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24 San Joaquin County Flood Control and
25 Water Conservation District, and
26 Mokelumne River Water and Power Authority

27
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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

HEARING IN THE MATTER OF
CALIFORNIA DEPARTMENT OF WATER
RESOURCES AND UNITED STATES
BUREAU OF RECLAMATION
REQUEST FOR A CHANGE IN POINT OF
DIVERSION FOR CALIFORNIA WATER
FIX

**OPENING STATEMENT OF
PROTESTANTS COUNTY OF SAN
JOAQUIN, SAN JOAQUIN COUNTY
FLOOD CONTROL AND WATER
CONSERVATION DISTRICT, AND THE
MOKELUMNE RIVER WATER AND
POWER AUTHORITY**

1 **I. INTRODUCTION**

2 San Joaquin County is ground zero for the adverse impacts of the current state and
3 federal export projects, and the proposed WaterFix. Rather than “fix” the Delta’s salinity and
4 harmful algal bloom problems - the WaterFix project proposes to remove even more fresh water
5 from the already choked and suffering Delta channels. The County’s case-in-chief, in close
6 coordination with those of other Delta-based protestants, will explain how removing more fresh
7 water from the delicate Delta ecosystem will harm both water users and the environment. We
8 will also explain how the massive construction impacts, slurry walls, and two forty-foot wide, 30-
9 mile long tunnels will leave a lasting scar on the Delta and obstruct groundwater flows for legal
10 users. Finally, we will highlight the statutory protections for the Delta that prohibit these harms
and urge the hearing officers to evaluate what is truly in the public interest.

11 The proposed WaterFix Project would dramatically reduce freshwater flows from the
12 Sacramento River into the largest and most significant estuary on the west coast of the
13 Americas. Yet, Petitioners’ witnesses admitted in their case in chief that they have not analyzed
14 any other project, anywhere in the world, which resulted in substantial reductions of freshwater
15 flows into a large estuary. Equally telling, the Petitioners’ case was largely devoid of argument
16 or evidence as to why the WaterFix is necessary or, on balance, advances the public interest -
17 let alone how the proposed change will avoid injury to legal users of water. Viewed most
18 charitably, Petitioners portrayed the “fix” as allowing only slightly more water exports with a
19 similar level of water quality objective compliance. They evaded the questions about injury to
20 legal users by invoking their projected compliance with D-1641 and the always convenient
21 talisman, adaptive management. As for the unknowns and threats inherent in such a project,
22 their operations witnesses repeatedly assured legal users of Delta water to the following effect:
23 “Trust us; we’ll continue to operate the projects to achieve the same great results for the Delta
24 that we have achieved in recent years.”

25 The County, in coordination with other protestants, will explain why the “fix” seriously
26 threatens the environmental health and utility of the Delta and should not move forward. There
27 are simply not enough potential benefits from this proposed massive construction project to
28 justify its potential harm to San Joaquin County and the larger Delta community.

1 **II. PETITIONERS HAVE NOT MET THEIR BURDEN UNDER WATER CODE**
2 **SECTION 1702**

3 **A. Petitioners have failed to establish no-injury to legal users.**

4 It is not San Joaquin County’s burden to show that the “fix” will injure legal users of water
5 in the County. Rather, Petitioners bear the burden to establish with evidence, such that this
6 Board can find, that the change will not “operate to the injury of any legal user of the water
7 involved.” (Water Code § 1702.) Petitioners failed to do so in their case in chief. Rather than
8 clearly identifying each category of legal user of water that could be impacted by the proposed
9 project (recreational users, diverters, fisherman, etc.) and explaining how they would not be
10 injured, Petitioners presented only cursory and superficial testimony claiming “no adverse
11 effect” to legal users because the SWP and CVP could still meet the existing water quality
12 objectives about as often as they currently do. This is not good enough. Merely predicting that
13 one can meet a water quality objective “most of the time” is not the same as establishing a lack
14 of injury to legal users of water. Further, as will be shown in protestants’ cases in chief,
15 establishing “no injury” requires much more than compliance with water quality standards.

16 Furthermore, by putting the cart before the horse - and holding this hearing prior to re-
17 visiting the Bay-Delta water quality control plan objectives - all of Petitioners’ analysis of how
18 well they can meet the current objectives is essentially meaningless for predicting the impact of
19 operations of the WaterFix in the future - when water quality objectives will be different.

20 County urges the hearing officers to consider, on the record before them at the close of
21 Part 1A of the hearing, whether they have sufficient evidence before them to make the required
22 no-injury findings for Water Code section 1702.¹ If they do not, the hearing officers should
23 suspend the hearings and direct Petitioners, pursuant to Water Code section 1701.3, to present
24 the missing information required to make the necessary findings. Allowing the hearings to
25 proceed to protestants’ cases-in-chief, before petitioners have presented a sufficient no-injury
26 showing, is procedurally improper and highly prejudicial.

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28 ¹ Based on Petitioners’ case in chief to date, the County Protestants anticipate that at the
appropriate time they will bring a formal motion to dismiss the Petition based on Petitioners’
failure to carry their burden of proof. Again, unless and until Petitioners satisfy their burden of
proof, protestants are not required even to present a case in chief.

1 **B. Petitioners’ vague project description evades proper review**

2 Rather than presenting a proposed project operation and conditions of approval,
3 Petitioners’ case-in-chief relied on multiple vague options for their “project definition,” and
4 Petitioners refused to agree to or even suggest any limiting conditions of approval. This lack of
5 specificity has allowed Petitioners to blur the project description and effectively shift the burden
6 of proving “no-injury” to the protestants.

7 The Petitioners’ use of a proposed “adaptive management” to address future difficult
8 years is indicative of this problem. Rather than identifying the projects’ inability to meet required
9 conditions during dry years and proposing concrete methods to avoid injury, Petitioners defer
10 to the vaguely outlined “adaptive management” process. The Delta Science Board has already
11 discredited this facile use of “adaptive management” as little more than an agency excuse to
12 avoid timely and responsible assessment of impacts, alternatives, mitigation, governance and
13 financing before commitment to the project becomes a *fait accompli*.

14 Having failed to make such a clearly defined adaptive management program an
15 “integral” part of the project, Petitioners also cannot qualify the project for consistency with the
16 Delta Plan, since the Delta Reform Act expressly requires such an integration. (See, e.g., E.
17 Biber, *Adaptive Management and the Future of Environmental Law* (2013) 46 AKRON L.R.
18 933; J. Lund, et al., [Adaptive management means never having to say you’re sorry](#); California
19 Water Blog article posted online and available at
20 [http://californiawaterblog.com/2011/07/21/adaptive-management-means-never-having-to-say-
you%E2%80%99re-sorry/.](http://californiawaterblog.com/2011/07/21/adaptive-management-means-never-having-to-say-you%E2%80%99re-sorry/))

21 Indispensable elements of genuine “adaptive management” missing from the project
22 and review include reliable funding and monitoring, independence of data review from
23 institutional tilting, and effective off-ramps. In 2011, the National Research Council reviewed
24 the then-draft BDCP’s use of science and adaptive management. (National Research
25 Council, *A Review of the Use of Science and Adaptive Management in California’s Draft Bay*
26 *Delta Conservation Plan* (National Academy of Sciences, 2011), available at
27 [http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/cmnt0817
28 12/dfg/cdfgnationalresearchcouncil2011.pdf.](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/cmnt081712/dfg/cdfgnationalresearchcouncil2011.pdf))

1 The Council sharply criticized the draft. Among the problems noted:

- 2 • The draft failed to provide a quantitative assessment of “specific hydrological and biological
3 consequences,” including consequent changes in “tributary watersheds, aquifers, demands,
4 risks of levee failure, and ecology of the BDCP plan area.” (NRC *Review*, at p. 27.)
- 5 • The draft did not clearly analyze the feasibility of meeting the Bay-Delta’s future demands, or
6 the tradeoffs between the plan’s co-equal goals (i.e., Delta ecosystem restoration, and a more
7 reliable water supply for California). (*Id.* at p. 28.)
- 8 • The draft expressed concern that built-in requirements would compromise a key condition of
9 adaptive management: that “opportunities for adjustments” remain available. (*Id.* at p. 34.)

10 The council also pointed to research showing than more than a hundred adaptive
11 management efforts have failed due to institutional problems ranging from lack of funding to
12 lack of leadership in implementation. It noted that the aims of adaptive management often
13 conflict with “institutional and political preferences,” such as the preference for known and
14 certain outcomes. (*Id.* at p. 34.) On that point – and at the risk of restating the obvious – any
15 adaptive management plan that lacks robust and independent enforceable safeguards
16 becomes an easy target for “regulatory capture,” the same “fox guarding the henhouse” problem
17 that often afflicts agencies charged with managing valuable public resources.

18 **C. Petitioners’ Change Petition is Procedurally Improper and Seeks to Appropriate**
19 **Water from a Different Source.**

20 The State Board’s Petition for Change Form clearly instructs on page 1 that “*Separate*
21 *Petitions are required for each water right.*” (SWRCB Exh. 1). Yet, Petitioners filed a single
22 petition for change for 15 different water rights - 4 separate DWR permits related to the SWP
23 and 11 separate Bureau permits related to the CVP. Notably, these various permits have
24 different sources of water, and some permits list two different sources of water (Delta Channels
25 and Sacramento River, for example). (SWRCB Exhs. 6-20). Petitioners’ attachment to the
26 single petition indicates they are requesting both a new point of diversion and point of
27 rediversion for all 15 separate permits. However, nothing in the petition describes which source
28

1 of water from which permit will be subject to diversion or rediversion. Despite several questions
2 to this end on cross-examination, none of the Petitioners' witnesses were able to answer this
3 simple threshold question.

4 Yet, Petitioners' operations panel clearly admitted that the source of water currently
5 diverted from the south delta export pumps (Banks and Jones) is different from the source of
6 water the projects would divert at the new north delta intakes - the former being Delta Channel
7 water and the latter being Sacramento River water. Thus, Petitioners are not simply asking the
8 Board to add a new point of diversion to divert the same water they have historically diverted -
9 rather they are asking for a new point of diversion to divert more Sacramento River water than
10 they have ever been able to divert historically. This is a fundamental change to how the CVP
11 and SWP will operate and will impact the entire Delta watershed - occurring a half-century after
12 the original permits were issued and numerous other water rights have been perfected in the
13 same watershed in the meantime. **Petitioners have made no effort to perform a water
14 availability analysis to confirm that the new Sacramento River supply they seek to divert
15 is available and not already relied on by intervening appropriators, riparians or public
16 trust uses.**

17 In sum, the change petition is not a simple change in point of diversion subject to a
18 section 1702 no-injury analysis. Rather, it more closely resembles a new water right.

19 **III. THE WATERFIX RUNS AFOUL OF STATUTORY, COMMON LAW AND STATE**
20 **BOARD POLICY PROTECTIONS FOR THE DELTA.**

21 **A. Reducing Fresh Water Supplies to the Already Imperiled Delta Violates the Delta**
22 **Protection Act (DPA).**

23 The DPA provides substantive protections for the Delta and in-Delta water users:

24 "The Legislature finds that the maintenance of an adequate water supply in the
25 Delta sufficient to *maintain and expand* agriculture, industry, urban, and
26 recreational development in the Delta area . . . and to provide a common source
27 of fresh water for export to areas of water deficiency is necessary to the peace,
28 health, safety and welfare of the people of the State, except that delivery of such
water shall be subject to the provisions of § 10505 and §§ 11460 to 11463,
inclusive, of this code. (Water Code § 12201 [emphasis added].)

1 “Among the functions to be provided by the State Water Resources Development
2 System, in coordination with the activities of the United States in providing salinity
3 control for the Delta through operation of the Federal Central Valley Project, shall
4 be the provision of salinity control and an adequate water supply for the users of
5 water in the Sacramento-San Joaquin Delta.” (Water Code § 12202.)

6 “It is hereby declared to be the policy of the State that no person, corporation or
7 public or private agency or the State or the United States should divert water from
8 the channels of the Sacramento-San Joaquin Delta to which the users within said
9 Delta are entitled.” (Water Code § 12203.)

10 “In determining the availability of water for export from the Sacramento-San
11 Joaquin Delta no water shall be exported which is necessary to meet the
12 requirements of §§12202 and 12203 of this chapter.” (Water Code § 12204.)

13 In 1960, when DWR embarked on the State Water Project, its interpretation of WC 12200
14 et seq. confirmed not only that the project had an obligation to provide water supply and salinity
15 control to the Delta, but also that the diversion of water upstream of the Delta (as proposed now
16 in WaterFix) would make this obligation more difficult:

17 Further increase in water use in areas tributary to the Delta will worsen the salinity
18 incursion problem and complicate the already complex water rights situation. To
19 maintain and expand the economy of the Delta, it will be necessary to provide an
20 adequate supply of good quality water and protect the lands from the effects of
21 salinity intrusion. In 1959 the State Legislature directed that *water shall not be
22 diverted from the Delta for use elsewhere unless adequate supplies for the Delta
23 are first provided.*

24 (December 1960 Bulletin 76, DWR Report to the Legislature pg. 12 – at l246). DWR’s
25 interpretation was confirmed by the judiciary in 1986. (*United States v. SWRCB* (1986) 182
26 Cal.App.3d 82, 139 (“Racanelli”) [emphasis added].)

27 The DPA recognizes “the importance of providing salinity control and an adequate water
28 supply in the Delta to serve dual goals: (1) maintaining and expanding agriculture, industry,
urban, and recreational development in the Delta; and (2) providing fresh water for export to
areas of water deficiency.” (*SWRCB Cases* (2006) 136 Cal.App.4th 674, 768; *see also* Water
Code, § 12201.) Importantly, the Third District Court of Appeal recognized that “[a]s between
these two goals, however, the Delta Protection Act gives preference to the first,” i.e., provision
of water supply for the Delta. (*SWRCB Cases, supra*, at p. 768.)

1 The Petitioners' case in chief admits that the proposed project will reduce the amount of
2 fresher Sacramento River water that flows through the Delta and that the hydrodynamics of the
3 Delta will force this reduction in fresh flow to be replaced with lower quality water from other
4 tributaries and the bay, brought in with the tide. The DPA does not allow the projects to increase
5 the export of water from the Delta, as proposed, at the expense of the Delta. On this point, the
6 statute could not be clearer, nor could Petitioners' proposed violation of the statute be clearer.

7 **B. The WaterFix is Inconsistent with Other Area of Origin Protections.**

8 Area of origin protections ensure that protected areas are not deprived of adequate
9 supplies of water, directly or indirectly, by a water supplier exporting or intending to export water
10 for use outside a protected area. The Watershed Protection Act, at Water Code § 11460, applies
11 this protective mandate to Petitioners in the operation of the CVP and SWP:

12 In the construction and operation by the department of any project under the
13 provisions of this part a watershed or area wherein water originates, or an area
14 immediately adjacent thereto which can conveniently be supplied with water
15 therefrom, shall not be deprived by the department directly or indirectly of the prior
16 right to all of the water reasonably required to adequately supply the beneficial
17 needs of the watershed, area, or any of the inhabitants or property owners therein.

18 (Water Code § 11460).

19 Notably, this protection extends to all of the beneficial needs of the watershed area, its
20 inhabitants and property owners. Thus, the residents and visitors of San Joaquin County who
21 fish, swim and recreate in the channels of the Delta enjoy this protection as well as any diverter
22 of water from the Delta. As Petitioners admitted in their case, and as County and others will
23 establish in their cases, the WaterFix will remove the fresher Sacramento River water from the
24 Delta channels in a manner that causes increased water quality problems as well as additional
25 risk of harmful algal blooms ("HABs").

26 **C. The WaterFix Project Fails to Comply with the 2009 Delta Reform Act.**

27 The Legislature preserved and reaffirmed the area of origin and Delta protections in
28 the 2009 Delta Reform Act:

1 This division does not diminish, impair, or otherwise affect in any manner
2 whatsoever any area of origin, watershed of origin, county of origin, or any other
3 water rights protections, including, but not limited to, rights to water appropriated
4 prior to December 19, 1914, provided under the law.

4 (Water Code § 85031(a).)

5 Section 85031(a) is consistent with section 85021 of the Delta Reform Act, in which the
6 Legislature recognized the damage inflicted by excessive water diversions, and the critical need
7 to reduce reliance on the Delta, declaring:

8 The policy of the State of California is to reduce reliance on the Delta in meeting
9 California's future water supply needs through a statewide strategy of investing in
10 improved regional supplies, conservation, and water use efficiency. *Each region
11 that depends on water from the Delta watershed shall improve its regional self-
12 reliance for water through investment in water use efficiency, water recycling,
13 advanced water technologies, local and regional water supply projects, and
14 improved regional coordination of local and regional water supply efforts.*

12 (Water Code § 85021 [emphasis added].)

13 Glaringly missing from Petitioners' case in chief is an explanation as to why the WaterFix
14 Project is needed to create additional export supply reliability over and above the mandates for
15 alternative supply reliability options outlined in Section 85021 of the Delta Reform Act.

16 **D. The WaterFix Violates the State Board's Anti-Degradation Policy.**

17 This Board's own "Statement of Policy with Respect to Maintaining High Quality Waters
18 in California" (Resolution No. 68-16) is impacted by the WaterFix proposal. The project
19 proposes to export more fresh water out of the Delta before it flows through the estuary. These
20 increased diversions will reduce the assimilative capacity of the remaining freshwater flows in
21 the Delta. As a result, the Board must evaluate whether approving the proposal to export up to
22 9,000 cfs of fresh Sacramento River water from the Delta is consistent with the policy in
23 Resolution No. 68-16.

24 Petitioners' case-in-chief did not address the degradation of water quality in the Delta
25 that will result from the WaterFix. Instead, Petitioners focused on whether or not the degradation
26 resulting from the project will be so severe that it will violate water quality standards. This is
27 inconsistent with the anti-degradation policy. If it is the policy of this Board to protect high quality
28 waters from degradation, all degradation of high quality water should be considered— even if it

1 does not rise to the level of a water quality objective violation. Again, the standard governing
2 this proceeding is the “no injury” standard, which entails far more than simply promising future
3 compliance with D-1641 or other water quality standards.

4 **E. The Public Trust Doctrine Prevents Approval of the WaterFix Petition.**

5 The Board must weigh and balance the public trust doctrine in each of its decisions,
6 including this petition. The legislature emphasized the public trust doctrine as the foundation
7 of state water management policy for the Delta in the 2009 Delta Reform Act. (Water Code §
8 85023.) The public trust doctrine requires the state, in its duty as trustee of the public trust
9 resources, to consider the effect of each taking on the public trust, and to preserve, so far as
10 consistent with the public interest, the uses protected by the trust. (*National Audubon v.*
11 *Superior Court* (1983) 33 Cal.3d 419, 447.)

12 Here, petitioners seek a significant taking of public trust resources – up to 9,000 cfs of
13 the freshest tributary flow into the imperiled Sacramento-San Joaquin Delta – in exchange for
14 a potential increase in the “reliability” of deliveries to southern California export interests. While
15 we recognize that public trust issues will become center stage considerations in Part 2, the
16 public trust concerns also go to the protection of public trust resources for legal users of water
17 in the Delta. The San Joaquin County Protestants urge this Board to critically evaluate the
18 public trust implications of this request. Wedo not allege that municipal and industrial use of
19 water in Los Angeles, or irrigation of almond trees in Westlands Water District, is wasteful or
20 unreasonable. Rather, the the San Joaquin County Protestants allege that under the WaterFix
21 proposal these uses come at the expense of another region – the Delta. We urge the Board to
22 carefully review the exact demand for this export water – is it necessary for a current beneficial
23 use that cannot be served from another source or through conservation? If not, then this Board,
24 as trustee of an invaluable public trust resource, the Delta, cannot agree to a further degradation
25 of the resource.
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1 **IV. The County’s Case-in-Chief Testimony: WATERFIX WILL ADVERSELY**
2 **IMPACT LEGAL USERS OF WATER, THE ENVIRONMENT and the**
3 **ECONOMY IN SAN JOAQUIN COUNTY.**

4 San Joaquin County will coordinate the presentation of its case-in-chief testimony with
5 Protestants South Delta Water Agency, Central Delta Water Agency, LAND, and other Delta
6 interests through panels of witnesses. The following generally outlines the subject matter of
7 this testimony.

8 **A. By Substantially Reducing the Sacramento River’s Freshwater Flows Through the**
9 **Delta, the WaterFix Project Will Increase the Conditions in which Harmful Algal**
10 **Blooms Develop and Flourish.**

11 The County, in coordination with other protestants, will present the testimony of Erik
12 Ringelberg, an expert in watershed ecology and microbiology, and the testimony of Linda
13 Turkatte, San Joaquin County’s Director of Environmental Health.² These witnesses will explain
14 the challenges the County currently faces due to harmful algal blooms (“HABs”) and the
15 increased threat of injury to legal users of water from HABs (and the resulting neurotoxin,
16 *microcystis*) that will result from the proposed WaterFix project’s reduced fresh water flows
17 through the Delta.

18 Residents and visitors in San Joaquin County use the Delta for fishing, swimming and a
19 variety of recreational activities, in addition to diversion of water for agricultural and M&I uses.
20 HABs directly impact the continued use of the waters of the Delta channels for these purposes.
21 The proposed increase in diversions of fresher Sacramento River flows from the Delta, as part
22 of the proposed project, will exacerbate the conditions that cause HABs to form and thrive –
23 significantly increasing the injury to legal users of water in San Joaquin County.

24 **B. The Proposed Slurry Walls and the Tunnels Themselves Are Likely to Interfere**
25 **with Groundwater Flows in San Joaquin County.**

26 The County, in coordination with other protestants, will present the testimony of Josef
27 Tootle and Robert Pyke.³ Mr. Tootle and Mr. Pyke are registered civil engineers who have
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26 ² Consistent with the above-noted efforts to achieve efficiencies through coordination with
27 other protestants, the NOI amendments to be submitted will show that the testimony of Mr.
28 Ringelberg and Ms. Turkatte will be presented on behalf of the San Joaquin County
Protestants and other protestants as well.

³ Again, this testimony is being coordinated with other protestants, most notably the LAND

1 reviewed and analyzed the physical impacts caused by construction of the tunnels on lands,
2 levees and groundwater basins within San Joaquin County and other locations in the Delta.

3 As proposed, the massive slurry walls – underground barriers driven deep into the
4 ground to facilitate construction of the tunnels – will be left in place. These walls are literally
5 used to block the flow of water. The combined effect of the abandoned slurry walls, and the
6 sheer obstructive nature of the forty-foot diameter tunnels, located 100 feet or more below
7 ground and stretching for many miles, is likely to impede the flow of natural groundwater to legal
8 users of groundwater in the area.

9 Mr. Tootle will testify that the Petitioners failed to perform an adequate analysis of the
10 impacts to legal users of groundwater located near the proposed forebay and tunnel sites. For
11 example, Mr. Tootle will testify that the Petitioners’ “no injury” analysis relies on their claim that
12 groundwater will simply move around the slurry wall. However, this claim relies on the
13 assumption that the subsurface soils surrounding the slurry wall are homogenous, uniformly
14 permitting the movement of water, and that there are no other natural barrier to groundwater
15 flow near the wall. Not only is the Petitioner’s assumption that Delta soils uniformly facilitate the
16 free flow of water completely unsubstantiated, it is contrary to previous geological studies which
17 have demonstrated that near-surface soil deposits in the Delta are a complex heterogeneous
18 mixture. Even extensive geotechnical explorations, which were not conducted, could easily
19 miss significant variations in subsurface geology that would impact aquifer connectivity.

20 Given the complex and sensitive nature of groundwater flow patterns and their critical
21 importance to legal users of water in the Delta, the potential for injury resulting from the
22 proposed use of a permanent slurry wall is very high and has not been adequately addressed
23 before the Board.

24 **C. As Proposed, the WaterFix Project Does Not Adequately Address the Likely
25 Injuries Resulting from Efforts to Dispose of the Spoils.**

26 Mr. Tootle will address the potential injury that will result from the disposal of spoil
27 materials on lands adjacent to waterways and overlying groundwater basins. The Petitioners

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protestants, as reflected in the amended LAND NOI.

1 estimate that 45.4 million cubic yards of spoil material will be produced as a result of the project.
2 If this soil were spread at a height of one foot, which may be necessary to permit drying and
3 conditioning of the material for storage, then it would occupy 44 square miles.

4 Despite the staggering amount of material that would need to be stored above ground,
5 the Petitioners have not analyzed the potential impacts to legal users of water related to run-off
6 from spoils sites, water quality impacts to groundwater, and disruption of surface run-off
7 patterns. Furthermore, the Petitioners did not address whether or not their proposed stockpile
8 locations will be equipped with a base liner, which would prevent water from infiltrating into the
9 soil, or if they will be unlined, causing groundwater mounding.

10 **D. As Proposed, the Tunneling Activities Pose a Significant Risk of Ground Loss,**
11 **with Potentially Catastrophic Impacts on Levees and Islands.**

12 Finally, Mr. Toole will describe how the Petitioner's analysis of the potential impacts to
13 water users on Delta islands is incomplete in light of the significant risk that subsurface boring
14 activities will result in levee failures. The two tunnels, which will be over forty feet in diameter,
15 are being constructed underneath a series of islands that sit as much as 15 feet below sea
16 level. If there is any damage to the levees surrounding these islands as a result of the tunnel
17 boring process, such as a levee breach, then those subsided islands would be 15 feet below
18 water.

19 The Petitioners' direct testimony supporting this Petition recognizes that tunnel boring
20 activities could damage levee foundations, resulting in catastrophic levee failure. (Exh. DWR-
21 57, p. 26, lines 21-23.) However, the Petition fails to address measures that would be taken to
22 prevent or avoid these harms. Furthermore, should a Delta island actually flood due to
23 Petitioners' activities, no amount of mitigation would ever repair the injury to legal users of water.
24 The most obvious impact would be to water rights holders located on the flooded island.
25 Additionally, a flooded island would cause salt water intrusion, preventing diversions by a large
26 number of water users in the Delta, including exporters. The increased hydrostatic head
27 created by a flooded island also presents a serious threat to nearby islands, a problem DWR
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1 itself is currently attempting to address in its Prospect Island project, as the proposed flooding
2 of much of the island threatens nearby Ryer Island.

3 **E. The WaterFix Project Is Likely to Inflict Significant Injury to Delta Agriculture and**
4 **Related Economies.**

5 County will join will other protestants in presenting the testimony of University of the
6 Pacific Economist Jeff Michael on the economics of the WaterFix project. Professor Michael will
7 detail the economic injury to agriculture in the Delta as a result of reduced water quality caused
8 by the WaterFix diversions, even if the CVP and SWP are able to operate to meet the D-1641
9 standards.⁴ Specifically, Michael will explain how a modest increase in average salinity of 1.1%
10 is estimated to result in a \$1.8 million decrease in Delta crop revenue due to the need to shift
11 to lower-value, but more salt tolerant, crops over time. Larger increases in salinity are predicted
12 to have even larger crop revenue impacts. Professor Michael will also explain how reductions
13 in Delta crop revenue has ripple effects in the Delta economy.

14 **F. The WaterFix Project Is Likely to Adversely Impact Delta Levee Systems and**
15 **Tourism**

16 Professor Michael will also testify regarding his work on the Delta Protection
17 Commissions' Economic Sustainability Plan for the Delta. Professor Michael will explain how
18 the WaterFix project can lead to reduced investment in Delta levees, increasing risk of
19 catastrophe to Delta communities. Professor Michael will also explain the importance of tourism
20 and recreation on the Delta economy, especially in San Joaquin County, and detail the impact
21 of the WaterFix on this industry.

22 **G. As Proposed, the WaterFix Project Is Not Economically Feasible, Which Casts an**
23 **Unacceptable Pall of Uncertainty Over Petitioners' Assurances of Compliance with**
24 **Standards Essential to Avoid Injury.**

25 Finally, Professor Michael will explain why the WaterFix is not economically feasible and
26 how this lack of feasibility creates a corresponding lack of credibility for the project's assurances
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28 ⁴ Professor Michael's Written Testimony and related exhibits have been uploaded to the FTP for protestants South Delta Water Agency and Central Delta Water Agency.

1 of no-injury to protestants. Petitioners have asked this Board to approve the WaterFix project,
2 **as proposed, with its supposed safeguards and promised water quality compliance**
3 **measures.** Yet, given the economic infeasibility of the project, the project that would actually
4 be delivered is likely to be very different from the *proposed* project. Economic feasibility, in
5 short, is not merely a political or accounting issue: it goes directly to the question of whether
6 the proposed project is likely to result in injury to legal users of water and whether it would be
7 in the public interest to approve the project.

8 **V. CONCLUSION**

9 This statement presents only an overview of the legal arguments and testimony the
10 County will present as part of this process, should the proceeding continue into Part 2 as
11 currently scheduled. As noted in section II. A. above, the County urges the Hearing Officers
12 to evaluate whether or not the Petitioners have satisfied their burden under Water Code
13 section 1702, and whether this project is truly merely a petition for change subject to section
14 1702, before proceeding with Part 1B of the hearing. County contends that Petitioners have
15 not satisfied either condition. The hearing officers should direct Petitioners to reframe and
16 substantiate their request for change before proceeding.

17 Respectfully submitted,

18 Dated: September 1, 2016

19 **FREEMAN FIRM,**

20 By: 
21 THOMAS H. KEELING

22 Dated: September 1, 2016

23 **SPALETTA LAW PC,**

24 By: 
25 JENNIFER L. SPALETTA