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## State Water Resources Control Board

March 16, 2018

VIA ELECTRONIC MAIL

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### **CALIFORNIA WATERFIX HEARING – RULING ON CONTESTED SUBPOENAS**

This ruling addresses a February 14, 2018 subpoena duces tecum (subpoena) served by Restore the Delta (RTD) on the California Department of Water Resources (DWR) and a March 2, 2018 subpoena served by Pacific Coast Federation of Fishermen's Associations (PCFFA) and the Institute for Fisheries Resources (IFR) on the California Department of Fish and Wildlife (CDFW).

#### **RTD's Subpoena**

RTD's subpoena would require DWR to produce several categories of documents related to a potential 6,000 cubic feet per second (cfs), single-tunnel alternative to the WaterFix Project or a version of the WaterFix Project implemented in stages. DWR filed a motion to quash RTD's subpoena on March 2, 2018, based on our February 21, 2018 ruling providing that issues related to staged implementation of the WaterFix Project would be addressed in a potential Part 3 of the hearing that we would convene if necessary. For the reasons provided in that ruling, the documents described in RTD's subpoena are not relevant to Part 2 of this hearing. Therefore, we do not find it appropriate to require production of those documents at this time.

However, we find that some or all of the documents described in RTD's subpoena likely would be relevant to a potential Part 3 as described in our February 21, 2018 ruling. We note that, should we convene such a Part 3, RTD and other protestants would have limited time during which to serve subpoenas on Petitioners, resolve any resulting disputes that may arise, obtain responsive documents from Petitioners, and review and synthesize that information into their participation in Part 3.

We hereby deny DWR's motion to quash but toll the due date for responses to RTD's subpoena until a future date that we will establish in the event that we either decide to conduct a Part 3 in this hearing or require those documents to decide whether to proceed with a Part 3. We expect DWR to facilitate prompt production of those documents by starting to compile them early.

#### **PCFFA's Subpoena**

PCFFA's subpoena requests certain categories of documents, communications, and electronic materials under CDFW's control related to the following topics:

1. Any changes to the WaterFix Project since the Incidental Take Permit for the WaterFix Project was signed on July 27, 2017

2. The WaterFix Project's compliance with the California and federal Endangered Species Acts (CESA and ESA, respectively), and the State Water Project's (SWP) and Central Valley Project's (CVP) compliance with CESA and ESA, since July 27, 2017
3. Re-initiation of consultation on the coordinated long-term operation of the SWP and CVP since a Memorandum of Understanding for the re-initiation of consultation was signed on December 21, 2016
4. Communications between CDFW and the U.S. Bureau of Reclamation concerning re-initiation of consultation on the coordinated long-term operation of the SWP and CVP since July 27, 2017
5. Communications between CDFW and DWR concerning re-initiation of consultation on the coordinated long-term operation of the SWP and CVP since July 27, 2017
6. Materials shared between CDFW and the State Water Board regarding the WaterFix change petition hearing, the WaterFix Project, or State Water Resources Control Board (State Water Board) permit terms for the SWP and CVP, since the water right change petition was filed on August 26, 2015
7. Communications related to withdrawal of CDFW as a party to the WaterFix water right change petition hearing

On March 6, 2018, CDFW moved for a protective order limiting the scope of the portions of the subpoena reflected in 2 and 6, above, that pertain to the SWP and CVP in general. CDFW argues that, because they pertain to the SWP and CVP generally rather than to proposed changes associated with the WaterFix Project, specifically, these parts of the subpoena describe a broad category of documents that are overly burdensome to produce and not relevant<sup>1</sup> to our present water right hearing. CDFW alleged that the request for documents concerning SWP and CVP compliance with CESA and ESA, in particular, "encompasses a very wider range of issues, crossing multiple programs and CDFW offices . . . ." CDFW further moved to quash the subpoena's direction that it provide a privilege log cataloguing any withheld documents and the applicable privilege supporting that non-disclosure. PCFFA and other parties have opposed CDFW's motion on the grounds that these portions of the subpoena are likely to result in the production of documents relevant to establishing a baseline against which to evaluate potential conditions for the WaterFix Project for the protection of fish, wildlife, and recreation uses.

We agree with PCFFA and the other parties opposing CDFW's motion that the two contested categories of subpoenaed materials are relevant to Part 2 of this proceeding. The SWP's and CVP's compliance with CESA and ESA under existing conditions is indeed relevant to establishing a baseline to inform the State Water Board's determination of whether incremental changes from the WaterFix Project will unreasonably affect fish, wildlife, or recreation uses. Additionally, as the Natural Resources Defense Council's joinder points out, Petitioners opened the door to this type of evidence when they framed claims that the WaterFix Project would be reasonably protective of certain public trust resources in terms of incremental impacts as compared to existing conditions.

It is unclear, however, how broad or burdensome production of the documents described in categories 2 and 6, above, would be, or whether the potential exists to narrow the scope of PCFFA's requests.

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<sup>1</sup> CDFW's statement that, "[a]s a non-party to these proceedings, CDFW does not provide any argument or opinion as to the relevance" of materials described in the subpoena is belied by the previous paragraph's argument that "[n]othing in [PCFFA's subpoena] appears to relate to the relevance or necessity of permit terms currently or formerly applicable to the SWP and CVP, in the absence of the [WaterFix] Project." CDFW Mot. for Prot. Order, p. 4.

Accordingly, PCFFA and CDFW are directed to meet and confer to discuss the scope of potentially responsive documents in categories 2 and 6, and whether they can agree to exclude any subcategories of documents from production. If, after meeting, the parties are unable to resolve their dispute, CDFW may renew its motion to quash PCFFA's subpoena for documents in categories 2 and 6, and we will rule on CDFW's motion.

With respect to PCFFA's request for a privilege log, we find it reasonable, for the sake of transparency, for CDFW to prepare a written record reflecting any applicable privileges it invokes to withhold materials otherwise responsive to PCFFA's subpoena. Such a written record need not necessarily conform to the requirements of a privilege log as that term is used in the California Code of Civil Procedure, but it should identify the general nature of documents withheld and the applicable privilege that justifies non-disclosure.

If you have any non-controversial, procedural questions about this ruling or other matters related to the California WaterFix Hearing, please contact the hearing team at [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov) or (916) 319-0960.

Sincerely,

*ORIGINAL SIGNED BY*

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Felicia Marcus, State Water Board Chair  
WaterFix Project Co-Hearing Officer

*ORIGINAL SIGNED BY*

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Tam M. Doduc, State Water Board Member  
WaterFix Project Co-Hearing Officer