



Deirdre Des Jardins  
145 Beel Dr  
Santa Cruz, CA 95060  
(831) 423-6857  
[ddj@cah2oresearch.com](mailto:ddj@cah2oresearch.com)

February 20, 2018

VIA electronic mail

Michael A.M. Lauffer, Chief Counsel,  
[Michael.Lauffer@waterboards.ca.gov](mailto:Michael.Lauffer@waterboards.ca.gov)

Nicole Kuenzi, Senior Staff Counsel  
[Nicole.Kuenzi@waterboards.ca.gov](mailto:Nicole.Kuenzi@waterboards.ca.gov)

Andrew Deeringer, Attorney III, Office of Chief Counsel  
[Andrew.Deeringer@Waterboards.ca.gov](mailto:Andrew.Deeringer@Waterboards.ca.gov)

State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

**Re: Public Records Act Requests for Ex Parte Communications and Documents Related to the WaterFix Hearing**

Dear Chief Counsel Lauffer, Senior Staff Counsel Kuenzi, and Mr. Deeringer,

Thank you for the Office of Chief Counsel's response to California Water Research's Public Records Act request of January 28, 2018. The response, signed by Andrew Deeringer, indicated that there were "mostly emails" responsive to my request, and that Nicole Kuenzi would be coordinating production. Please provide the files to the WaterFix Hearing FTP server as they become available. I also have some additional requests, as detailed below.

**I. Contract Executed Pursuant to Water Code § 85086(d.)**

I am requesting a clarification of the Office of Chief Counsel's response to one of the requests in my PRA. Request #6 included the following:

A copy of the contract executed by the State Water Resources Control Board pursuant to the Board's 2010 resolution Authorizing the Executive Director to Enter into an Agreement With the State Water Project Contractors and the Federal Central Valley Project Contractors, or a Joint Powers Authority Comprised of Those Contractors, for Reimbursement of the Costs of Analysis Associated With Developing New Flow Criteria for the Delta Ecosystem, and any payments received under the contract.

The request refers to State Water Resources Control Board Resolution No. 2010-0003. The response to the PRA indicates that the contracts authorized by the resolution may never have been executed. If the contracts required under Water Code section 85086(d) were not executed by the Board, please provide a letter so stating.

## **II. WaterFix Subsequent or Supplemental EIR**

In addition, given recent developments with the WaterFix project, California Water Research also requests responses to the following two questions:

1. Has the Office of Chief Counsel had any Ex Parte communications with the Department of Water Resources relating to preparation of a Subsequent or Supplemental EIR for the WaterFix?
2. If so, will the Office of Chief Counsel disclose the Ex Parte communications in response to the Public Records Act request by the County of Sacramento et. al.?

As explained below, many protestants in the WaterFix hearing have requested that the Board prepare a Subsequent EIR. For this reason, the Board should provide notice to the WaterFix Hearing parties and an opportunity to submit comments before determining that a Subsequent EIR is not required for the WaterFix project, but only a Supplemental EIR. Any final decision, and the basis for the decision, should also be noticed to the parties in the WaterFix hearing. California Water Research requests that the Chief Counsel ensure that this happens.

## **BACKGROUND**

Friends of the River, the Sierra Club, and Planning and Conservation League requested that the Board prepare a subsequent EIR on January 21, 2016.<sup>1</sup> The Hearing Officers' February 11, 2016 pre-hearing conference ruling stated:

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<sup>1</sup> Friends of the River and the Sierra Club, January 21, 2016 letter, Re: Written Comments for January 28, 2016, Pre-Hearing Conference. Available at [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/docs/2017/20170921\\_fotr\\_pt2phctopic.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2017/20170921_fotr_pt2phctopic.pdf)

If during the course of this proceeding, the State Water Board determines that the range of alternatives evaluated by DWR is not adequate to support the Board's decision, then either DWR or the Board will need to prepare subsequent or supplemental documentation. (See *id.*, §§ 15096, subd. (e), 15162, 15163.) At this point, however, it is uncertain whether any subsequent or supplemental documentation will be required. (p. 9.)

Friends of the River, the Sierra Club, Planning and Conservation League, Save the California Delta Alliance, California Water Impact Network, California Sportfishing Protection Agency, and Restore the Delta requested reconsideration of the Hearing Officers' decision not to prepare a subsequent EIR on February 17, 2016, citing the failing grade that the EPA gave the WaterFix EIR/EIS.<sup>2</sup>

Friends of the River and the Sierra Club also stated in their September 21, 2017 pre-hearing conference letter, under Need to Address CEQA issues<sup>3</sup>:

As either a lead or responsible agency, the State Water Board needs to consider requiring a subsequent EIR under CEQA, Public Resources Code § 21166(a), (b), and (c), because substantial changes are proposed in the project, substantial changes occur with respect to the circumstances under which the project is being undertaken, and new information has become available. Accord, 14 Code Cal. Regs (CEQA Guidelines) § § 15162; 15096(e)(3). (p. 2.)

The February 6, 2018 Hearing Ruling stated,

We direct Petitioners to update us and the parties if and when they decide to modify the proposed WaterFix project. At that time, it may be necessary for us to solicit input from the parties as to whether such modifications necessitate an amended change petition or new or supplemental CEQA analysis. Until that time, however, we will proceed with consideration of the water right change petition that is now before us. (p. 3.)

The Department of Water Resources indicated at the Hearing on February 8 that substantial changes had been proposed in the WaterFix project, and that the changes required preparation of

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<sup>2</sup> Friends of the River et. al., February 17, 2016 letter, Re: Written Comments Responding to CEQA Procedural Ruling in California Water Fix State Water Board hearing process. Available at [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/20160217\\_fotretal.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/20160217_fotretal.pdf)

<sup>3</sup> Friends of the River et. al., September 21, 2017 letter, Re: Agenda Topics for October 19, 2017, Pre—Hearing Conference to discuss Part 2 procedural Issues. Available at [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/docs/2017/20170921\\_fotr\\_pt2phctopic.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2017/20170921_fotr_pt2phctopic.pdf)

a supplemental EIR. CEQA guideline § 15162, subdivision (a) trigger preparation of a supplemental EIR when there are substantial changes proposed to a project. CEQA guideline § 15162 (c) then provides that

Once a project has been approved, the lead agency's role in project approval is completed, unless further discretionary approval on that project is required. Information appearing after an approval does not require reopening of that approval. If after the project is approved, any of the conditions described in subdivision (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any. In this situation no other responsible agency shall grant an approval for the project until the subsequent EIR has been certified or subsequent negative declaration adopted.

The WaterFix project has been approved by the Department of Water Resources, and the State Water Resources Control Board is the agency with the next discretionary approval, so the State Water Resources Control Board would be the agency to prepare a subsequent EIR under section 15162, subdivision (c), as requested by the protestants.

However, CEQA guidelines § 15163(a) provides:

(a) The Lead or Responsible Agency may choose to prepare a supplement to an EIR rather than a subsequent EIR if:

- (1) Any of the conditions described in Section 15162 would require the preparation of a subsequent EIR, and
- (2) Only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation.

Whether the construction of the WaterFix project in stages would require “only minor additions or changes” to the WaterFix Final EIR is also a major issue in the WaterFix Water Right Change Petition Hearing, and many protestants have filed briefs in the Hearing on the issue.

Ex Parte communications between the State Water Resources Control Board and the Department of Water Resources were requested under a January 23, 2018 Public Records Act request by Sacramento County et. al. The request included the following:

All communications between SWRCB and DWR, during the period of January 1, 2016, to the present, referencing or relating to (1) a single tunnel alternative for the WaterFix Project, or (2) separation of the two tunnels (and related facilities, such as intakes) proposed in the WaterFix Project into two distinct phases of construction and/or operation.

The Board's response, which was signed by Matthew Jay, Associate Governmental Program Analyst, indicates that Ex Parte correspondence with the Board about the one tunnel project may be withheld under one or more exemptions to the Public Records Act:

We are in the process of gathering and reviewing the records to determine whether any records responsive to your request may be disclosable.

The potential bases for non-disclosure include one or more of the following exemptions to the Public Records Act: Attorney-Client Privilege, Deliberative Process Privilege, Attorney Work Product Privilege, Investigative Records Exemption, Pending Litigation Exemption, Trade Secret Exemption, Other Laws

This response did not indicate whether there were Ex Parte communications between DWR and the Board about the extent of the changes to the WaterFix Final EIR/EIS required to adequately evaluate the proposed staged implementation of the project, or if so, if they would ever be produced.

Thank you,

A handwritten signature in black ink, appearing to read 'D. Des Jardins', with a stylized flourish at the end.

Deirdre Des Jardins  
Principal, California Water Research

Cc: WaterFix Hearing Counsel Dana Heinrich

WaterFix Water Right Change Petition Hearing Service List

# EXHIBIT A



EDMUND G. BROWN JR.  
GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

## State Water Resources Control Board

February 6, 2018

Ms. Des Jardins  
145 Beel Drive  
Santa Cruz, CA 95060  
Telephone: (831) 423-6857  
Email: [ddj@cah2oresearch.com](mailto:ddj@cah2oresearch.com)

**RE: 10-DAY RESPONSE LETTER REGARDING REQUEST FOR PUBLIC RECORDS**

Dear Ms. Des Jardins,

The California State Water Resources Control Board (State Water Board, or Board) received your January 28, 2018 request under the California Public Records Act (Gov. Code, § 6250 et seq.) for State Water Board records generally pertaining to communications between the State Water Board and certain entities participating in or otherwise involved in the proposed WaterFix project. Your request is attached for reference.

You requested the following State Water Board records:

1. *Any and all communications between the California Natural Resources Agency and the State Water Resources Control Board relating to:*
  - a. *The WaterFix project;*
  - b. *The WaterFix Water Right Change Petition application or hearing;*
  - c. *Permit terms for the State Water Project and Central Valley Project, since the WaterFix Water Right Change Petition application was filed on August 26, 2015, not currently posted on the State Water Resources Control Board website.*
2. *Any and all communications between the California Governor's office and the State Water Resources Control Board relating to:*
  - a. *The WaterFix project;*
  - b. *The WaterFix Water Right Change Petition application or hearing;*

FELICIA MARCUS, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | [www.waterboards.ca.gov](http://www.waterboards.ca.gov)



staff will make every effort to facilitate prompt review and timely disclosure of non-exempt, responsive public records. If, after OCC's review, the State Water Board withholds one or more documents based on an applicable privilege or other Public Records Act exemption, you will be provided with the number of documents withheld, the general nature of each, the specific privilege or other exemption justifying non-disclosure, and the name and title of the State Water Board employee who made the non-disclosure determination.

OCC and/or Board staff may follow up with you to coordinate the production of these records on a rolling basis as OCC's review progresses so that you may start obtaining access to responsive records as soon as possible. In the meantime, if you have questions or wish to express concerns regarding the State Water Board's response to your records request, you may contact Nicole Kuenzi by phone (916-322-4142) or email at [Nicole.Kuenzi@waterboards.ca.gov](mailto:Nicole.Kuenzi@waterboards.ca.gov).

Sincerely,

A handwritten signature in cursive script, appearing to read "A. Deeringer".

Andrew Deeringer  
Attorney III  
Office of Chief Counsel  
State Water Resources Control Board

# EXHIBIT B



EDMUND G. BROWN JR.  
GOVERNOR



MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

## State Water Resources Control Board

February 13, 2018

### VIA US AND ELECTRONIC MAIL

Kelley Taber  
SOMACH SIMMONS & DUNN  
500 Capitol Mall, Suite 1000  
Sacramento, CA 95814  
[ktaber@somachlaw.com](mailto:ktaber@somachlaw.com)

**Re: Public Records Request**

Dear Ms. Taber,

On February 9, 2018, we received the *County of Sacramento et al.'s Petition for Reconsideration and Request for Stay or Continuance of Waterfix Part 2 Hearing*, which included several attachments, including a January 23, 2018 Public Records Act (PRA) request from you to the State Water Resources Control Board (State Water Board) that was labeled Exhibit C. Although you addressed the letter to the State Water Board, the email address you used to submit the PRA is specific to the State Water Board's State Contracting department. Therefore, we have only recently obtained your January 23, 2018 email and attached PRA request.

The State Water Board staff has made an initial determination that the State Water Board has records responsive to your request. We are in the process of gathering and reviewing the records to determine whether any records responsive to your request may be disclosable.

The potential bases for non-disclosure include one or more of the following exemptions to the Public Records Act: Attorney-Client Privilege, Deliberative Process Privilege, Attorney Work Product Privilege, Investigative Records Exemption, Pending Litigation Exemption, Trade Secret Exemption, Other Laws Exemption, and the Catch-All Balancing Test in Government Code section 6255.

If we determine your requested documents are exempt from disclosure, we will notify you. If we determine they are not exempt from disclosure, we will provide them to you as soon as possible after the determination is made.

Your request to receive responsive documents in electronic format has been noted, and we will provide these documents to you in this format if they are available.

FELICIA MARCUS, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | [www.waterboards.ca.gov](http://www.waterboards.ca.gov)

Please contact Mr. Matthew Jay by phone at (916) 341-5396 or by e-mail at [matthew.jay@waterboards.ca.gov](mailto:matthew.jay@waterboards.ca.gov) should you have any questions regarding your request.

Sincerely,



Matthew Jay  
Associate Governmental Program Analyst  
State Water Resources Control Board  
Division of Water Rights

# EXHIBIT C



**SOMACH SIMMONS & DUNN**  
A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW

500 CAPITOL MALL, SUITE 1000, SACRAMENTO, CA 95814  
OFFICE: 916-446-7979 FAX: 916-446-8199  
SOMACHLAW.COM

January 23, 2018

**Via Electronic Mail**

State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814  
[PubRecReq@waterboards.ca.gov](mailto:PubRecReq@waterboards.ca.gov)

Re: California Public Records Act Request

Dear Sir or Madam:

Pursuant to the California Public Records Act, Government Code section 6250 et seq., this letter on behalf of the County of Sacramento serves as a formal request upon the California State Water Resources Control Board (SWRCB) to furnish all public records prepared, received, owned, used, transmitted, or possessed (including, without limitation, those constructively possessed) by SWRCB which are responsive to the categories listed below. This request applies to all public records as defined in Government Code section 6252, subdivision (e), which includes any electronic mail and "writing," as defined in Government Code section 6252, subdivision (g).

In this request, "SWRCB" includes SWRCB itself, any and all persons acting on behalf of SWRCB, as well as SWRCB's officers, representatives, agents, employees, affiliates, consultants, and individual directors. The "Metropolitan Water District of Southern California" (MWD) includes MWD itself, any and all persons acting on behalf of MWD, as well as MWD's Board of Directors, officers, representatives, agents, employees, affiliates, consultants, and individual directors. The "Department of Water Resources" (DWR) includes DWR itself, any and all persons acting on behalf of DWR, as well as DWR officers, representatives, agents, employees, affiliates, consultants, and individual directors. The (SWC) includes the organization known as the SWC itself, any and all persons acting on behalf of the State Water Contractors, as well as the SWC's officers, representatives, agents, employees, affiliates, consultants, and individual directors. The "United States Bureau of Reclamation" (USBR) includes USBR itself, any and all persons acting on behalf of USBR, as well as USBR officers, representatives, agents, employees, affiliates, consultants, and individual directors. Additionally, the term "WaterFix Project" refers to the California WaterFix Project.

Please provide or otherwise make available for review copies of the following:

1. All documents referencing or relating to (1) a single tunnel alternative for the WaterFix Project, or (2) separation of the two tunnels (and related facilities, such as intakes) proposed in the WaterFix Project into two distinct phases of construction and/or operation.
2. All documents referencing or relating to (1) the operation of a single tunnel alternative for the WaterFix Project; and (2) operation of the WaterFix Project, if the WaterFix Project is constructed in two or more distinct phases of construction and/or operation. "Operation" includes, but is not limited to, the amount and timing of diversions at both North and South Delta intakes and the amount of water delivered to State Water Project and/or Central Valley Project contractors, or any single contractor or combination of them.
3. All documents referencing or relating to the evaluation of environmental effects of (1) a single tunnel alternative for the WaterFix Project, or (2) separation of the two tunnels (and related facilities, such as intakes) proposed in the WaterFix Project into two distinct phases of construction and/or operation.
4. All documents referencing or relating to the cost of (1) a single tunnel alternative for the WaterFix Project, or (2) separation of the two tunnels proposed (and related facilities, such as intakes) in the WaterFix Project into two distinct phases of construction and/or operation, including costs associated with planning, design, investigation, environmental review, construction and operation.
5. All communications between SWRCB and MWD, during the period of January 1, 2016, to the present, referencing or relating to (1) consideration of a single tunnel alternative for the WaterFix Project, or (2) separation of the two tunnels (and related facilities, such as intakes) proposed in the WaterFix Project into two distinct phases of construction and/or operation.
6. All communications between SWRCB and DWR, during the period of January 1, 2016, to the present, referencing or relating to (1) a single tunnel alternative for the WaterFix Project, or (2) separation of the two tunnels (and related facilities, such as intakes) proposed in the WaterFix Project into two distinct phases of construction and/or operation.
7. All communications between SWRCB and SWC, during the period of January 1, 2016, to the present, referencing or relating to (1) a single tunnel alternative for the WaterFix Project, or (2) separation of the two tunnels (and related facilities, such as

intakes) proposed in the WaterFix Project into two distinct phases of construction and/or operation.

8. All communications between SWRCB and USBR, during the period of January 1, 2016, to the present, referencing or relating to (1) a single tunnel alternative for the WaterFix Project, or (2) separation of the two tunnels (and related facilities, such as intakes) proposed in the WaterFix Project into two distinct phases of construction and/or operation.

Pursuant to Government Code section 6253.9, subdivision (a), I request any record that is available in electronic format to be provided in electronic format. If any computer programming services are necessary to export the data or files into the requested format, and SWRCB intends to charge for such costs pursuant to Government Code section 6253.9, subdivision (b), I hereby request to be advised of such costs immediately.

Please contact me within ten (10) business days of this request to let me know if SWRCB has any of the public records requested herein. Should you decide to withhold any of the requested records, please provide a written response in accordance with Government Code section 6255 that specifies the basis for withholding the records. I can be reached at (916) 469-3841 or via email at [ktaber@somachlaw.com](mailto:ktaber@somachlaw.com). Thank you for your attention to this matter.

Sincerely,



Kelley Taber  
Attorney

MEC:rs