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20 SUPERIOR COURT OF CALIFORNIA

21 COUNTY OF SACRAMENTO

22 COUNTY OF SACRAMENTO;  
23 SACRAMENTO COUNTY WATER AGENCY;  
24 CITY OF STOCKTON; COUNTY OF SAN  
25 JOAQUIN; LOCAL AGENCIES OF THE  
26 NORTH DELTA; CITY OF ANTIOCH;  
27 COUNTY OF YOLO; COUNTY OF CONTRA  
28 COSTA AND CONTRA COSTA COUNTY  
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SOUTH DELTA WATER AGENCY;  
CALIFORNIA SPORTFISHING PROTECTION  
ALLIANCE; CALIFORNIA WATER IMPACT  
NETWORK; AND AQUALLIANCE,

Petitioners/Plaintiffs,

v.

STATE WATER RESOURCES CONTROL  
BOARD and DOES 1-20,

Respondent/Defendants.

CALIFORNIA DEPARTMENT OF WATER  
RESOURCES; UNITED STATES BUREAU OF  
RECLAMATION

Real Parties in Interest

**EXEMPT FROM FILING FEES  
PURSUANT TO GOV. CODE § 6103**  
Superior Court Of California,  
Sacramento  
02/27/2018  
Importanza  
By \_\_\_\_\_, Deputy  
Case Number:  
34-2018-80002812

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INTRODUCTION

1  
2 1. Petitioners/Plaintiffs County of Sacramento et al. (Petitioners/Plaintiffs) seek relief  
3 from the unlawful conduct of members of the State Water Resources Control Board (State Water  
4 Board) Hearing Team, staff and counsel of the Department of Water Resources (DWR), and staff  
5 of the United States Bureau of Reclamation (USBR), which is occurring during the State Water  
6 Board's ongoing quasi-judicial evidentiary hearing (Hearing) on DWR and USBR's joint petition  
7 for change in water rights (Change Petition) to implement the project known as the California  
8 WaterFix (WaterFix Project). The WaterFix Project is a massive water diversion and delivery  
9 project through which DWR and the USBR would divert a substantial amount of water from the  
10 Sacramento River in the northern Sacramento-San Joaquin River Delta near Clarksburg and  
11 convey that water south through twin tunnels for use in Southern California, the San Joaquin  
12 Valley, and parts of the San Francisco Bay Area. In doing so, the WaterFix Project will cause  
13 significant injury to Petitioners/Plaintiffs as legal users of water and to the environment. The  
14 scope of such injury is a key issue before the State Water Board in the Hearing, in which it is  
15 DWR and USBR's obligation to demonstrate, with evidence, that the WaterFix Project will not  
16 injure legal users of water or unreasonably affect the environment or public trust resources, and is  
17 otherwise in the public interest.

18 2. Evidence revealed in response to a recent request under the Public Records Act  
19 (PRA) demonstrates deliberate obstruction, and possible collusion, by DWR, USBR, and Hearing  
20 Team members and counsel, in shaping evidence at issue in the Hearing, through a series of  
21 unlawful ex parte communications stretching back to the beginning of the Change Petition  
22 proceedings in 2015.

23 3. The constitutional, statutory and rule violations apparent from the limited  
24 information disclosed to date by the State Water Board have created an appearance of bias so  
25 compelling as to demonstrate Petitioners'/Plaintiffs' inability to receive a fair hearing in this  
26 proceeding, in which the water supplies and property rights of millions of Northern California  
27 residents, and the environment, are at stake.

28 4. The Change Petition Hearing is the largest and most significant water rights

1 proceeding in the history of the State of California. The State Water Board's conduct threatens  
2 both the water supplies and property rights of millions of citizens, the environment, and the public  
3 interest. Petitioners/Plaintiffs, and dozens of other parties, are forced to expend substantial  
4 resources, in legal and expert witness fees, and public agency personnel time, to protect their  
5 property rights, which are at significant risk due to the State Water Board staff's unlawful  
6 conduct. The amount of public resources at stake, both in terms of time and money, is too  
7 significant to proceed without judicial intervention.

8 5. Petitioners/Plaintiffs have no adequate administrative remedy and will suffer  
9 irreparable injury if this Court does not immediately intervene and issue an order staying the  
10 Change Petition Hearing until such time as State Water Board complies with due process  
11 requirements under the Constitution, the Administrative Procedure Act (APA), and its own rules.

## 12 BACKGROUND

### 13 *The California WaterFix Project*

14 The WaterFix Project is one of the largest public works projects ever proposed in  
15 California, rivaling the California Aqueduct and Shasta Dam and, if constructed, would be the  
16 most expensive water-related project in the history of California. The WaterFix Project  
17 contemplates the construction of three new intakes in the North Delta and two 40-foot diameter  
18 tunnels to convey water from the Sacramento River directly to the South Delta for export. The  
19 three new intakes would be built on the east side of the Sacramento River, in Sacramento County,  
20 between Clarksburg and Courtland. The intakes would be capable of diverting up to a third of the  
21 flow of the Sacramento River for conveyance south to the Clifton Court Forebay in the South  
22 Delta. Using the existing state and federal pumping plants, water would then be exported from  
23 the Delta for use in the Bay Area, San Joaquin Valley and Southern California. Unprecedented in  
24 size and scope, the project requires the reoperation of state and federal water storage and delivery  
25 facilities, substantially changing how water flows in and through the Delta.

### 26 *Environmental Review of the California WaterFix Project*

27 6. In order to approve the WaterFix Project, DWR and USBR, as "lead agencies,"  
28 were required to evaluate the project's environmental impacts pursuant to the California

1 Environmental Quality Act (CEQA) and National Environmental Policy Act, respectively. In  
2 2013, DWR and USBR issued a Draft Environmental Impact Report/Environmental Impact  
3 Statement (DEIR/EIS) for the Bay Delta Conservation Plan (BDCP).

4 7. In 2015, following comments from federal resource agencies indicating the BDCP  
5 would not meet the requirements for species protection as a habitat conservation plan under the  
6 federal Endangered Species Act (ESA), the BDCP was divided into two separate components: the  
7 WaterFix Project and California EcoRestore. In July of 2015, DWR and USBR issued the Bay  
8 Delta Conservation Plan/California WaterFix Partially Recirculated Draft Environmental Impact  
9 Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS).

10 8. The RDEIR/SDEIS describes preferred project Alternative 4A as the WaterFix  
11 Project, which includes water conveyance facilities consisting of three new water diversion  
12 intakes along the Sacramento River between Clarksburg and Courtland and two 30-mile-long, 40-  
13 foot-diameter tunnels to convey water to existing pumping facilities near Tracy, California.

14 9. In December of 2016, DWR and USBR issued the Bay Delta Conservation  
15 Plan/California WaterFix Final Environmental Impact Report/Environmental Impact Statement  
16 (FEIR/EIS) for the WaterFix Project and accepted comments.

17 10. On July 21, 2017, DWR certified the Final Environmental Impact Report  
18 (Certified EIR) for the WaterFix Project and approved the WaterFix Project.

19 11. CEQA requires the State Water Board, as a responsible agency with jurisdiction  
20 over the water rights and water quality in the Bay-Delta, to consider the environmental effects of  
21 the WaterFix Project identified in the Certified EIR prior to reaching a decision on whether and  
22 under what conditions to approve the Change Petition. To approve the Change Petition, the State  
23 Water Board must determine that the project will not cause "injury" to any other legal user of  
24 water, or result in unreasonable harm to fish, wildlife or other public trust resources. (Wat. Code,  
25 § 1702.)

26 12. To the extent feasible, the State Water Board is responsible for mitigating or  
27 avoiding significant environmental impacts identified in the resource areas within the State Water  
28 Board's jurisdiction, specifically for the water right petition components of the WaterFix Project.

1 (Cal. Code Regs., tit. 14, § 15096.)

2 13. When considering the Change Petition, the State Water Board must make  
3 independent findings concerning significant environmental effects within the State Water Board's  
4 jurisdiction, and may require additional or different mitigation measures for impacts in those  
5 resource areas.

6 14. State Water Board staff consulted with DWR during preparation of the DEIR/EIS,  
7 RDEIR/SDEIS, and FEIR/EIS, and provided extensive comments on various drafts. State Water  
8 Board staff raised the issue of whether the DEIR/EIS, RDEIR/SDEIS, and FEIR/EIS evaluated a  
9 range of operational scenarios that would be adequate for the State Water Board's decision  
10 whether and under what conditions to approve the Change Petition. In response, DWR included  
11 "Alternative 8" in the DEIR/EIS released in 2013. Finding that Alternative 8 did not avoid  
12 impacts to fish and upstream water users, State Water Board staff, prior to the release of the  
13 RDEIR/SDEIS in 2015, requested that DWR and USBR develop and evaluate a WaterFix Project  
14 operational scenario that maximizes Delta outflows without adverse consequences to fishery  
15 resources in upstream tributaries or impacts to upstream reservoirs. Supplemental modeling of  
16 this scenario, known as the "State Water Board Staff Scenario" is contained in Appendix C to the  
17 RDEIR/SDEIS. Additional modeling of a revised version of the State Water Board Staff  
18 Scenario (referred to as Staff Scenario 2) is contained in Appendix 5E of the Certified EIR.

19 15. The resource impact analyses in the RDEIR/SDEIS, FEIR/EIS, and Certified EIR  
20 have been informed by extensive hydrologic, hydrodynamic and biological modeling.

21 ***Change Petition Hearing-Ex Parte Communications***

22 16. Despite the fact that environmental review of the WaterFix Project was not close  
23 to complete, on August 26, 2015, DWR and USBR filed the Change Petition with the State Water  
24 Board.

25 17. In response to the Change Petition, letters from interested parties criticizing the  
26 Change Petition began pouring in on August 31, 2015.

27 18. DWR and the USBR filed an addendum and errata to the Change Petition on  
28 September 16, 2015.



1           19.     On October 30, 2015, the State Water Board filed a Notice of Petition for the  
2 WaterFix Project and Notice of Public Hearing and Pre-Hearing Conference to Consider the  
3 Petition (Hearing Notice) on October 30, 2015.

4           20.     The Hearing Notice appoints State Water Board Chair Felicia Marcus and Member  
5 Tam Doduc as the Hearing Officers to preside over the Change Petition Hearing. The Hearing  
6 Notice further appoints Dana Heinrich, Staff Attorney IV; Diane Riddle, Environmental Program  
7 Manager; Rich Satkowski, Senior Water Resource Control Engineer; John Gerlach, Senior  
8 Environmental Scientist; Michael Buckman; Kenneth Emanuel; Thaddeus Hunt; Kevin Long;  
9 Steve Marquez; and Jean McCue as the “Hearing Team,” which assists the Hearing Officers by  
10 providing legal and technical advice during the Hearing and in the development of the Hearing  
11 Officers’ final order on the Change Petition. This list is not exhaustive, as additional State Water  
12 Board staff have been and may be assigned to the Hearing Team as the Change Petition Hearing  
13 progresses.

14           21.     The Hearing Notice states, “During the pendency of this proceeding, commencing  
15 no later than issuance of the Notice of Hearing, there shall be no ex parte communications with  
16 State Water Board members or State Water Board hearing team staff and supervisors, regarding  
17 substantive or controversial procedural issues within the scope of the proceeding. (Gov. Code, §§  
18 11430.10-11430.80.) **Any communications regarding potentially substantive or**  
19 **controversial procedural matters, including but not limited to evidence, briefs, and motions,**  
20 **must demonstrate that all parties were served and the manner of service. . . .**” (emphasis in  
21 original). Similar prohibitions regarding ex parte communications are included in subsequent  
22 notices issued by the State Water Board.

23           22.     An “ex parte communication” is a prohibited communication between a party to an  
24 administrative proceeding and a presiding officer in that proceeding. (See Gov. Code, §§  
25 11405.80, 11430.10.)

26           23.     Over fifty parties, including cities, counties, urban and agricultural water suppliers,  
27 individuals, and environmental groups, submitted protests to the Change Petition on the grounds  
28 that the WaterFix Project will injure legal users of water, the environment and public trust

1 resources, and is not in the public interest. Those parties, including Petitioners/Plaintiffs, are  
2 participating in the Change Petition Hearing, a quasi-judicial evidentiary hearing before the State  
3 Water Board Hearing Officers and Hearing Team to determine whether the Change Petition  
4 should be granted.

5 24. Per the Hearing Notice, the Change Petition Hearing is being conducted in two  
6 Parts. Part 1 concerned the potential effects of the Change Petition on other legal users of water.  
7 Part 1 of the Change Petition Hearing began on July 26, 2016 and proceeded through July 2017.  
8 Part 2 concerns the potential effects of the Change Petition on fish, wildlife, recreational uses of  
9 water, as well as the public interest. The evidentiary portion of Part 2 commenced on February  
10 22, 2018, and is scheduled to proceed through June 29, 2018.

11 25. DWR's Part 1 case in chief submitted as evidence in the Hearing included an  
12 analysis of potential impacts to legal users of water under four California WaterFix Project  
13 operational scenarios: Boundary 1; Alternative 4A(H3), Alternative 4A(H4); and Boundary 2.  
14 Boundary 2 was based on the State Water Board Staff Scenario.

15 26. Hydrologic and hydrodynamic modeling results served as the foundation for the  
16 testimony offered by numerous DWR and USBR witnesses in Part 1 of the Change Petition  
17 Hearing regarding each of the four WaterFix Project operational scenarios. The hydrologic and  
18 hydrodynamic modeling contains specific operational assumptions. Most relevant to this  
19 Petition/Complaint, the hydrologic modeling assumes specific Delta outflow requirements – i.e.,  
20 the quantity of water that must flow from Delta tributaries through the Delta towards the San  
21 Francisco Bay to achieve Delta water quality requirements necessary protect fish species listed  
22 under the federal and state ESA's. Changes in the amount of Delta outflow have the potential to  
23 effect the exercise of Petitioners'/Plaintiffs' water rights and the environment, by changing the  
24 quantity and quality of water in the Delta and amount of water stored in upstream reservoirs.

25 27. In Part 1 of the Change Petition proceeding, DWR and the USBR presented  
26 "Alternative 4A," the preferred WaterFix Project alternative from the RDEIR/SDEIS. Alternative  
27 4A was described by initial operational criteria that provided for a range of Delta outflows  
28 because, according to DWR witnesses, at the time, the WaterFix Project Biological Opinions had

1 not yet been issued so it was not certain what Delta outflow requirements would be necessary to  
2 protect listed species. DWR and USBR therefore presented a “Boundary Analysis” for Part 1.  
3 DWR described the Boundary Analysis as a broad range of operational criteria, and asserted that  
4 the initial operating criteria would fall within this range. DWR further asserted that “[t]hese  
5 boundaries are sufficiently broad so as to assure the State Water Board that any operations  
6 considered within this change petition proceeding have been evaluated with regard to effects on  
7 legal users of water. These boundaries are described ... as boundary 1 and boundary 2.” (Change  
8 Petition Hearing, Exh. DWR-51, p. 10:11-14.)

9         28. DWR’s Part 1 evidence and witnesses repeatedly referred to the RDEIR/SDEIS  
10 and FEIR/EIS alternatives and modeling evidence in support of DWR’s position (including the  
11 boundary 1 and 2 scenarios) that approval of the Change Petition would not result in injury to  
12 legal users of water. Petitioners/Plaintiffs and other parties dispute the adequacy and import of  
13 the RDEIR/SDEIS and FEIR/EIS alternatives and modeling evidence as they relate to the key  
14 issues in the Change Petition Hearing.

15         29. Requests by Pacific Coast Federation of Fishermen’s Associations (PCFFA) and  
16 California Water Research (CWR) in June of 2016 for additional and more detailed modeling  
17 information in support of DWR and USBR’s case in chief were disregarded by DWR as  
18 duplicative and invalid. PCFFA and CWR requested, in part, raw modeling data, version  
19 histories, and model outflows. These requests were disregarded by DWR as invalid and  
20 dismissed by DWR counsel Robin McGinniss on July 11, 2017, when she stated, “there are no  
21 additional responsive documents,” in reference to PCFFA and CWR’s requests. However,  
22 responses to subsequent PRA requests prove this assertion to be false.

23         30. On August 31, 2017, Mr. Patrick Porgans, a protestant in the Hearing who was not  
24 represented by counsel at the time, filed a PRA request (Gov. Code, § 6250 et seq.) with the State  
25 Water Board, asking for all ex parte correspondence between DWR and the State Water Board  
26 from August 26, 2015, through the present. Mr. Porgans’ letter stated that cross-examination  
27 during the Change Petition Hearing revealed ongoing ex parte communications between DWR  
28 and Hearing Team members regarding modeling contained in the RDEIR/SDEIS.

1           31.     On October 18, 2017, State Water Board attorney Nicole Kuenzi responded to  
2 Mr. Porgans' PRA request by producing numerous emails between DWR and State Water Board  
3 staff evidencing ex parte communications (both emails and meetings) between August 2015 and  
4 October 2016 which violated the Hearing Officers' direction in the Hearing Notice. Ms. Kuenzi's  
5 response attempted to downplay the import of the unlawful communications, stating that, to the  
6 extent any substantive ex parte communications occurred, they were not conveyed to the Hearing  
7 Officers. Notably, the revelation of these communications in October 2017 proved the falsity of  
8 the statements by DWR's counsel Robin McGinnis to the Hearing Officers in July 2017 that all  
9 documents relating to the modeling had been disclosed.

10           32.     On December 28, 2017, Michael A. Brodsky, counsel for Mr. Porgans and Save  
11 the California Delta Alliance, sent a letter to Michael Lauffer, State Water Board Chief Counsel,  
12 requesting that the State Water Board fully produce documents requested by Mr. Porgans in his  
13 PRA request. Mr. Brodsky's letter describes repeated communications between Hearing Team  
14 members and DWR representatives revealed by the partial disclosure of documents responsive to  
15 Mr. Porgans' PRA request. Mr. Brodsky attached emails to his letter evidencing communications  
16 and sought additional materials exchanged between Hearing Team members and DWR.

17           33.     Ex parte communications revealed to date include:

- 18           a.     On September 15, 2015, communications between DWR counsel James "Tripp"  
19 Mizell and Hearing Team member Dana Heinrich covered technical and  
20 procedural details of the Petition Addendum that the State Water Board ultimately  
21 received from DWR and USBR on September 16, 2015. Mr. Mizell and  
22 Ms. Heinrich spoke again on October 28, 2015, regarding similar issues in a  
23 discussion that included DWR hearing counsel Kenneth Bogdan.
- 24           b.     On January 4, 2016, Hearing Team members Samantha Olson, Dana Heinrich,  
25 Rich Satkowki, and Jon Gerlach, met with DWR counsel Kenneth Bogdan and  
26 DWR staff Cassandra Enos for "WaterFix EIR discussion."
- 27           c.     On January 25, 2016, DWR counsel, Kenneth Bogdan, and DWR staff and  
28 consultants, Cassandra Enos, Jennifer Pierre, and Chandra Chilmakuri, held an in

1 person and WebEx meeting with State Water Board Hearing Team members, Dana  
2 Heinrich, John Gerlach, and Rich Satkowski to discuss "Preparation of the Final  
3 EIR/EIS." Jennifer Pierre later appeared as a witness for DWR in Part 1 of the  
4 Hearing.

- 5 d. On April 18, 2016, DWR counsel Kenneth Bogdan, in an email labeled "internal  
6 review draft of Appendix 5E," transmitted a document to Dana Heinrich with the  
7 note, "[i]n preparation for our meeting on Thursday, attached please find a write  
8 up of the impact discussion for the additional modeling prepared for the SWB."  
9 e. On April 21, 2016, DWR counsel, Kenneth Bogdan and DWR consultants Jennifer  
10 Pierre and Chandra Chilmakuri met with Hearing Team members John Gerlach,  
11 Dianne Riddle, Dana Heinrich and Kyle Ochendusko to discuss contents of the  
12 document Mr. Bogdan transmitted to Ms. Heinrich on April 18, 2016, and  
13 "WaterFix modeling."  
14 f. On May 26, 2016, DWR counsel, Kenneth Bogdan, and DWR representatives  
15 Jennifer Pierre and Chandra Chilmakuri met with Hearing Team members Dana  
16 Heinrich, Diane Riddle, John Gerlach, and Kyle Ochendusko to discuss WaterFix  
17 Project EIR Appendix 5E.  
18 g. On June 10, 2016, in an email exchange between DWR counsel, Kenneth Bogdan,  
19 DWR staff, Marcus Yee, and Hearing Team members Dianne Riddle, Dana  
20 Heinrich, and Kyle Ochendusko, DWR requested a meeting with Hearing Team  
21 members to discuss the modeling for Appendix 5E.  
22 h. On June 16, 2016, in a Skype call, DWR staff Marcus Yee, DWR consultants  
23 Jennifer Pierre, and DWR counsel Kenneth Bogdan discussed Appendix 5E  
24 modeling with Hearing Team members Dianne Riddle, Dana Heinrich, and Kyle  
25 Ochendusko.  
26 i. On June 21, 2016, DWR staff Marcus Yee, DWR consultant Jennifer Pierre, and  
27 DWR counsel Kenneth Bogdan held a conference call with Hearing Team  
28 members Dana Heinrich, Dianne Riddle, and Kyle Ochendusko to discuss

1 Appendix 5E and “some of the visuals” DWR had presented to Ms. Riddle.

- 2 j. On July 12-13, 2016, DWR counsel Kenneth Bogdan and DWR staff Marcus Yee  
3 communicated by email with Hearing Team members Dianne Riddle and Dana  
4 Heinrich to schedule a meeting regarding Appendix 5E.
- 5 k. On July 14, 2016, and October 4, 2016, USBR consultant Rick Wilder participated  
6 in discussions with DWR representatives and Hearing Team members regarding  
7 the Boundary 1 – Boundary 2 analysis and Appendix 5E.
- 8 l. On September 21, 2016, DWR sent a draft of Appendix 5E to State Water Board  
9 staff for review. The draft included an evaluation of Boundary 1 and Boundary 2,  
10 in addition to an evaluation of State Water Board Staff Scenario 2. Hearing Team  
11 member, Dana Heinrich, has acknowledged that she reviewed the draft and  
12 provided feedback to DWR.

13 34. Hearing Team member Dana Heinrich has since confirmed in a declaration that  
14 State Water Board staff and DWR staff held a series of meetings concerning the modeling of the  
15 Staff Scenario analyzed in Appendix 5E. Ms. Heinrich confirmed that the meetings took place on  
16 the following dates – all of which occurred after the State Water Board issued the Hearing Notice:  
17 January 4, 2016; January 25, 2016; April 21, 2016; May 26, 2016; June 16, 2016; July 14, 2016;  
18 and October 4, 2016. Hearing Team member Diane Riddle confirmed in a declaration that State  
19 Water Board staff and DWR staff met on the same dates. Hearing Team member Kyle  
20 Ochendusko in a declaration confirmed that he attended some of these same meetings and has  
21 also indicated that he attended similar meetings on June 10, 2016 and September 22, 2016.

22 35. Throughout the time that Hearing Team members and DWR representatives were  
23 conducting their ex parte communications, the Hearing Officers made several rulings in the  
24 Change Petition Hearing bearing on the role of CEQA and water modeling evidence at issue in  
25 the Change Petition Hearing.

26 36. On January 8, 2018, Nicole Kuenzi, State Water Board attorney, responded to  
27 Mr. Brodsky’s December 28, 2017 letter, admitting meetings between Hearing Team members  
28 and DWR representatives on factual and legal matters related to the RDEIR/SDEIS. Ms. Kuenzi

1 asserted that communications between the Hearing Team members and DWR counsel, staff and  
2 consultants were not improper under the APA because the communications related solely to the  
3 adequacy of the EIR for the WaterFix Project for which the State Water Board is a responsible  
4 agency under CEQA. Ms. Kuenzi further asserted that the subject matter of the meetings was  
5 restricted to factual and legal matters related to the EIR, and to the extent any information  
6 discussed may have been related to controversial matter within the scope of the Change Petition  
7 Hearing, State Water Board staff did not share this information with any member of the State  
8 Water Board.

9 37. Ms. Kuenzi's letter indicates that State Water Board staff would produce  
10 responsive documents that were identified at that time by January 15, 2018, and would then begin  
11 producing additional documents on a rolling basis as they are identified.

12 38. On January 10, 2018, Mr. Brodsky filed a PRA request with DWR asking for  
13 production of documents to further elucidate the nature, content, and extent of DWR's ex parte  
14 communications with the Hearing Team and other State Water Board personnel after August 26,  
15 2015. According to this PRA request, Ms. Kuenzi informed Mr. Brodsky that: (1) substantive  
16 materials were present and/or utilized at the meetings between the Hearing Team members and  
17 DWR counsel, staff and consultants; (2) the materials were present and/or utilized at these  
18 meetings, either in physical form, at in-person meetings, or as on-screen presentations at remotely  
19 conducted meetings; and (3) the end of each of these meetings, DWR collected these materials.

20 39. On February 19, 2018, DWR responded to Mr. Brodsky's PRA request by  
21 providing numerous documents but has not made this information available to all parties in the  
22 WaterFix Hearing. At this point, any attempt by DWR to make this information available to all  
23 parties will fall well after the date that DWR and the USBR's witnesses will present their case-in-  
24 chief testimony and be subject to cross examination on this testimony in Part 2 of the Change  
25 Petition Hearing.

26 40. On January 12, 2018, Mr. Brodsky, on behalf of Save the California Delta  
27 Alliance, filed a motion for continuance of Part 2 of the Hearing for 90 days to allow for a  
28 "Reformation Hearing." Based on information and belief, Save the California Delta Alliance's

1 objective appears to be to determine, in light of the evidence of ex parte communications, how the  
2 Hearing may be structured to comply with the rule of law going forward.

3 41. Based on the records already produced illustrating ongoing ex parte  
4 communications, Petitioners/Plaintiffs filed a Motion to Stay or Continue WaterFix Part 2  
5 Hearing (Motion to Stay) on January 15, 2018. Joinders to the Motion to Stay were filed on  
6 January 16 and 17, 2018. Petitioners/Plaintiffs requested a 90-day continuance before the start of  
7 Part 2 to allow for formal discovery and compliance with pending and any additional PRA  
8 requests, as well as a hearing to address the rule violations regarding ex parte communications.

9 42. Petitioner County of Sacramento filed a Freedom of Information Act (FOIA)  
10 request with USBR on January 17, 2018, and PRA requests with DWR, Metropolitan Water  
11 District of Southern California (MWD), and the State Water Board on January 23, 2018,  
12 requesting additional information regarding ex parte communications related to the WaterFix  
13 Project. Neither the USBR, DWR, MWD nor State Water Board have produced documents in  
14 response to these requests.

15 43. In response to the motions to stay Part 2 of the Hearing, the Hearing Officers  
16 vacated the hearing dates between January 18, 2018, and February 7, 2018, and ordered Part 2 to  
17 commence on February 8, 2018.

18 44. On February 6, 2018, the Hearing Officers, on behalf of the State Water Board,  
19 issued a decision denying the Motion to Stay (Ruling). In its Ruling, the State Water Board  
20 acknowledged that “[t]he analysis of alternatives and potential environmental impacts in the  
21 WaterFix project EIR will, of course, inform the State Water Board’s decision on the petition  
22 before us. That is the very purpose of the requirement for environmental documentation under  
23 CEQA.” (Ruling, p. 8.)

24 45. On February 9, 2018, Petitioners/Plaintiffs filed a Petition for Reconsideration of  
25 the Hearing Officers’ denial of the Motion to Stay. Petitioners/Plaintiffs again requested a  
26 continuance of Part 2 for 90-days or until the State Water Board complies with the PRA requests  
27 and APA requirements regarding ex parte communications, and holds a hearing to determine how  
28 to move forward in the upcoming proceedings in compliance with the law. On February 21,



1 2018, the State Water Board denied Petitioners'/Plaintiffs' Request for Reconsideration and  
2 confirmed that Part 2 of the Change Petition Hearing would resume at 9:30 a.m. on February 22,  
3 2018. The Hearing resumed on February 22, 2018, and is continuing as scheduled.

4 ***Regulatory Setting***

5 ***APA – Ex Parte Communications***

6 46. The Change Petition Hearing is an adjudicative proceeding before the State Water  
7 Board. Adjudicative proceedings before the State Water Board are governed by chapter 4.5 of the  
8 APA (commencing with Section 11400 of the Government Code). (Cal. Code Regs., tit. 23,  
9 § 648, subd. (b).)

10 47. The APA ensures a fair tribunal by requiring that “[w]hile the [adjudicative]  
11 proceeding is pending there shall be no communication, direct or indirect, regarding any issue in  
12 the proceeding, to the presiding officer from an employee or representative of an agency that is a  
13 party or from an interested person outside the agency, without notice and opportunity for all  
14 parties to participate in the communication.” (Gov. Code, § 11430.10, subd. (a).)

15 48. In a water rights matter, a proceeding is typically pending once the State Water  
16 Board issues a notice of hearing. (See Transmittal of Ex Parte Communications Questions and  
17 Answers Document from Michael Lauffer to the State Water Resources Control Board and  
18 Regional Water Quality Control Boards (April 25, 2013), p. 5.) The State Water Board’s Chief  
19 Counsel, however, has warned that “[w]here a proceeding is clearly impending, water board  
20 members should consider ex parte communications to be prohibited based on due process  
21 considerations.” (*Id.* at p. 6.)

22 49. The California Supreme Court interprets “presiding officer” as it is used in the  
23 APA to mean all decision makers, not only “an officer who presides over an evidentiary hearing,”  
24 but also “agency heads and their delegees, whether or not they preside over an evidentiary  
25 hearing,” including advisors to decision makers. (*Department of Alcoholic Beverage Control v.*  
26 *Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 9-10 (*Quintanar*).)

27 50. To succeed on a claim that an agency violated the APA’s ex parte rules, it is not  
28 necessary that the record contain proof that the ex parte communications were actually

1 considered. (*Quintanar, supra*, 40 Cal.4th at p. 16.) Similarly, a showing of prejudice is not  
2 required. (*Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274,  
3 1288-1289.)

4 51. The APA requires that if a presiding officer receives an ex parte communication,  
5 the presiding officer must make the ex parte communication known by written publication and  
6 notify all parties that the communication has been made part of the record. (Gov. Code, §  
7 11430.50, subs. (a)-(b).) When a party requests the opportunity to address the communication,  
8 the presiding officer must allow the party to comment, may allow a party to present evidence  
9 concerning the subject of the communication, and may even reopen a hearing that has been  
10 concluded. (Gov. Code, § 11430.50(c).) Receipt by a presiding officer of a communication in  
11 violation of the APA may be grounds for disqualification of the presiding officer. (Gov. Code,  
12 § 11430.60.)

13 52. Although the APA provides for the Hearing Officers to use nonadversarial staff to  
14 advise them in the Change Petition proceeding, the staff may not go so far as to “furnish,  
15 augment, diminish, or modify the evidence in the record.” (Gov. Code, § 11430.30(a).) The  
16 State Water Board Chief Counsel’s interpretation of the ex parte rules is to this effect. (See  
17 Transmittal of Ex Parte Communications Questions and Answers Document from Michael  
18 Lauffer to the State Water Resources Control Board and Regional Water Quality Control Boards  
19 (April 25, 2013), p. 9.)

#### 20 ***Due Process in Administrative Proceedings***

21 53. The California Constitution guarantees that “[a] person may not be deprived of  
22 life, liberty, or property without due process of law.” (Cal. Const. art. I, § 7, subd. (a).) The  
23 constitutional guarantee of due process, including a fair tribunal, applies in adjudicative  
24 proceedings conducted by an administrative agency. (*Morongo Band of Mission Indians v. State*  
25 *Water Resources Control Board* (2009) 45 Cal.4th 731, 741 (*Morongo*).)

26 54. State administrative adjudicators are entitled to a presumption that they are  
27 impartial only “when rules mandating an agency’s internal separation of functions and prohibiting  
28 ex parte communications are observed.” (*Morongo, supra*, 45 Cal.4th at pp. 731, 741.) Both the