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11 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

12  
 13  
 14 In the matter of Hearing re California  
 15 WaterFix Petition for Change

**RESPONSE TO DEPARTMENT OF  
 WATER RESOURCES CONSOLIDATED  
 OPPOSITION TO NATURAL  
 RESOURCES DEFENSE COUNCIL,  
 DEFENDERS OF WILDLIFE, AND THE  
 BAY INSTITUTE'S RENEWED MOTION  
 TO STAY PART II OF WATERFIX  
 HEARING DUE TO CHANGES IN  
 PROPOSED PROJECT**

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1 Species Act (“ESA”), and National Environmental Policy Act (“NEPA”) would serve in  
2 Part 2. Indeed, from the start of this hearing, the Hearing Officers have been generally  
3 consistent with their original proposal that Part 2 not begin until “at least 30 days after  
4 the CEQA, ESA, and CESA processes have been completed,” to ensure those  
5 associated documents would be part of the hearing record. (Hearing Notice, October 30,  
6 2015, p. 2.; *see also* January 15, 2016 Pre-Hearing Conference Agenda, p. 3 (“The  
7 Hearing Notice specifies that Part II will not commence until at least 30 days after  
8 completion of the NEPA/CEQA and ESA/CESA processes.”); February 11, 2016 Ruling,  
9 p. 3 (“Part 2 of the hearing will commence following completion of the CEQA/NEPA and  
10 ESA/CESA processes.”); *id.* at 9 (“We recognize that ultimately the final EIR must be  
11 adequate to support the State Water Board’s decision in this proceeding.”); March 4,  
12 2016 Ruling, p. 2 (“These regulatory processes must be complete before we begin Part  
13 2 of the hearing.”); June 27, 2017 Ruling, p. 2 (“Rather than addressing this issue  
14 piecemeal as new information becomes available, it would be more efficient to address  
15 this issue based on all of the information that is presented in Part 2.”).)

16 DWR’s EIR, which was approved and certified in 2017, considered, and rejected,  
17 the “phased” approach that is now contemplated in the revised Project description.

18 DWR’s January 30, 2018 Opposition to the City of Antioch’s Motion to Continue  
19 this hearing, which was based in part on a staged construction approach revealed in  
20 documents intended for parties bidding on the Project construction contract. In its  
21 signed pleading, DWR argued that it “has not altered its water rights petition” and coyly  
22 offered that, “[s]hould additional information become available regarding the project  
23 description, Antioch has the ability to cross-examine Petitioners’ witnesses with  
24 authenticated copies of that information.” (DWR’s Consolidated Opposition to City of  
25 Antioch’s Motion to Continue – Motion For Continuance of Phase 2 and Reconsideration  
26 of Reopening Part 1, January 30, 2018, pp. 5:12, 18-20.) In suggesting on January 30  
27 that it intended no changes to the Project, and arguing vigorously that such information  
28 about apparent changes should not affect the start of Part 2, DWR gave the Hearing

1 Officers and parties no indication that it had progressed so far down the path towards  
2 phasing that it had, in fact, already modeled a phased approach, met with other  
3 responsible agencies about those changes, and determined to prepare an SEIR.

4 DWR's February 7, 2018 letter to Project participants notes that while DWR "does  
5 not expect substantial change to" the Biological Opinions or the Section 2081 Incidental  
6 Take Permit, it "*will fully evaluate the potential environmental impacts* of the staged  
7 implementation option" and expects to issue a draft SEIR in June of 2018, when that  
8 process is complete. (February 7, 2018 Letter to Stakeholders, p. 2 (emphasis added).)  
9 That additional information, required by CEQA, "will also be used to supplement the  
10 Endangered Species Act, Section 7 and California Endangered Species Act, Section  
11 2081 record." (*Ibid.*) DWR goes on to explain that it "expects no changes in impact  
12 determinations and no changes to mitigation," based on its preliminary modelling, and  
13 thus "will be able to immediately implement this option, *in addition to the project already*  
14 *analyzed under CEQA.*" (*Ibid.* (emphasis added).)

15 Based on this significant new development, and in light of the Hearing Officers'  
16 statements that Part 2 should not commence until environmental review is complete,  
17 Protestants Natural Resources Defense Council *et al.* and the County of Sacramento *et*  
18 *al.* submitted renewed motions stay the proceedings (the "Motions"). These Motions  
19 were joined by a host of other parties.

20 In light of this development, and in response to a request that the Hearing be  
21 stayed until the release of the SEIR in June 2018, the Hearing Officers directed parties  
22 to respond to six questions relating to the significant legal and procedural implications of  
23 DWR's late-breaking announcement. The undersigned Protestants' responses to those  
24 questions are indicated below.

25 **I. A STAY IS REQUIRED TO APPROPRIATELY ANALYZE THE CHANGED**  
26 **PROJECT**

27 DWR's change petition described a project that would "introduce new  
28 operational flexibility into the SWP and CVP," by using three intakes with a cumulative

1 capacity of 9,000 cfs to convey water from North to South Delta facilities through two  
2 twin tunnels. In that approach, “operating criteria applicable to [Waterfix] that are in  
3 addition to the criteria that govern CVP and SWP operations without the California  
4 Waterfix will only take effect once the North Delta Diversion facilities become  
5 operational.” (SWRCB-110, p. 39.) DWR is now considering a single-tunnel project,  
6 with additional phases to be constructed if funding materializes, and on that basis claims  
7 that the Project is unchanged. DWR fails to acknowledge or evaluate the repercussions  
8 if such funding does not materialize, however. The shift from the two-tunnel, three-  
9 intake joint project identified in the EIR and in Part 1 testimony, to a phased project  
10 construction starting with one tunnel and two intakes, reduced stakeholder participation,  
11 and significantly reduced capacity, necessarily implicates changes to the operational  
12 criteria. DWR’s decision to pursue a Supplemental EIR is an acknowledgement of that  
13 fact, having previously found in its EIR that such an approach would result in greater  
14 impacts and ultimate infeasibility

15 The full extent of impacts from constructing and operating the Project in multiple  
16 stages is impossible to discern, as DWR now holds almost all the information (and  
17 Protestants almost none of it). However, the available evidence, including the WaterFix  
18 final environmental impact report (FEIR) that DWR certified on July 21, 2017 and the  
19 preliminary modeling data it disclosed for the first time last Thursday, indicates that  
20 constructing and operating the Project in phases will result in new or substantially more  
21 severe significant impacts to the environment as well as legal users of water both North  
22 and South of the Delta.

23 As recently as July 2017, DWR dismissed phased construction and anything less  
24 than a three-intake, two-tunnel project as infeasible. The parties’ participation in the  
25 Hearing was predicated on those representations by DWR. Part 1 and Part 2 testimony  
26 that has already been submitted is subject to change under the phased implementation  
27 approach. Testimony throughout Part 1, and submitted for Part 2, was based on various  
28 operations assumptions that did not include a staged construction approach. Recently,

1 Protestants, including Sacramento Regional County Sanitation District, Sacramento  
2 County Water Agency (as part of the American River Water Agencies), and County of  
3 Sacramento submitted Part 2 testimony that includes modeling results based on a three-  
4 intake, two-tunnel project. In this testimony, conclusions regarding, flows, water levels,  
5 water quality, groundwater movement, and reservoir storage were drawn assuming a  
6 three-intake, two-tunnel configuration, rather than a two-intake, one tunnel layout.

7 The parties to this hearing have not addressed the serious impacts that extending  
8 the construction period, or the potential re-opening of multiple construction periods  
9 (multiplying the impacts of mobilizing the equipment and supplies needed to construct  
10 the Project), would have on Delta residents, the environment or legal users of water in,  
11 above and below the Delta. All the available evidence shows that the staging “option”  
12 would have new significant impacts, would be so expensive as to compromise  
13 Petitioners’ ability to ever construct the project described in their petition, and would not  
14 be in the public interest. Relevant to DWR’s opposition, the evidence demonstrates why  
15 the State Water Board should not proceed with this hearing until after the details of the  
16 phased approach, and its significant impacts, are disclosed to the Board and public  
17 through a certified SEIR.

18 **A. Phase 2 Cannot Go Forward Until the Environmental Impacts of the**  
19 **Revised Project Are Fully Analyzed and Disclosed.**

20 The order of these proceedings is fundamental to a just outcome. Environmental  
21 review of the Project, as it will actually be built, must be completed before Part 2  
22 commences. The Hearing Officers have previously explained that “[w]ith the exception  
23 of the certified, final EIR, the environmental review documents are not legally required  
24 for the State Water Board to process the water right change petition for the WaterFix  
25 Project.” (August 31, 2017 Ruling, p. 4). In November 2017, the Hearing Officers  
26 recognized that “[w]hether a revision to the proposed project would trigger the need for a  
27 revision to the petition or additional administrative procedures before the Board depends  
28 on the nature of the proposed change.” (November 8, 2017 Ruling, p. 1.) There is no

1 need to deviate from the order of proceedings as directed by the Hearing Officers;  
 2 indeed, to do so would be nonsensical, impractical, and unfair.

3 **B. The Phased Approach is a significant departure from the Project**  
 4 **described in DWR and Reclamation's joint change petition**

5 The project now contemplated by DWR is both physically and institutionally  
 6 different than the one presented in the change petition, and analyzed in its Final EIR.  
 7 The revised Project requires additional environmental review, and that review must be  
 8 completed before the Hearing Officer can resolve the issues in dispute in Part 2.

9 1. The Project Before the Board Today is Physically and Institutionally  
 10 Distinct From the One Previously Proposed by DWR and  
 11 Reclamation.

12 When it certified the EIR and approved the Project, DWR explicitly found that a  
 13 two-intake, one-tunnel project alternative with 6,000 cfs of diversion capacity (Alternative  
 14 3) – was infeasible and instead approved Alternative 4A as the project, reasoning that:

15 Because of [Alternative 3, 5, and 5A's] reduced north Delta diversion  
 16 capacity compared with the Project (Alternative 4A), which has three north  
 17 Delta intakes, reverse flows in the south Delta would persist under  
 18 Alternatives 3, 5, and 5A, and fish losses in the south Delta would  
 continue, though to a lesser degree than at present . . . [B]ecause they  
 include fewer intakes, Alternatives 3, 5 and 5A would not meet the project  
 objective of "develop[ing] projects that restore and protect water supply  
 and ecosystem health and reduce other stressors on the ecological  
 functions of the Delta in a manner that creates a stable regulatory  
 framework under the ESA and either the CESA or NCCPA . . .

19 (SWRCB-110, p. 71.) A project scaled at this size, DWR concluded, "would result in an  
 20 increase in reverse flows in April-May, and Alternative 3 would also increase reverse  
 21 flows in October compared to Existing Conditions;" would provide "less operational  
 22 flexibility compared to the Project;" would "have lower capacity than three-intake dual  
 23 conveyance alternatives like the Project, and would be more susceptible to system  
 24 failure, which would translate into greater reliance on the existing south Delta facilities  
 25 than the Project would afford, which would in turn result in a greater persistence in the  
 26 ecological problems current [sic] experienced with the current system." (SWRCB-110,  
 27 pp. 70-72.)

28 Moreover, federal participation in this Project, which was assumed in the original

1 petition, is now speculative at best. The original Project and the analysis provided to  
2 date was premised on a jointly executed state and federal Project. On February 8,  
3 Director Nemeth represented to the Hearing Officers that the phased approach would  
4 “allow implementation in the near term of a first stage that would include those elements  
5 of WaterFix fundable by south-of Delta State Water Project contractors.” The remaining  
6 elements would be constructed when (and if) “additional funding materializes.” (*Ibid.*).  
7 While Reclamation remains a party to the hearing, it has been altogether silent on this  
8 point, and in fact declined to answer the Hearing Officers’ specifically pointed questions  
9 regarding its future involvement in the Project.

10 DWR’s statements that staging the Project is not a change to the Project, and that  
11 staging will not result in new significant impacts or mitigation, are belied by its  
12 determination to prepare a SEIR. When an agency proposes changes to a previously  
13 approved project, CEQA Guidelines section 15162 generally prohibits the agency from  
14 requiring a subsequent or supplemental EIR unless the agency determines, “on the  
15 basis of substantial evidence in the light of the whole record,” that “[s]ubstantial changes  
16 ... will require major revisions of the previous EIR or negative declaration due to the  
17 involvement of new significant environmental effects or a substantial increase in the  
18 severity of previously identified significant effects.” (*Friends of the College of San Mateo*  
19 *Gardens v. San Mateo Community College District* (2016) 1 Cal.5th 937, 957; citing  
20 CEQA Guidelines, § 15162(a).) When conditions triggering a supplemental EIR arise,  
21 “no other responsible agency shall grant an approval for the project” until that  
22 subsequent environmental review is complete. (Guidelines, §§ 15162(c), 15163; Pub.  
23 Res. Code § 21166.)

24 Whatever this new “phased approach” may prove to be, it is not the Project that  
25 DWR and Reclamation presented to the Hearing Team in their Change Petition, and it is  
26 not the Project that was analyzed in the EIR.  
27  
28

1                   2.     DWR's "Preliminary" Modeling of the Staged Approach Reveals  
2                                 Significant Changes in Project Operations Compared to the  
3                                 Petitioned Project

4             DWR has asserted to the Hearing Officers that the Boundary 1 and Boundary 2  
5     (B1 and B2) scenarios presented in this hearing encompass all the potential operational  
6     impacts of the staged implementation. This is incorrect, and DWR's unsubstantiated  
7     assertions are contradicted by the certified EIR for the WaterFix, as well as independent  
8     analyses of the preliminary modeling by expert witnesses Dr. Susan Paulsen and Walter  
9     Bourez. (See Exhibit A, February 13, 2018 Declaration of Susan Paulsen, Ph.D., P.E  
10    and Exhibit B, February, 13, 2018 Declaration of Walter Bourez.). Dr. Paulsen's initial  
11    analysis of DWR's staged project modeling results indicates that WaterFix operations  
12    under the "Single Tunnel, Stage 1" scenario would result in *significantly different* export  
13    flow rates than the WaterFix project versions presented by Petitioners in this hearing.  
14    Mr. Bourez's analysis reveals substantial changes in south of Delta deliveries as  
15    compared to the H3+ scenario, and increased use of the North Delta diversion, among  
16    other concerns.

17             DWR's preliminary modeling results provided show that in many months of the  
18    16-year DSM 2 simulation period, the flow rate exported from the South Delta is *greater*  
19    in the new staged single tunnel scenario than in *all other* WaterFix project scenarios; this  
20    includes both B1 and B2, which DWR has stated represent the outer limits, or  
21    "bookends" of potential WaterFix operational impacts. In addition, the annual average  
22    export flow rate from the South Delta is greater for the staged approach than for all other  
23    Project scenarios in at least five of the 16 years. Dr. Paulsen's initial analysis of the  
24    preliminary modeling indicates there are many months over the 16-year model period  
25    (61 total) in which total export flow rate (both North and South Delta) is greater for the  
26    single tunnel staged approach than for either the B1 or B2 scenarios. In three of the 16  
27    years, the total export flow rate is greater than either the B1 or B2 scenarios for 33  
28    percent of the year. In six of the 16 years, the total export flow rate is greater than either  
29    the B1 or B2 scenarios for 25 percent or more of the year. In five months during the 16

1 year period, the monthly average export flow rate is greater for scenario the single tunnel  
2 staged approach than for all the project scenarios (Alternative 4A H3, H4 and H3+, B1  
3 and B2) and greater than for the no-project scenarios (EBC2 and NAA).

4 As discussed in Mr. Bourez's declaration, DWR's modeling shows south of Delta  
5 CVP deliveries under the Single Tunnel Stage 1 scenario are reduced by 120,000 acre  
6 feet as compared to a reduction of only 8,000 acre feet under scenario H3+. Insofar as  
7 reduced south of Delta deliveries have water supply impacts, this result alone contradicts  
8 DWR's claim that the phased approach results in "no additional (or even a reduction in)  
9 environmental impacts from California WaterFix H3+." Mr. Bourez's analysis also shows  
10 that use of the North Delta diversion in the Single Tunnel Stage 1 modeling results is  
11 greater than in H3+, Boundary 1 and Boundary 2 in July and August. There has been no  
12 analysis of the water supply or environmental impacts of this increase in diversions, and  
13 any such impacts are outside of the boundary analysis presented in this hearing. Finally,  
14 contrary to the suggestion that a phased project would serve SWP contractors, DWR's  
15 Single Tunnel Stage 1 modeling allocates North Delta diversion capacity between the  
16 SWP and CVP, with 1,000 cfs dedicated to the CVP and 5,000 cfs dedicated to the  
17 SWP. It is unclear, and Petitioners have presented no evidence to demonstrate, whether  
18 allocating exports in this manner is consistent with Petitioners' Coordinated Operating  
19 Agreement, especially given that CVP deliveries under the "phased option" are reduced  
20 by a significant margin (120,000 acre feet).

21 **C. Contrary to DWR's Unsubstantiated Assertions, there is Substantial**  
22 **Evidence that the Staged Approach Will Result in New or**  
23 **Substantially More Severe Significant Impacts to the Environment,**  
**Including Public Trust Resources.**

24 On February 8, 2018, DWR Director Karla Nemeth acknowledged to the Hearing  
25 Team that the timing of future phases of the WaterFix construction period was uncertain  
26 and dependent on future funding under DWR's new phased option. For the same  
27 reasons, DWR and Reclamation refused in 2017 even to evaluate a staged approach to  
28 the Project in the WaterFix EIR/EIS. Petitioners rejected the Delta Stewardship

1 Council's suggestion that the EIR/EIS consider such an approach, on the grounds that  
2 phasing the Project would be "extremely costly compared with an approach by which all  
3 approved conveyance facilities were constructed during a single phase." (SWRCB-102,  
4 Appendix 3A, p. 3A-93.) Specifically, the FEIR cites *additional costs of up to \$17.2*  
5 *billion* (on top of the EIR's estimate of \$12.9 billion to construct the full Project). (*Id.*)  
6 DWR found those additional costs "could well be prohibitive" and lead to Project  
7 abandonment should financing for future phases fail to materialize. (*Id.* at p. 3A-94.)  
8 Phasing is now being proposed because Petitioners have been unable to secure even  
9 half the necessary funding commitments for the full Project (only \$6 billion has been  
10 pledged, with no binding financing arrangements in place for even that). The FEIR  
11 evidence strongly suggests that if the Project proceeds in phases, the full Project will  
12 never be built, and thus many, if not most, of its purported benefits will never be realized.  
13 This is, of course, the same situation that occurred when the SWP was constructed and  
14 DWR was unable to secure sufficient funds or public support to complete the North Delta  
15 diversions, despite repeated efforts between the late 1960s through early 1980s, when  
16 voters overwhelmingly rejected the WaterFix predecessor, the Peripheral Canal.

17 The prohibitive expense, which could result in potential abandonment of the  
18 Project, was not the only reason that Petitioners refused even to consider a phased  
19 approach in the EIR/EIS. As DWR itself put it,

20 In addition to increased costs and perhaps more importantly, phasing  
21 would greatly increase the number of years during which Delta residents  
22 would have to endure construction activities in their midst. . . . Not only  
23 would Delta residents be affected by longer construction periods, sensitive  
24 species and habitats would experience negative impacts. Areas that will  
25 be restored after construction would be affected a second or third time as  
26 subsequent phases are constructed . . . Sensitive species would also be  
27 exposed to much longer period of disturbance, which could have  
28 substantial indirect effects. (FEIR Appendix 3 at p. 3A-94.)

29 For these reasons, DWR's certified EIR concluded that it would be "financially  
30 imprudent" to "knowingly embark on a two-phase or two stage process. *Such an*  
31 *approach could also result in needless environmental impacts and inconveniences to*

1 *Delta residents.*" (Id. at p. 3A-95 (emphasis added).)

2 In addition to its statements rejecting a phased approach, the certified FEIR  
3 identified potential impacts to fish and wildlife associated with construction and operation  
4 of the same intake/tunnel configuration that DWR now describes as its "staged"  
5 construction proposal, and concluded such an alternative was infeasible. DWR's CEQA  
6 Findings of Fact and Statement of Overriding Considerations adopted when it approved  
7 the Project identify FEIR Alternative 3 as a single tunnel, two-intake, 6,000-cfs project  
8 and declare that alternative to have potential adverse effects in the Delta, even relative  
9 to existing conditions. SWRCB-110, pp. 53, 70-72. Most notably, DWR found that:

10 Because of the[] reduced north Delta diversion capacity compared with the  
11 Project (Alternative 4A), which has three north Delta intakes, reverse flows  
12 in the south Delta would persist under Alternatives 3 ..., and fish losses in  
13 the south Delta would continue.... (SWRCB-110, p. 71.)

14 DWR also made the following findings relevant to a phased or single tunnel two intake  
15 option:

16 Alternative[] 3 ..., with [its] reduced diversion capacity in the north Delta,  
17 would result in more negative reverse flows in Old and Middle Rivers,  
18 compared to the Project, during critical periods where species such as  
19 salmonids and delta smelt are present in the south .... (SWRCB-110, p.  
20 71.)

21 Alternative 3 ... would result in an increase in reverse flows in April-May,  
22 and ... would also increase reverse flows in October compared to Existing  
23 Conditions .... (SWRCB-110, p. 71.)

24 Due to the 'limited diversion capacit[y] in the northern facilities, and  
25 therefore the[] heavier reliance on current water facilities in the south Delta,  
26 Alternative[] 3 ..., while improving on existing conditions, would entail a  
27 greater degree of entrainment of larval/juvenile delta smelt compared to the  
28 Project ....' (SWRCB-110, pp. 71-72.)

Alternative[] 3 ... would have lower capacity than three intake dual-  
conveyance alternatives like the Project, and would be more susceptible to  
system failure, which would translate into greater reliance on the existing  
south Delta facilities than the Project would afford, which would in turn  
result in a greater persistence in the ecological problems current [sic]  
experienced with the current system. (SWRCB-110, p. 72.)

Having made these statements regarding phased and single tunnel, two intake

1 alternatives in its own certified EIR and CEQA Findings; DWR cannot now “unring the  
2 bell” and credibly claim, with no additional evidence, that proceeding with the Project in  
3 phases is not a substantial change to the Project described in the petition for change, or  
4 that such an approach will have no greater impact. DWR’s statement that it “does not  
5 expect” that proceeding with a phased project will result in new impacts or mitigation  
6 measures is disingenuous, at best.

7 Notably, DWR and Reclamation refused even to evaluate a staged approach to  
8 the Project in the WaterFix EIR/EIS. Petitioners rejected the Delta Stewardship  
9 Council’s suggestion that the EIR/EIS consider such an approach on the grounds that  
10 phasing the Project would be “extremely costly compared with an approach by which all  
11 approved conveyance facilities were constructed during a single phase.” (See SWRCB-  
12 102, Appendix 3A, p. 3A-93.) Specifically, the final EIR cites *additional costs of up to*  
13 *\$17.2 billion* (on top of the EIR’s estimate of \$12.9 billion to construct the full Project).  
14 (*Id.*) DWR found those additional costs “could well be prohibitive” and lead to Project  
15 abandonment should financing for future phases fail to materialize. (*Id.* at p. 3A-94.)  
16 Phasing is now being proposed because Petitioners have been unable to secure even  
17 half the necessary funding commitments for the full Project (only \$6 billion has been  
18 pledged, with no binding financing arrangements in place for even that). The EIR  
19 evidence strongly suggests that if the Project proceeds in phases, the full Project will  
20 never be built, and thus many, if not most, of its purported benefits will never be realized.  
21 This is, of course, the same situation that occurred when the SWP was constructed and  
22 DWR was unable to secure sufficient funds or public support to complete the North Delta  
23 diversions, despite repeated efforts between the late 1960s through early 1980s, when  
24 voters overwhelmingly rejected the WaterFix predecessor, the Peripheral Canal.

25 As recently as July 2017, DWR dismissed phased construction and anything less  
26 than a three-intake, two-tunnel project, as infeasible; and the parties’ participation in the  
27 Hearing was predicated on those representations by DWR. The parties to this hearing  
28 have not addressed the serious impacts that extending the construction period, or the

1 potential re-opening of multiple construction periods (multiplying the impacts of  
 2 mobilizing the equipment and supplies needed to construct the Project), would have on  
 3 Delta residents, the environment or legal users of water in, above and below the Delta.  
 4 All the available evidence shows that the staging “option” would have new significant  
 5 impacts, would be so expensive as to compromise Petitioners’ ability to ever construct  
 6 the project described in their petition, and would not be in the public interest. Contrary to  
 7 DWR’s opposition, the evidence clearly demonstrates why the Hearing Officers should  
 8 not proceed with this hearing until after the details of the phased approach, and its  
 9 significant impacts, are fully disclosed through a certified SEIR.

10 **D. Moving Forward With the Hearing Prior to Completion of the SEIR**  
 11 **Confounds Judicial and Administrative Efficiency.**

12 Curiously, at the same time it presses the Hearing Officers to advance forward  
 13 through Part 2, DWR takes the position that the SEIR, rather than an addendum, would  
 14 be offered because an addendum “provides for no public or agency review and input.”<sup>1</sup>  
 15 Public review and input is precisely why the hearing process should be stayed in order to  
 16 consider the entire project as it is now proposed (and not the now-outdated version  
 17 previously analyzed). Indeed, Part 2’s start date was premised on the assumption that  
 18 environmental review of the Project would be complete, giving the Hearing Team, the  
 19 parties, and the public a meaningful opportunity to review and consider DWR’s  
 20 environmental assessment of the Project.

21 California WaterFix is unique in its size and historic importance, and the project  
 22 deserves the degree of attention and serious consideration that the State Water Board  
 23 has afforded it. Now, DWR asks that the Hearing Officers reverse their longstanding  
 24 position that the Project’s CEQA analysis must be complete before Part 2 of the Hearing  
 25 commences, and take on-faith, DWR’s representation that the Project and its impacts to

26 \_\_\_\_\_  
 27 <sup>1</sup> On January 23, 2018, DWR prepared an addendum to the WaterFix final EIR related to the Project’s  
 28 power supply; an addendum is appropriate only if “minor technical changes or additions are necessary” to an EIR and  
 none of the conditions triggering preparation of a SEIR are present. (CEQA Guidelines, § 15162(b).) The decision  
 to prepare a SEIR for the staged one tunnel, two intake “option,” by contrast, constitutes an implied admission that  
 phasing is a major change to the Project, and that change must be fully analyzed in accordance with CEQA.

1 legal users of water remain unchanged. DWR asks that the Hearing Officers disregard  
2 the specific direction in the Hearing Notice that Part 2 would not begin until “at least 30  
3 days after the CEQA, ESA, and CESA processes *have been completed.*” (Hearing  
4 Notice, October 30, 2015, p. 2.)

5 Pressing on with Part 2 in the manner that DWR suggests would result in a due  
6 process violation that no measure of later participation in the hearing process could cure.  
7 DWR acknowledges that it holds only preliminary modelling, that it is currently in the  
8 process of evaluating the environment impacts of the Project, and that specific physical  
9 and institutional changes to the Project are imminent. Despite this, DWR now asks that  
10 the Hearing Team disregard its own Hearing Notice, ignore DWR’s prior representations  
11 about the feasibility and scope of the Project before it, and proceed with the Hearing,  
12 with additional information to be presented at DWR’s convenience. Proceeding in such  
13 a manner would jeopardize the validity of these proceedings, violate the Hearing  
14 Officers’ own prior rulings in this matter, and unjustly impair the public and parties’ ability  
15 to participate in the process. That result is inconsistent with the importance and stature  
16 of this hearing, and with due process under the law.

17 **II. PROPOSED SCHEDULE BASED UPON COMPLETION OF SEIR**

18 Based upon the foregoing, the undersigned Protestants respectfully request the  
19 following:

20 First, that Part 2 of the Hearing be stayed until 60 days after DWR certifies a  
21 Supplemental EIR and approves the modified Project.

22 Second, that the Hearing Officers direct both DWR and Reclamation to submit the  
23 additional information required under Water Code section 1701.3(b)(1), (2) and (3) to  
24 demonstrate that any changes to the project that are the subject of the certified  
25 Supplemental EIR will not injure any other legal user of water and that the change will  
26 comply with CESA, ESA and CEQA requirements. The additional information must be  
27 submitted within 10 days after certification of a Supplemental EIR.

28 Third, that all parties should be allowed an opportunity to submit case-in-chief

1 evidence on any Part 1 or Part 2 issue that arises from changes described in the  
2 Supplemental EIR, and in response to the information provided by Petitioners under  
3 Water Code section 1701.3. All such case-in-chief evidence should be due 45 days  
4 after certification of a Supplemental EIR.

5 Finally, during Part 2, parties should be permitted to cross-examine and present  
6 rebuttal on all Part 1 or Part 2 issues that arise from changes in the Supplemental EIR.

7 **III. SUMMARY RESPONSES TO HEARING OFFICERS' QUESTIONS**

8 The undersigned Protestants' response to the Hearing Officers' February 8  
9 questions essentially is contained in the above arguments. Our specific responses to  
10 those questions are as follows:

11 **Question 1:** No, for the reasons discussed above, the EIR does not address all  
12 potential impacts.

13 **Question 2:** This question is addressed to Petitioners. Protestants note that  
14 Reclamation has not provided any additional information regarding its plans to  
15 participate (or not participate) in the first stage of the new Project; and the recently filed  
16 Opposition is signed only by DWR.

17 **Question 3:** DWR's proposal to phase or stage the Project is an amendment to  
18 the Petition because such an incremental approach is both physically and institutionally  
19 distinct from the prior proposals. DWR must acknowledge, and the Board must consider,  
20 the potential impacts if the Project is completed over a longer time period, without  
21 Federal participation, or perhaps never completed at all.

22 **Question 4:** Yes, there are significant potential impacts to all interests that would  
23 warrant revisiting Part 1 and Part 2 issues if DWR attempted to carry out a phased or  
24 staged approach, many of which were acknowledged in DWR's own findings on the EIR.  
25 Of significant note, the only supporting materials that DWR has provided regarding this  
26 approach (the preliminary modeling files), reflect impacts during the phased operations  
27 that are outside the range originally considered by DWR and presented to the Hearing  
28 Officers in Part 1 of these proceedings.



1 For the reasons stated above, the undersigned Protestants respectfully request  
2 that the Hearing Officers stay the hearing until 60 days after DWR certifies its proposed  
3 SEIR and approves the modified project, consistent with the schedule identified above.

4  
5 DATED: February 13, 2018

DOWNEY BRAND LLP

6  
7 By: 

8 Kevin M. O'Brien  
9 David R.E. Aladjem  
10 Meredith E. Nikkel  
11 Rebecca R.A. Smith

12 Attorney for CARTER MUTUAL WATER  
13 COMPANY, EL DORADO IRRIGATION  
14 DISTRICT, EL DORADO WATER & POWER  
15 AUTHORITY, HOWALD FARMS, INC.,  
16 MAXWELL IRRIGATION DISTRICT,  
17 NATOMAS CENTRAL MUTUAL WATER  
18 COMPANY, MERIDIAN FARMS WATER  
19 COMPANY, OJI BROTHERS FARM, INC.,  
20 OJI FAMILY PARTNERSHIP, PELGER  
21 MUTUAL WATER COMPANY, PLEASANT-  
22 GROVE VERONA MUTUAL WATER  
23 COMPANY, PRINCETON-CODORA-GLENN  
24 IRRIGATION DISTRICT, PROVIDENT  
25 IRRIGATION DISTRICT, RECLAMATION  
26 DISTRICT 108, SACRAMENTO MUNICIPAL  
27 UTILITY DISTRICT, HENRY D. RICHTER,  
28 ET AL., RIVER GARDEN FARMS  
COMPANY, SOUTH SUTTER WATER  
DISTRICT, SUTTER EXTENSION WATER  
DISTRICT, SUTTER MUTUAL WATER  
COMPANY, TISDALE IRRIGATION AND  
DRAINAGE COMPANY, WINDSWEPT LAND  
AND LIVESTOCK COMPANY

21 DATED: February 13, 2018

SOMACH, SIMMONS & DUNN, PC

22  
23 By: /s/Andrew M. Hitchings

24 Andrew M. Hitchings  
25 Attorneys for GLENN-COLUSA IRRIGATION  
26 DISTRICT, BIGGS-WEST GRIDLEY WATER  
27 DISTRICT, SACRAMENTO COUNTY  
28 WATER AGENCY, PLACER COUNTY  
WATER AGENCY, CARMICHAEL WATER  
DISTRICT

# **Exhibit A**

1 SOMACH SIMMONS & DUNN  
A Professional Corporation  
2 PAUL S. SIMMONS (SBN 127920)  
ANDREW M. HITCHINGS (SBN 154554)  
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9  
10 Attorneys for County of Sacramento;  
Sacramento County Water Agency;  
11 Sacramento Regional County Sanitation  
District; City of Stockton  
12

13  
14 BEFORE THE  
15 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD  
16

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

21 **DECLARATION OF SUSAN  
PAULSEN, PH.D., P.E., IN  
SUPPORT OF RESPONSE TO  
DEPARTMENT OF WATER  
RESOURCES' CONSOLIDATION  
OPPOSITION TO NATURAL  
RESOURCES DEFENSE COUNCIL,  
DEFENDERS OF WILDLIFE, AND  
THE BAY INSTITUTE'S RENEWED  
MOTION TO STAY PART II OF  
WATERFIX HEARING DUE TO  
CHANGES IN PROPOSED  
PROJECT**  
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1 I am a Principal and Director of Environmental and Earth Sciences practice at  
2 Exponent, Inc. (Exponent). I have provided expert testimony in these proceedings; my  
3 qualifications and curriculum vitae have been entered into evidence in various exhibits,  
4 including, but not limited to, Exhibits SKTN-25 and 26. I make this Declaration in support  
5 of Sacramento County et al.'s Response to the Department of Water Resources' (DWR)  
6 Consolidated Opposition to Natural Resources Defense Council, Defenders of Wildlife,  
7 and the Bay Institute's Renewed Motion to Stay Part II of WaterFix Hearing Due to  
8 Changes in Proposed Project. I have personal knowledge of the matters contained in  
9 this declaration and if called as a witness, I could and would testify competently to all  
10 such matters.

11 Exponent has reviewed and evaluated modeling results presented by DWR to  
12 date in this hearing, for the following WaterFix operating scenarios: Existing Conditions  
13 (EBC2), the No Action Alternative (NAA), Alternative 4A H3, H4 and H3+, and  
14 Boundaries 1 and 2 (B1 and B2). Exponent downloaded one (1) new set of model files  
15 from the link DWR provided on Thursday, February 8, 2018, which DWR has  
16 characterized as the "preliminary" modeling results of a phased implementation of the  
17 WaterFix project. According to DWR, these "preliminary" model results depict the  
18 operation of a first phase of WaterFix that would consist of two (2) North Delta intakes  
19 capable of diverting up to 6,000 cubic feet per second (cfs) and a single conveyance  
20 tunnel, along with continued diversions at the existing South Delta points of diversion.

21 Exponent conducted an initial analysis of the modeling results for this Single  
22 Tunnel, Stage 1 scenario, which I refer to as H3+ST1. Specifically, Exponent extracted  
23 from DSM2 model files the flow rate of water exported under the H3+ST1 scenario,  
24 including the flow rates of water diverted from the North Delta and South Delta, for each  
25 of the 16 years in the DSM2 model runs. We further used those results to calculate  
26 monthly average export flow rates for four (4) water year types (critical, dry, "normal"  
27 (both below and above normal), and wet). Exponent's analysis of DWR's H3+ST1  
28 modeling results indicates that WaterFix operations under the Single Tunnel, Stage 1

1 scenario would result in *significantly different* export flow rates than the WaterFix project  
2 versions presented by Petitioners in this hearing.

3 The preliminary modeling results provided by DWR show that in 61 months of the  
4 16-year simulation period, the monthly average flow rate exported from the South Delta  
5 is *greater* in new scenario H3+ST1 than in *all other* WaterFix project scenarios, including  
6 both B1 and B2, which DWR has stated represent the outer limits, or “bookends” of  
7 potential WaterFix operational impacts.<sup>1</sup> In addition, the annual average export flow rate  
8 from the South Delta is greater for new scenario H3+ST1 than for all other project  
9 scenarios in three (3) of the 16 years.

10 The results of Exponent’s analysis are summarized in Exhibit A to this  
11 Declaration. Exhibit A is a summary table that indicates the months over the 16-year  
12 model period in which total export flow rate (both North and South Delta) for scenario  
13 H3+ST1 is greater than the total export flow rate for either the B1 or B2 scenarios. In  
14 three (3) of the 16 years (WY 1978, 1980, and 1989), the total export flow rate is greater  
15 than the total export flow rate for either the B1 or B2 scenarios for 33 percent of the year.  
16 In six (6) of the 16 years, the total export flow rate is greater than the total export flow  
17 rate for either the B1 or B2 scenarios for 25 percent or more of the year (WY 1978, 1980,  
18 1982, 1983, 1986, and 1989). In five (5) months during the 16-year period, the monthly  
19 average export flow rate for scenario H3+ST1 is greater than for all the project scenarios  
20 (Alternative 4A H3, H4 and H3+, and B1 and B2) and greater than for the no-project  
21 scenarios EBC2 and NAA.

22 The modeling results disclosed by DWR included files identified as “Stage 2” files.  
23 Exponent attempted to download the Stage 2 modeling files from the link provided by  
24 DWR but could not download anything. Although there is a 7.55 GB zip file at the link,  
25 Exponent found multiple sub-folders that all appear to be empty when double-clicked,  
26 and an error message is received when attempting to unzip individual folders.

27 \_\_\_\_\_  
28 <sup>1</sup> Throughout this Declaration, we identified flow rates for Scenario H3+ST1 that were greater than flow  
rates for other scenarios by at least 5 percent.

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I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed in Pasadena, California on February 13, 2018.



---

Susan Paulsen, Ph.D., P.E

# **EXHIBIT A**

**Exhibit A. Months where total export flow rate (north and south Delta) is greater for scenario H3+ST1 than for either Boundary 1 or Boundary 2. See also footnotes.**

Water Year	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Annual Avg.	Percent of Year
1976			X											8%
1977														0%
1978					X					X	X	XX		33%
1979									X					8%
1980		XX			X					X	X			33%
1981			X						XX					17%
1982										X	X	X		25%
1983	X		X	X									X	25%
1984										X	X			17%
1985									X					8%
1986						XX				X	X			25%
1987									X					8%
1988					X									8%
1989			X						X	XX	X			33%
1990										X				8%
1991														0%

"X" indicates that the total export flow rate is greater for Scenario H3+ST1 than for the Boundary 1 or Boundary 2 scenarios by a margin of at least 5%.

"XX" indicates that the total export flow rate for Scenario H3+ST1 is greater than for all other scenarios, including the EBC2 and NAA scenarios.

## **Exhibit B**

1 DOWNEY BRAND LLP  
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7 Attorneys for Protestants  
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 8 IRRIGATION DISTRICT; EL DORADO WATER & POWER  
 AUTHORITY; HOWALD FARMS, INC.; MAXWELL IRRIGATION  
 9 DISTRICT; NATOMAS CENTRAL MUTUAL WATER COMPANY;  
 MERIDIAN FARMS WATER COMPANY; OJI BROTHERS FARM,  
 10 INC.; OJI FAMILY PARTNERSHIP; PELGER MUTUAL WATER  
 COMPANY; PLEASANT-GROVE VERONA MUTUAL WATER  
 11 CO.; PRINCETON-CODORA-GLENN IRRIGATION DISTRICT;  
 PROVIDENT IRRIGATION DISTRICT; RECLAMATION DISTRICT  
 12 108; SACRAMENTO MUNICIPAL UTILITY DISTRICT; HENRY D.  
 RICHTER, ET AL.; RIVER GARDEN FARMS COMPANY; SOUTH  
 13 SUTTER WATER DISTRICT; SUTTER EXTENSION WATER  
 DISTRICT; SUTTER MUTUAL WATER COMPANY; TISDALE  
 14 IRRIGATION AND DRAINAGE COMPANY; WINDSWEPT LAND  
 AND LIVESTOCK COMPANY; NORTH DELTA WATER AGENCY;  
 15 RECLAMATION DISTRICT 999; RECLAMATION DISTRICT 2060;  
 RECLAMATION DISTRICT 2068; BRANNAN-ANDRUS LEVEE  
 16 MAINTENANCE DISTRICT; RECLAMATION DISTRICT 407;  
 RECLAMATION DISTRICT 2067; RECLAMATION DISTRICT 317;  
 17 RECLAMATION DISTRICT 551; RECLAMATION DISTRICT 563;  
 RECLAMATION DISTRICT 150; RECLAMATION DISTRICT 2098;  
 18 RECLAMATION DISTRICT 800 (BYRON TRACT); TEHAMA-  
 COLUSA CANAL AUTHORITY

19 *Additional parties and counsel listed on next page*  
 20

21 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

22 In the matter of Hearing re California  
 23 WaterFix Petition for Change

**DECLARATION OF WALTER BOUREZ  
 IN SUPPORT OF SACRAMENTO  
 COUNTY ET AL.'S RESPONSE TO  
 DEPARTMENT OF WATER RESOURCES  
 CONSOLIDATED OPPOSITION TO  
 NATURAL RESOURCES DEFENSE  
 COUNCIL, DEFENDERS OF WILDLIFE,  
 AND THE BAY INSTITUTE'S RENEWED  
 MOTION TO STAY PART II OF  
 WATERFIX HEARING DUE TO  
 CHANGES IN PROPOSED PROJECT**

1 SOMACH, SIMMONS & DUNN, PC  
2 Andrew M. Hitchings (Bar No. 154554)  
3 Kelley M. Taber (Bar No. 184348)  
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14  
15 Attorneys for  
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17 COUNTY WATER AGENCY; SACRAMENTO  
18 REGIONAL COUNTY SANITATION DISTRICT; CITY  
19 OF STOCKTON  
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Attorneys for ANDERSON-COTTONWOOD  
IRRIGATION DISTRICT, BUTTE WATER DISTRICT,  
NEVADA IRRIGATION DISTRICT, PARADISE  
IRRIGATION DISTRICT, PLUMAS MUTUAL WATER  
COMPANY, RECLAMATION DISTRICT NO. 1004,  
RICHVALE IRRIGATION DISTRICT, SOUTH  
FEATHER WATER & POWER AGENCY, WESTERN  
CANAL WATER DISTRICT

1 I, Walter Bourez, declare as follows:

2 1. I am a registered civil engineer in the State of California and am employed by the  
3 firm of MBK Engineers ("MBK"). I hold Bachelor of Science and Master of Science degrees in  
4 Civil Engineering from California State University, Sacramento. A copy of my resume, which  
5 accurately describes my education and experience, was previously submitted as Exhibit SVWU-  
6 101. As such, I have personal knowledge of the facts stated in this declaration. If called to  
7 testify, I could and would competently testify to the facts stated herein.

8 2. MBK has reviewed and evaluated modeling results presented by DWR to date in  
9 this hearing. In particular for purposes of this declaration, I personally reviewed select results  
10 from the following modeling scenarios: the No Action Alternative (NAA), Alternative 4A H3,  
11 Alternative 4A H4, CWF H3+, Boundary 1 and Boundary 2.

12 3. At my direction, MBK visited the link DWR provided on Thursday, February 8,  
13 2018 and downloaded "Preliminary Modeling Data" for the CalSim II study called "Stage 1."

14 4. MBK conducted an initial review of select modeling results produced by the Stage  
15 1 CalSim modeling scenario. During this initial review, I noted two key changes in the Stage 1  
16 modeling compared to the CWF H3+. The first change is that the North Delta Diversion (NDD)  
17 capacity is modified from 9,000 cubic feet per second (cfs) to 6,000 cfs, this change was made to  
18 CalSim file "*IsolatedFacility.table* (.\\con\\run\\Lookup)". The second change assigns dedicated  
19 sharing of the NDD capacity of 5,000 cfs to the State Water Project (SWP) and 1,000 cfs to the  
20 Central Valley Project (CVP), this change was made to CalSim file "*IsolatedFacility.wresl*  
21 (.\\common\\Delta\\IsolatedFacility)". The Stage 1 model scenario is set so that the SWP can only  
22 use its 5,000 cfs share of the NDD and cannot use the CVP share regardless of CVP use of its  
23 1,000 cfs share. In the Stage 1 scenario, CVP may access the SWP share of NDD capacity for  
24 wheeling water supply to CVP contractors, including Cross Valley Canal contractors.

25  
26 5. When comparing the Stage 1 model results, MBK found that use of the NDD  
27 during the month of June is higher than Boundary 1, Boundary 2, H3, and H4 scenarios  
28 approximately 11% of the time and use of the NDD in July and August is higher than all these

1 scenarios approximately 7% and 20% of the time, respectively. This increase in use of the NDD  
2 in July and August falls outside of the results in the Boundary Analysis from Part 1 of the CWF  
3 hearing. Furthermore, use of the NDD is higher in the Stage 1 scenario compared to the CWF  
4 H3+ scenario about 20% of the time in July and about 18% of the time in August.

5 6. It is unclear if dedicated CVP and SWP share of the NDD is consistent with the  
6 1986 Coordinated Operating Agreement. Although the CVP is given a 1,000 cfs dedicated share  
7 of the NDD in the Stage 1 modeling, the CVP south of Delta deliveries decrease by annual  
8 average of 120,000 acre feet when compared to the No Action Alternative. SWP deliveries  
9 increase by 192,000 acre feet in the Stage 1 modeling compared to the No Action Alternative and  
10 the total increase (CVP plus SWP) in south of Delta deliveries is 72,000 acre feet. Because  
11 sharing of the NDD facility is undefined in the CWF H3+ scenario, use of the NDD fluctuates  
12 between the SWP and CVP and results in different sharing of water supply benefits due to the  
13 CWF. Specifically, the CVP south of Delta deliveries decrease in the CWF H3+ scenario relative  
14 to the No Action Alternative by an annual average of 8,000 acre feet while SWP deliveries  
15 increase by 211,000 acre feet. Sharing of available water supply in the Stage 1 modeling scenario  
16 is different than the CWF H3+ modeling scenario, therefore CVP/SWP operations are different  
17 and water supply benefits are different.

18 I declare under penalty of perjury under the laws of the State of California that the  
19 foregoing is true and correct and that this Declaration was executed this 13th day of February,  
20 2018 at Sacramento, California.

21   
22 WALTER BOUREZ

**STATEMENT OF SERVICE**

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

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

**RESPONSE TO DEPARTMENT OF WATER RESOURCES CONSOLIDATED  
OPPOSITION TO NATURAL RESOURCES DEFENSE COUNCIL, DEFENDERS OF  
WILDLIFE, AND THE BAY INSTITUTE'S RENEWED MOTION TO STAY PART II  
OF WATERFIX HEARING DUE TO CHANGES IN PROPOSED PROJECT**

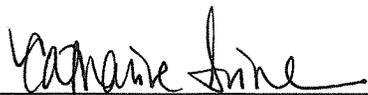
to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated January 24, 2018, posted by the State of Water Resources Control Board at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http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

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

**For Petitioners Only:**

	I caused a true and correct <b>hard copy</b> of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:  <b>Method of Service:</b> _____
--	--

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

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814