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**CALIFORNIA DEPARTMENT OF WATER
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8 **BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

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

CALIFORNIA DEPARTMENT OF
WATER RESOURCES' MOTION FOR
PROTECTIVE ORDER

15 California Department of Water Resources ("DWR") requests that the Hearing
16 Officers issue an order pursuant to Government Code section 11450.30, subdivision (b)
17 to protect it from the unreasonable and oppressive demands in the Notice to Appear filed
18 by San Joaquin River Exchange Contractors Water Authority ("SJREC"). DWR requests
19 that the Hearing Officers vacate SJREC's notice to appear or limit it as to avoid
20 unnecessary questioning outside the scope of this hearing or knowledge of this
21 employee.

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23 **I. STATEMENT OF FACTS**

24 On August 26, 2015, DWR and Reclamation filed a petition for a change to their
25 water rights necessary to allow for the implementation of key components of the State's
26 California Water Fix ("CWF") program. On October 30, 2015, the Board issued a Notice
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1 of Petition and Notice of Public Hearing and Pre-Hearing Conference to consider the
2 petition.

3 SJREC submitted its Notice of Intent to Appear (“NOI”) on January 4, 2016
4 indicating that Christopher Neudeck would be one of its four witnesses and the subject
5 of his proposed testimony would be:

6 Need for comprehensive agreements between SWP/CVP/local
7 Reclamation Districts, and funding for maintenance, repair and
8 improvement of levees and channels for conveyance and control of water
9 across and through Sacramento/San Joaquin Delta to CVP and SWP
pumps to prevent unreasonable salinity impairment of water quality; flow
characteristics damaging to fish life[.]

10 On August 30, 2016, SJREC served a Notice to Appear demanding that DWR
11 produce witnesses on the following topics:

- 12 1. Delta Risk Management Study (“DRMS”) Phase 2 Report: portions of
13 Section Eight entitled “Building Block 1.6: Armored ‘Pathway’
14 (Through-Delta Conveyance)” at pages 8-i through 8-13, and Tables T-
15 1 through T-4, Figure 8-1; Section Nineteen entitled “Results and
Observations” at pages 19-1 through 19-13 (SJRECWA-2).
- 16 2. The feasibility of the assumptions contained in the modeling of both
17 Boundary 1 and Boundary 2 utilizing the H-3 Alternatives described in
18 DWR Exhibit 515, Table 4 on page 2, and the “note” which describes
19 the assumptions incorporated in Boundary 1 and 2 that states as
20 follows: “SWRCB D-1641, pumping at the South Delta intakes are
preferred during July through September months up to a total pumping
of 3,000 cfs to minimize potential water quality degradation in the
South Delta channels. No specific intake is assumed beyond 3,000
cfs.”
- 21 3. The financial contributions to be made by the DWR, Bureau of
22 Reclamation and local Reclamation Districts that would provide
reasonable assurance that this dual pathway for water to reach CVP
23 and SWP pumps would exist in the future.
- 24 4. Why the proposed CWF facilities do not provide for a means of DWR,
25 DOI, Reclamation, and Reclamation Districts implementing the levee
26 improvement projects and levee protection programs described in the
DRMS Phase 2 report to assure the likelihood of the ability to maintain
27 flows across the Delta as described in DWR-515 and models depicting
28 Boundary 1 and 2 conditions.

1 In an attempt to meet, confer, and compromise regarding the Notice to Appear, a
2 conference call between DWR and SJREC occurred on October 14, 2016. After a
3 productive conversation, SJREC provided its "Possible Questions" to DWR on October
4 25, 2016. (See Exhibit A.) SJREC's questions cover a range of topics, including
5 modeling, operations, levee safety, and funding for levee programs. DWR offered to
6 stipulate to some of the topics in the list of possible questions, but its offer was refused,
7 because SJREC wants to include questions about the reasonableness of funding for
8 levees and future occurrences of levee failures in the Delta. (See Exhibit B.)
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10 **II. ARGUMENT**

11 SJREC's possible questions fall into three categories, the presentation of which
12 does not require participation from a DWR witness. The three categories are:
13 (1) foundational questions about modeling (Exhibit A, Questions 1-1.2 at pages 1-2);
14 (2) questions about the 2009 and 2011 Delta Risk Management Study (DRMS) Reports
15 (Exhibit A, Questions 2-2.7 at pages 3-7 & Questions 4-4.2 at pages 10-12); and
16 (3) opinions about the reasonableness of funding for levees and future occurrences of
17 levee failures in the Delta (Exhibit A, Questions 3-3.4 at pages 7-10 & Questions 5-5.9 at
18 pages 12-17).
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20 **A. Foundational questions about modeling were already covered.**

21 DWR's experts were available for cross-examination where parties used that
22 opportunity to establish testimony for the record. It appears that SJREC failed to explore
23 the topics on which it now seeks information. It is unreasonable for SJREC to now
24 demand that DWR produce additional witnesses to present SJREC's case-in-chief,
25 because it missed its opportunity to question the right witnesses on cross examination.
26 SJREC's Questions 1-1.2 cover modeling and operations, topics on which DWR
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1 provided panels of witnesses to testify.¹ SJREC already had the opportunity to ask the
2 correct witnesses about these topics, and it is therefore unreasonable to call another
3 DWR witness to testify on these topics.

4 **B. It is unnecessary for a DWR witness to testify about the 2009 and 2011**
5 **DRMS reports.**

6 The 2009 and 2011 DRMS reports are in the public realm.² These are reports
7 prepared by DWR, a public agency, of which the Board can take official notice or that
8 can be submitted as exhibits to a party's case-in-chief. These reports are fully discussed
9 in publicly available documents, including Chapter 6 in the 2013 Draft Environmental
10 Impact Report/Environmental Impact Statement (DEIR/DEIS) and updated in the 2015
11 Partially Recirculated Draft Environmental Impact Report/Supplemental Draft
12 Environmental Impact Statement (RDEIR/SDEIS).³ (See Exhibit C.) They are also
13 discussed in the Delta Stewardship Council's (DSC's) January 2015 report entitled,
14 "State Investments in Delta Levees, Key Issues for Updating Priorities."⁴ (See Exhibit
15 D.) It should also be noted that SJREC did, in fact, submit portions of the 2011 DRMS
16 report as an exhibit to its Part 1B case-in-chief. The relevant information has already
17 been submitted as part of SJREC's case-in-chief, and it is therefore unreasonable and
18 oppressive for SJREC to require a DWR to attend and testify about the contents of these
19 reports.
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23 ¹ The Operations panel testified on direct and was cross examined on August 10-12 and 18-19.
24 The Modeling panel testified on direct and was cross examined on August 23-26. Transcripts of the
25 hearing are available here:
[http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/transcript
s.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/transcript_s.shtml).

26 ² Available here: <http://www.water.ca.gov/floodsafe/fessro/levees/drms/>.

27 ³ Available here: [http://baydeltaconservationplan.com/RDEIRS/Ap_A_Rev_DEIR-
S/06_SurfWater.pdf](http://baydeltaconservationplan.com/RDEIRS/Ap_A_Rev_DEIR-S/06_SurfWater.pdf).

28 ⁴ Available here: [http://deltacouncil.ca.gov/sites/default/files/2015/01/15-
0109_Levee_Investment_Strategy_Issue_Paper.pdf](http://deltacouncil.ca.gov/sites/default/files/2015/01/15-0109_Levee_Investment_Strategy_Issue_Paper.pdf).

1 **C. Opinions about the reasonableness of funding for levees and future**
2 **occurrences of levee failures in the Delta.**

3 SJREC's questions about levee safety and funding for levee programs, if they
4 pertained to CWF, are covered in Chapter 6 of the 2013 DEIR/DEIS and 2015
5 RDEIR/SDEIS. However, it appears that SJREC's questions apply to programs well
6 outside of CWF. Similar to some of the other issues raised by Protestants, long term
7 levee maintenance improvement and funding is a State issue, and is not limited to CWF
8 or even DWR. The Delta Stewardship Council (DSC) is leading the Delta Levee
9 Investment Strategy (DLIS) effort, specifically flood and levee long term planning and
10 funding. Again the DSC programs are outside the scope of this hearing. Information
11 about levee safety and funding is found in documents such as DSC's July 2014 DLIS
12 Fact Sheet, DLIS FAQs, and March 24, 2016 DLIS Update and Contract Amendment.
13 (Exhibits E, F & G.) In addition to the DSC's planning efforts regarding Delta levees, the
14 Central Valley Flood Management Planning (CVFMP) Program sets forth a plan for
15 sustainable flood management and investment to improve flood risk management in the
16 Central Valley through use of the State Plan of Flood Control (SPFC) facilities.⁵

17 Further, the engineering panel was cross examined for two full days and included
18 questions about levee safety related to CWF.⁶ SJREC could have had its questions
19 about the reasonableness of funding for levees and future occurrences of levee failures
20 in the Delta addressed at that time. SJREC has not shown that cross examination of
21 DWR's Part 1 witnesses or the information in the publicly available documents are
22 insufficient. It is therefore unreasonable for SJREC to demand an additional DWR

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26 ⁵ More information is available here: <http://www.water.ca.gov/cvfmpl/>.

27 ⁶ The Engineering panel testified on direct and was cross examined on August 5 and 9.
28 Transcripts of the hearing are available here:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/transcripts.shtml.

1 witness to testify on these topics, and it is inappropriate to ask a DWR employee to
2 predict future funding of levee maintenance or improvements as this is a complex state
3 wide policy level decision being led by the DSC and that ultimately depends on the
4 legislature for long-term funding.

5 **III. CONCLUSION**

6 SJREC's possible questions do not require participation from a DWR witness and
7 requiring a DWR witness to testify on these topics would be unreasonable and
8 oppressive. DWR therefore requests that the Hearing Officers vacate SJREC's notice to
9 appear or in the alternative limits the scope of the questioning to those that would not
10 otherwise have been covered by other witnesses, go beyond the scope of Part 1B, or
11 the witness's ability to predict future funding.
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13 Dated: October 27, 2016

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