
26 testimony. As was the case with Part 1a and Part 1b of the first part of this hearing, the  
27 hearing could then proceed as Part 2a (Petitioners) followed by Part 2b (other parties).  
28

1 **G. Conditions Necessary to Adequately Protect the Rights of Legal Users, Fish and**  
2 **Wildlife, or the Public Interest Would Be Different If the Project Were Constructed**  
3 **in Stages (Question 6)**

4 *“Would any conditions necessary to adequately protect the rights of legal users, fish and*  
5 *wildlife, or the public interest be different if the WaterFix Project were constructed in stages?*  
6 *Would appropriate Delta flow criteria be different? Why or why not?”*

7 DWR summarily dismisses the final Hearing Officer question by responding with a red  
8 herring. DWR states that “staged construction . . . does not alter the underlying basis of right  
9 for any claims of injury from legal users of water.” (DWR Opp., p. 14.) Yet the basis of right of  
10 legal users of water is not one of the Hearing issues. Moreover, DWR’s response ignores the  
11 critical issues of construction period length, character and timing, as well as operational  
12 differences between the project described in the Petition as it has evolved over the course of  
13 the hearing. While Protestants have objected to the continual changes in scenarios as they  
14 relate to project modeling, those all involved the same project configuration. No evidence has  
15 yet been submitted that addresses what the impacts on legal users and fish and wildlife would  
16 be, much less what the necessary conditions would be.

17 Similar to the response to Hearing Officer Question 4, DWR refers dismissively to the  
18 ability of the parties to challenge staged construction at some later date. (DWR Opp., p. 15.)  
19 This response ignores the jurisdiction of the State Water Board over this proceeding and the  
20 role of the State Water Board in implementing the water rights system with respect to DWR’s  
21 Petition. The ability to bring a lawsuit in a separate forum is no answer to the Hearing Officers’  
22 question. As discussed herein, impacts examined in both Part 1 and Part 2 would be different  
23 under a phased approach (see Exhibit A), which means that the conditions would also need to  
24 be different in order the adequately protect water users, fish and wildlife and the public interest.

25 DWR has been working on its own analysis of a phased project approach since at least  
26 November 2017, if not earlier. DWR was in the best position to describe to the State Water  
27 Board and the parties how conditions may be imposed to ensure that water users, fish and  
28 wildlife and the public interest could be protected. By failing to do so, DWR misses its

1 opportunity to justify why the Hearing should proceed despite the significant change in the  
2 project now being proposed.

3 **IV. CONCLUSION**

4 For the foregoing reasons and those set forth in NRDC’s Motion and the parties’  
5 Joinders therein, this Board must re-notice the Petition for Change after Petitioners submit an  
6 Amended Petition that fully complies with the Water Code and its implementing regulations.  
7 Alternatively, this proceeding should be stayed or continued until such time as (1) the Final  
8 Supplemental EIR has been certified; (2) Petitioners have provided a stable and adequately  
9 detailed project description of what they wish to request a permit to operate and when; (3)  
10 Petitioners have submitted testimony that meets their burden to describe the effects of the new  
11 phased approach in with sufficient specificity to enable Protestants to meaningfully respond;  
12 and (4) Protestants have been afforded a reasonable and sufficient period of time in which to  
13 review and analyze the Final Supplemental EIR and Petitioners’ revised testimony with respect  
14 to the Hearing issues and adjust their testimony as necessary.

15 This Response focuses on Petitioners’ failure to comply with California law governing  
16 their Petition for Change and on the serious prejudice to Protestants if they are not allowed an  
17 opportunity to respond to a stable project description and are compelled to proceed prior to  
18 issuance and comment on the Supplemental EIR. However, something else is at stake here:  
19 the integrity of the State Water Board’s adjudicative processes and restoration of public  
20 confidence in those processes. Responding to the Hearing Officers’ well-considered  
21 Questions, DWR has offered glib and dismissive non-answers, waving off objections with  
22 unsubstantiated assurances that nothing has changed, no further analysis is needed, and that  
23 the parties and Hearings Officers already have—in the Petition itself—everything they need  
24 and are entitled to. DWR’s Response is stunning both for its dismissive tone and its lack of  
25 substance.

26 Protestants and the public deserve better. The Delta ecosystem and Delta communities  
27 deserve better. The State Water Board and California also deserve better. This Board now  
28 has another opportunity to see to it that everyone gets the “better” they deserve.

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Respectfully submitted,

Dated: February 13, 2018

SOLURI MESERVE,  
A LAW CORPORATION

By:  \_\_\_\_\_

Osha R. Meserve  
Attorney for Protestants  
Local Agencies of the North Delta  
and Friends of Stone Lakes National Wildlife  
Refuge; specially appearing for Protestants Save  
Our Sandhill Cranes and Environmental Council  
of Sacramento for Purposes of Presenting Part 2  
Testimony

Dated: February 13, 2018

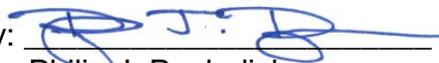
FREEMAN FIRM

By:  \_\_\_\_\_

Thomas H. Keeling  
Attorney for Protestants County of San Joaquin,  
San Joaquin County Flood Control and Water  
Conservation District, and  
Mokelumne River Water and Power Authority

Dated: February 13, 2018

OFFICE OF THE COUNTY COUNSEL,  
COUNTY OF YOLO

By:  \_\_\_\_\_

Philip J. Pogledich  
Attorney for Protestant  
County of Yolo

Dated: February 13, 2018

LAW OFFICE OF  
MATTHEW EMRICK

By: /s/ Matthew Emrick

Matthew Emrick  
Attorney for Protestant  
City of Antioch

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Dated: February 13, 2018

OFFICE OF THE COUNTY COUNSEL,  
COUNTY OF CONTRA COSTA

By: /s/ Kurtis C. Keller  
Kurtis C. Keller  
Attorney for Protestant  
County of Contra Costa and  
Contra Costa County Water Agency

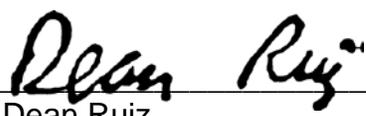
Dated: February 13, 2018

OFFICE OF THE COUNTY COUNSEL,  
COUNTY OF SOLANO

By:   
Daniel M. Wolk  
Attorney for Protestant  
County of Solano

Dated: February 13, 2018

MOHAN, HARRIS, RUIZ,  
WORTMANN, PERISHO & RUBINO, LLP

By:   
S. Dean Ruiz  
Attorney for Protestant  
South Delta Water Agency,  
Central Delta Water Agency, Lafayette Ranch,  
Heritage Lands, Mark Bachetti Fatms  
and Rudy Mussi Investments L.P.

# **EXHIBIT A**

**AGREEMENT SUMMARY**

STD 215 (REV. 1-2014)

AGREEMENT NUMBER

4600009986

AMENDMENT NUMBER

5

CHECK HERE IF ADDITIONAL PAGES ARE ATTACHED

1. CONTRACTOR'S NAME

Hallmark Group

2. FEDERAL I.D. NUMBER

68-0481455

3. AGENCY TRANSMITTING AGREEMENT

Department of Water Resources

4. DIVISION, BUREAU, OR OTHER UNIT

State Water Project Analysis Office

5. AGENCY BILLING CODE

81000

6. NAME AND TELEPHONE NUMBER OF CONTRACT ANALYST FOR QUESTIONS REGARDING THIS AGREEMENT

Nancy Shaltes; [nancy.shaltes@water.ca.gov](mailto:nancy.shaltes@water.ca.gov); (916) 654-7359 / SME: Roger Lee; [roger.lee@water.ca.gov](mailto:roger.lee@water.ca.gov); (916)651-9707

7. HAS YOUR AGENCY CONTRACTED FOR THESE SERVICES BEFORE?

NO

YES (If YES, enter prior contractor

name and Agreement Number)

8. BRIEF DESCRIPTION OF SERVICES - LIMIT 72 CHARACTERS INCLUDING PUNCTUATION AND SPACES

Amend to add time and money

9. AGREEMENT OUTLINE (Include reason for Agreement; Identify specific problem, administrative requirement, program need or other circumstances making the Agreement necessary; include special or unusual terms and conditions.)

The purpose of this Amendment is to extend the expiration date by three (3) months from December 31, 2017 to March 31, 2018. The Amendment also adds \$696,000.00 to the contract. Additional time and money are needed for continued planning, coordination and oversight of the program. Recent meetings with fish and wildlife agencies have triggered additional planning and permitting activities such as the development of a supplemental EIR/EIS. The Hallmark Group also needs to manage and coordinate the closeout of planning task orders and deliverables. Additionally, this Amendment updates Exhibit C – General Terms and Conditions, and Exhibit E, Attachment 1 – Travel and Per Diem Expenses.

10. PAYMENT TERMS (More than one may apply.)

MONTHLY FLAT RATE

QUARTERLY

ONE -TIME PAYMENT

PROGRESS PAYMENT

ITEMIZED INVOICE

WITHHOLD 10 %

ADVANCED PAYMENT NOT TO EXCEED

REIMBURSEMENT/REVENUE

\$ \_\_\_\_\_ or \_\_\_\_\_ %

OTHER (Explain) No more often than monthly, in arrears / 10% retention withheld at Contract Manager's discretion.

11. PROJECTED EXPENDITURES  
FUND TITLE

ITEM

F.Y.

CHAPTER

STATUTE

PROJECTED EXPENDITURES

WRRF

3860-902-0691

17/18

186/86

Sec 135 WC

\$696,000.00

\$

OBJECT CODE X.9911.PIF1.111 – G/L 9032640200

AGREEMENT TOTAL

\$

696,000.00

OPTIONAL USE Contract Manager: Ted Alvarez (916) 653-6271

AMOUNT ENCUMBERED BY THIS DOCUMENT

\$ 696,000.00

I CERTIFY upon my own personal knowledge that the budgeted funds for the current budget year are available for the period and purpose of the expenditure stated above.

PRIOR AMOUNT ENCUMBERED FOR THIS AGREEMENT

\$ 13,808,620.28

ACCOUNTING OFFICER'S SIGNATURE

DATE SIGNED

TOTAL AMOUNT ENCUMBERED TO DATE

\$ 14,504,620.28

12. AGREEMENT

TERM

From

Through

TOTAL COST OF THIS TRANSACTION

BID, SOLE SOURCE, EXEMPT

Original

12/01/12

12/31/15

\$ 4,155,620.28

RFQ

Amendment No. 1

12/01/12

12/31/15

\$ 7,300,000.00

Exempt: 23CCR387

Amendment No. 2

12/01/12

12/31/15

\$ 0.00

Exempt: 23CCR387

Amendment No. 3

12/01/12

12/31/16

\$ 807,000.00

Exempt: 23CCR387

Amendment No. 4

12/01/12

12/31/17

\$ 1,546,000.00

Exempt: 23CCR387

Amendment No. 5

12/01/12

3/31/18

\$ 696,000.00

Exempt: 23CCR387

TOTAL

\$ 14,504,620.28

(Continue)

**AGREEMENT SUMMARY**

STD. 215 (REV. 1-2014)

**13. BIDDING METHOD USED:**

- REQUEST FOR PROPOSAL (RFP)  INVITATION FOR BID (IFB)  USE OF MASTER SERVICE AGREEMENT  
*(Attach justification if secondary method is used)*
- SOLE SOURCE CONTRACT  EXEMPT FROM BIDDING  OTHER *(Explain)* Request for Qualifications  
*(Attach STD. 821)* *(Give authority for exempt status)* 23CCR387 and GC 4525 et seq.

NOTE: *Proof of advertisement in the State Contracts Register or an approved form STD. 821, Contract Advertising Exemption Request, must be attached*

**14. SUMMARY OF BIDS (List of bidders, bid amount and small business status) (If an amendment, sole source, or exempt, leave blank)**

N/A - Amendment

**15. IF AWARD OF AGREEMENT IS TO OTHER THAN THE LOWER BIDDER, PLEASE EXPLAIN REASON(S) (If an amendment, sole source, or exempt, leave blank)**

N/A - Amendment

**16. WHAT IS THE BASIS FOR DETERMINING THAT THE PRICE OR RATE IS REASONABLE?**

The original negotiated rates were compared to other contracts' rates providing similar services, and based on comparison were considered fair and reasonable. This Amendment does not change the rates originally negotiated.

**17 (a) JUSTIFICATION FOR CONTRACTING OUT (Check one)**

- Contracting out is based on cost savings per Government Code 19130(a). The State Personnel Board has been so notified.  Contracting out is justified based on Government Code 19130(b). Justification for the Agreement is described below.

Justification:

N/A - RFQ pursuant to Government Code Section 4525 et. Seq.

**17 (b) EMPLOYEE BARGAINING UNIT NOTIFICATION**

- By checking this box, I hereby certify compliance with Government Code section 19132(b)(1).

N/A - RFQ pursuant to Government Code Section 4525 et. Seq.

AUTHORIZED SIGNER:

DATE:

<b>18. FOR AGREEMENTS IN EXCESS OF \$5,000, HAS THE LETTING OF THE AGREEMENT BEEN REPORTED TO THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING?</b> <input type="checkbox"/> NO <input checked="" type="checkbox"/> YES <input type="checkbox"/> N/A	<b>19. HAVE CONFLICT OF INTEREST ISSUES BEEN IDENTIFIED AND RESOLVED AS REQUIRED BY THE STATE CONTRACT MANUAL SECTION 7.10?</b> <input type="checkbox"/> NO <input checked="" type="checkbox"/> YES <input type="checkbox"/> N/A	<b>20. FOR CONSULTING AGREEMENTS, DID YOU REVIEW ANY CONTRACTOR EVALUATIONS ON FILE WITH THE DGS LEGAL OFFICE?</b> <input type="checkbox"/> NO <input type="checkbox"/> YES <input type="checkbox"/> NONE ON FILE <input checked="" type="checkbox"/> N/A
<b>21. IS A SIGNED COPY OF THE FOLLOWING ON FILE AT YOUR AGENCY FOR THIS CONTRACTOR?</b> A. CONTRACTOR CERTIFICATION CLAUSES <input type="checkbox"/> NO <input checked="" type="checkbox"/> YES <input type="checkbox"/> N/A B. STD. 204, VENDOR DATA RECORD <input type="checkbox"/> NO <input checked="" type="checkbox"/> YES <input type="checkbox"/> N/A	<b>22. REQUIRED RESOLUTIONS ARE ATTACHED</b> <input type="checkbox"/> NO <input type="checkbox"/> YES <input checked="" type="checkbox"/> N/A	

**23. ARE DISABLED VETERANS BUSINESS ENTERPRISE GOALS REQUIRED? (If an amendment, explain changes, if any)**

- NO *(Explain below)*  YES *(If YES complete the following)*

DISABLED VETERAN BUSINESS ENTERPRISES: 3 % OF AGREEMENT

Explain:

DVBE program requirements are applied on a Task order basis for this contract.

<b>24. IS THIS A SMALL BUSINESS CERTIFIED BY OFFICE OF SMALL BUSINESS AND DISABLED VETERAN BUSINESS ENTERPRISE SERVICES?</b> <input checked="" type="checkbox"/> NO <input type="checkbox"/> YES <i>(Indicate Industry Group)</i>	SMALL BUSINESS REFERENCE NUMBER
--	---------------------------------

**25. IS THIS AGREEMENT (WITH AMENDMENTS) FOR A PERIOD OF TIME LONGER THAN TWO YEARS? (If YES, provide justification)**

- NO  YES

The DHCCP, when finalized, will provide essential environmental restoration and water supply to California. This multi-year contract provides Program Management services. In order for the DHCCP to be successful, continual Program Management services need to be in place; therefore a multi-year contract is in the best interest of the State.

*I certify that all copies of the referenced Agreement will conform to the original Agreement sent to the Department of General Services.*

SIGNATURE/TITLE

DATE SIGNED

Pedro Villalobos, Chief, SWPAO

*Pedro Villalobos*  
 12/18/17

# **EXHIBIT B**

**Partial List of Testimony Impacted by  
Phased Implementation of the CWF Tunnels**

**Part 1 Testimony**

<b>Exhibit/Party</b>	<b>Witness</b>	<b>Subject</b>	<b>Potential Changes</b>
<p>LAND-25 Revised</p> <p>Submitted on behalf of LAND, County of San Joaquin, and Islands, Inc.</p>	Richard Elliot	Impact on Water Users	Nearly half of Elliot’s Farm, Rose Orchard, would be used as a work area, and subject to “temporary” conversion; Elliot also operates agricultural diversions downstream of the proposed intakes. (LAND-25 Revised, pp. 2-3.) Two separate construction stages could mean that farmland, such as that owned by Elliot, may be converted or disrupted for longer periods of time than described previously. (See SWRCB-102, Appendix 3C – Construction Timeline; LAND-207.)
<p>LAND-20</p> <p>Submitted on behalf of LAND and County of San Joaquin</p>	Daniel Wilson	Water Levels	The project described in the petition would interfere with Wilson’s and other farmers’ capacity to irrigate crops using agricultural diversions. (LAND-20, p. 2.) If staged construction occurs, with different operations than analyzed previously, impacts to water levels may be different than previously described in DWR’s Part 1 Case in Chief, and elsewhere.
<p>LAND-35 Errata</p> <p>Submitted on behalf LAND, County of San Joaquin, and Islands, Inc.</p>	Josef Tootle	Groundwater Movement	The Tunnels have the potential to obstruct the flow of groundwater, similar to slurry cutoff walls. (LAND-35 Revised, p. 3.) Staging the tunnel construction over a different period of time would result in different impacts to groundwater movement in comparison to the originally described project.
<p>II-2 Revised</p> <p>Submitted on behalf of Islands, Inc., and LAND</p>	R. Stanley Grant	Soil Salinity	Under the petitioned project, additional irrigation water would be needed to manage salinity (II-2 Revised, p. 4) and sodium and chloride intrusion (II-2 Revised, p. 6). By staging the project construction, and operating intakes serving a single tunnel differently than presented thus far in the hearing, different and more severe salinity impacts may occur.
<p>II-24 Revised</p> <p>Submitted on behalf of</p>	Erik Ringelberg	Salinity	Ringelberg relied on operational scenarios presented in Part 1 to form his conclusions on flow reductions, including the modeling assumptions and bypass flows shown in

**Partial List of Testimony Impacted by  
Phased Implementation of the CWF Tunnels**

<b>Exhibit/Party</b>	<b>Witness</b>	<b>Subject</b>	<b>Potential Changes</b>
Islands, Inc., and LAND			DWR-515. (II-24 Revised, pp. 4-5.) The staged approach would implement different operations, therefore changing the basis for Ringelberg's conclusions.
EBMUD-152	Dr. Benjamin Bray	Reverse Flows	Dr. Bray relied on DWR data and modeling of operational scenarios in his Part 1 testimony. (EBMUD-152, pp. 2-4.) An operational period with two intakes and a single tunnel may change Dr. Bray's analysis and conclusions.
DWR-75	John Bednarski	Sea Level Rise	Bednarski estimates that sea level rise will amount to 18 inches at the intake locations (DWR-75, p. 23.) While this estimation may apply to the Early Long Term (2025-2030), it does not account for conditions farther out into the future, when phase two of the Tunnels project may be constructed.
DWR-66	Parviz Nader- Tehrani	Delta Water Quality and Water Level	Nader-Tehrani relies on operational scenarios to assess the quantitative changes in water quality, but the operational scenarios do not include phased implementation. (DWR-66, p. 4.) Phased implementation of the tunnels would change the overall operation of the project, and affect Delta water quality and water level in a manner that was not analyzed under the disclosed project.
DWR-71	Armin Munevar	Water Contractor Deliveries	Munevar based his conclusions regarding water contractor deliveries on CALSIM II and DSM2 models, neither of which includes a phased implementation scenario. (DWR-514.) Phased implementation, could change the projects impact on water contractor deliveries.
DWR-71	Armin Munevar	Reservoir Storage	The modeling scenarios used to analyze the tunnels effect on reservoir storage did not include a phased implementation scenario. (DWR-71, pp. 18-19.) Phased implementation of the tunnels project could have unforeseen impacts on reservoir storage.

**Partial List of Testimony Impacted by  
Phased Implementation of the CWF Tunnels**

**Part 2 Testimony**

<b>Exhibit/Party</b>	<b>Witness</b>	<b>Subject</b>	<b>Potential Changes</b>
LAND-130  Submitted on behalf of LAND and County of Sacramento	Russel Van Loben Sels	Tunnel Muck Storage	Under the original project, Van Loben Sels' farm would be used as a staging area and muck storage. (LAND-130, p. 3.) Under the staged approach, his and other properties, may be converted a second time, or a longer total period, thereby changing the impacts to his agricultural operations.
LAND-130  Submitted on behalf of LAND and County of Sacramento	Russel Van Loben Sels	Delta Agriculture	The project would disrupt the Delta agricultural economy with traffic impacts, land conversion, and soil salinity. (LAND-130, pp. 5-6.) Extending the overall length of the project construction period would exacerbate the harms in comparison to the originally presented project.
LAND-132 Errata  Submitted on behalf of LAND	Daniel Wilson	Traffic Impacts on Delta Agriculture	Wilson's testimony described concerns about the initially proposed project's effects on roadway conditions. (LAND 132 Errata, p. 5.) Extending the project construction period, including the staging areas, would lead to worse roadway conditions from construction related use.
LAND-135  Submitted on behalf of LAND and County of San Joaquin	Dr. Fraser Shilling	Noise Impacts on Wildlife	Dr. Shilling's testimony discusses the frequency of high decibel noises and their effect on wildlife behavior. (LAND-135, pp. 2-3.) Extending the overall project construction timeline would result in a longer period of disruption for wildlife beyond that shown in SWRCB-102, Appendix 3C – Construction Timeline. (See also LAND-207)
LAND-135  Submitted on behalf of LAND and County of San Joaquin	Dr. Fraser Shilling	Noise Impacts on Delta Communities	Noise has been shown to have subsequent morbidity and economic consequences on those affected, including hypertension and heart ailments. (LAND-135, p. 4.) The communities of Clarksburg, Hood, and others in the project area would suffer worse, and different health effects under a staged approach that extended the overall project construction timeline beyond that shown in SWRCB-102, FEIR/S, Appendix 3C – Construction Timeline. (See also LAND-207.)

**Partial List of Testimony Impacted by  
Phased Implementation of the CWF Tunnels**

<b>Exhibit/Party</b>	<b>Witness</b>	<b>Subject</b>	<b>Potential Changes</b>
LAND-188  Submitted on behalf of LAND	David Robinson	Traffic Impacts	Robinson’s testimony relied extensively on Chapter 19 of the FEIR/S (LAND-188 Errata, pp. 5-8) as well as Chapter 16 (LAND-188 Errata, p. 4). Staging construction, and prolonging the construction period, could result in changes to overall worker numbers, traffic levels, and increased damages to roads relied upon for provision of emergency services.
ECOS-1-errata  SJC-223	Robert Burness  John Lambie	Groundwater Aquifer Impacts	The tunnels, as originally planned, have the potential to impair groundwater recharge, and subsequently prevent wetland plants and riparian habitats from obtaining water needed to survive. (ECOS-1-errata, p. 5; (SJC-223, p. 8.) While the FEIR/S indicates that groundwater levels would drop no more than five feet due to lower flows in the Sacramento River, as originally proposed, phased implementation would rely on a different operational plan (CWF H3+ 6,000) with differing impacts to groundwater recharge and groundwater flows.
ECOS-1-errata	Robert Burness	Construction Related Truck Traffic	To consider how wildlife populations would be affected by reduced landscape connectivity, Mr. Burness relied on Appendix 19A, Attachment E of the 2016 FEIR/S, which depicts traffic levels throughout the Delta. (ECOS-1-errata, p. 7.) Extending the length of construction beyond that shown in SWRCB-102, FEIR/S, Appendix 3C – Construction Timeline, combined with multiple mobilization periods, would increase construction related traffic. Increased traffic could exacerbate construction related noise, prolong the inability of wildlife to use habitats adjacent to roadways, and increase wildlife mortality due to collisions. Moreover, increased traffic could further limit the regular movement of wildlife to different habitats (e.g., wetland to grassland).

**Partial List of Testimony Impacted by  
Phased Implementation of the CWF Tunnels**

<b>Exhibit/Party</b>	<b>Witness</b>	<b>Subject</b>	<b>Potential Changes</b>
SOSC-6	Sean Wirth	Impact on Terrestrial Species	The original project would likely have caused species such as the Greater Sandhill Crane to abandon their habitat due to construction related disturbances. (SOSC-6, pp. 9-10.) The fact that the second tunnel, under a phased implementation plan, could be constructed sometime in the distant future would extend the length of the project construction. Lengthening the overall construction period would cause greater and different impacts on terrestrial species within the project area than previously disclosed.
SOSC-6	Sean Wirth	Impact on Wetlands	The original project impacts are largely concentrated in wetland habitats, an area of critical wildlife concern. (SOSC-6, p. 12.) Phased implementation of the tunnels project may have different impacts on wetland habitats than previously disclosed.
FSL-21 errata	Gary L. Ivey	Other Construction Related Disturbances	Traffic and other construction activities “flush” cranes from their habitat and increase the risk of transmission line collisions. (FSL 21 Errata, p. 9.) Phased implementation would increase the overall length of time that traffic and other activities related to construction, such as light and noise disturbances, are present, which would lead to the take of Greater Sandhill Cranes and disturb wildlife generally.
FSL-21 errata	Gary L. Ivey	Salinity Effects on Greater Sandhill Crane Foraging	As a result of the project described in the Final EIR/S, diversions would cause reduced freshwater flows into the Delta, resulting in increased salinity in water used for irrigation. (FSL-21-errata, p. 10.) If the phased implementation approach changes the operation of the tunnels to cause increased salinity, the yield and the extent of grain crops could be reduced, which are important to Greater sandhill crane foraging habitat in the Delta. These impacts on the wildlife would need to be assessed in light of new information regarding the water quality and agricultural effects of a phased implementation approach.

**Partial List of Testimony Impacted by  
Phased Implementation of the CWF Tunnels**

<b>Exhibit/Party</b>	<b>Witness</b>	<b>Subject</b>	<b>Potential Changes</b>
SOSC-21 errata  FSL-21 errata  DWR-1014	Edward Pandolfino  Gary L. Ivey  Christopher Earle	Transmission Lines	Under the project described in the Final EIR/S, temporary transmission lines would be constructed within the Greater sandhill crane wintering area. Phased construction may affect where, when, and for how long temporary transmission lines are used and where new power lines are constructed. While it was previously disclosed that temporary lines could be in place for at least 10-14 years, that timespan would be increased as a result of phased implementation, changing the previously prepared analyses.
DWR-1014	Christopher Earle	Construction Impacts on Habitat	Earle recognizes that construction related disturbances, such as noise, light, and traffic, impact wildlife. (DWR-1014, pp. 14-16). Extending the length of construction beyond that shown in SWRCB-102, FEIR/S, Appendix 3C – Construction Timeline, combined with multiple mobilization periods, would have different impacts on wildlife.
ECOS-11 errata	Judith Lamare	Air Quality	Extending construction beyond the timeframe described in SWRCB-102, FEIR/S, Appendix 3C – Construction Timeline due to the staged implementation, could affect the air quality analysis, as well as change the mitigation required to comply with applicable federal and state law. Phased implementation, which would result in altered construction plans, would change the emission impacts and the mitigation needed for indirect emissions. Furthermore, likely air quality conditions, which would exist during the course of phase 2, would need to be understood.
SJC-323  Submitted on behalf of San Joaquin County	Kris Balaji	Transportation	Balaji’s Part 2 Testimony relied largely upon the FEIR/S and the Mitigation Monitoring and Reporting Program adopted by DWR, including the Construction Traffic Impact Analysis. Extending the length of construction beyond that shown in SWRCB-102, FEIR/S, Appendix 3C – Construction Timeline, combined with multiple mobilization periods, would

**Partial List of Testimony Impacted by  
Phased Implementation of the CWF Tunnels**

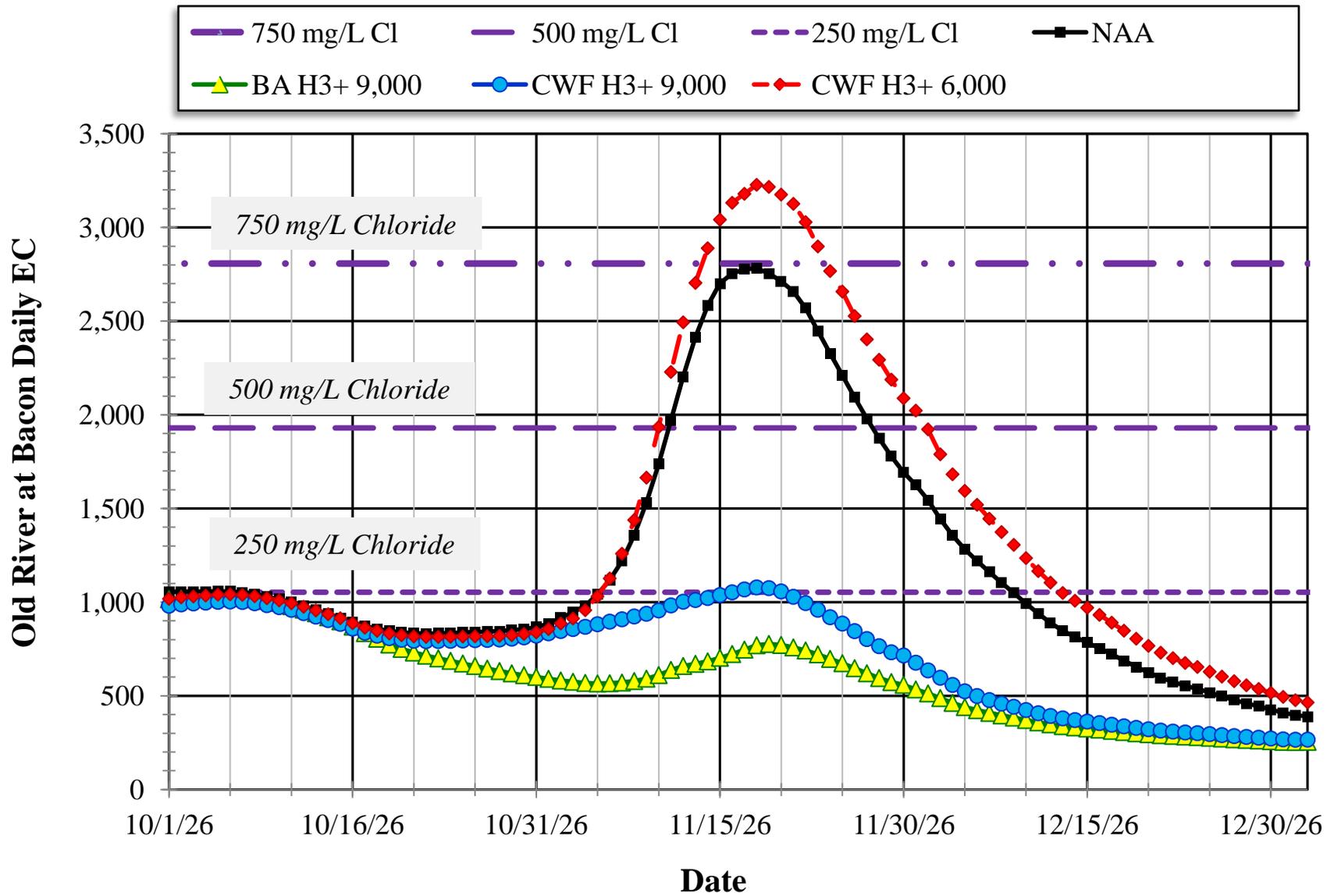
Exhibit/Party	Witness	Subject	Potential Changes
			<p>increase construction-related traffic impacts, including increased damage to roads relied upon for provision of emergency services and ordinary commerce, increased potential conflicts with San Joaquin County projects in proximity to CWF construction activities, and increased adverse effects upon significant drivers of the Delta counties' economies, including agricultural crop harvests, recreational tourism and agri-tourism, and special events/festivals. A staged project would result in transportation-related impacts different from those examined in Mr. Balaji's Part 2 Testimony.</p>
<p>SDWA-265</p> <p>Submitted on behalf of San Joaquin County, Sacramento County, CDWA, and SDWA</p>	<p>Dr. Jeffrey Michael</p>	<p>Economic Impacts</p>	<p>Portions of Dr. Michael's Part 2 Testimony relating to the economic impacts of CWF construction activities were based on the existing construction timeline. (SDWA-265, pp. 4-5.) Extending the length of construction beyond that shown in SWRCB-102, FEIR/S, Appendix 3C – Construction Timeline, combined with multiple mobilization periods, would increase construction-related impacts, including adverse economic impacts on Delta counties and communities. A staged project would result in economic impacts different from those examined in Dr. Michael's Part 2 Testimony.</p>
<p>SJC-291</p> <p>Submitted on behalf of San Joaquin County, CDWA, and SDWA</p>	<p>Christopher H. Neudeck</p>	<p>Impacts on Delta Levees and the Work of Reclamation Districts</p>	<p>Mr. Neudeck's Part 2 Testimony relied in large part on the 2016 Final BDCP/California WaterFix EIR/EIS-Volume I (WaterFix EIR). Extending the length of construction beyond that shown in SWRCB-102, FEIR/S, Appendix 3C – Construction Timeline, combined with multiple mobilization periods, would increase construction-related impacts on the critical work of Reclamation Districts, including levee maintenance and repair and flood-fighting tasks. Mr. Neudeck's testimony specifically examines the impacts of traffic on Delta roadways and</p>

**Partial List of Testimony Impacted by  
Phased Implementation of the CWF Tunnels**

<b>Exhibit/Party</b>	<b>Witness</b>	<b>Subject</b>	<b>Potential Changes</b>
			barge traffic over the estimated construction period. A staged project would result in impacts different from those examined in Mr. Neudeck's Part 2 Testimony.

# **EXHIBIT C**

# Old River at Bacon Island



1 **STATEMENT OF SERVICE**

2 I hereby certify that I have this day, February 13, 2018, submitted to the State Water  
3 Resources Control Board and caused a true and correct copy of the following document:

4 **RESPONSE OF SAN JOAQUIN COUNTY ET AL. TO DWR'S OPPOSITION TO MOTION OF**  
5 **NRDC ET AL. TO STAY OR CONTINUE HEARING PENDING COMPLETION OF**  
6 **SUPPLEMENTAL EIR ON A PHASED TUNNELS PROJECT; RESPONSES TO**  
7 **QUESTIONS FROM THE HEARING OFFICERS**

8 to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current**  
9 **Service List** for the California WaterFix Petition Hearing, dated January 24, 2018 posted by  
10 the State Water Resources Control Board at  
11 [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_water](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_water_fix/service_list.shtml)  
12 [fix/service\\_list.shtml](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_water_fix/service_list.shtml)

13 I certify that the foregoing is true and correct and that this document was executed on  
14 February 13, 2018.

15 Signature:  \_\_\_\_\_

16 Name: Mae Ryan Empleo

17 Title: Legal Assistant for Osha R. Meserve  
18 Soluri Meserve, A Law Corporation

19 Party/Affiliation:

20 Local Agencies of the North Delta  
21 and Friends of Stone Lakes National Wildlife Refuge;  
22 specially appearing for Protestants Save Our Sandhill  
23 Cranes and Environmental Council of Sacramento for  
24 Purposes of Presenting Part 2 Testimony

25 Address:

26 Soluri Meserve, A Law Corporation  
27 510 8th Street, Sacramento, CA 95814  
28