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CALIFORNIA DEPARTMENT OF WATER
7 RESOURCES, an agency of the State of California,
LESTER SNOW, an individual in his official
8 capacity, RALPH TORRES, an individual in his
official capacity, DAVID STARKS, an individual
9 in his official capacity, DAVID DUVAL, an
individual in his official capacity, L.D. ELMORE,
10 an individual in his official capacity,
11

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF ALAMEDA

14 WATERSHED ENFORCERS, a project of
CALIFORNIA SPORTFISHING
15 PROTECTION ALLIANCE, a non-profit
corporation,
16
Petitioner,

17 v.

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19 CALIFORNIA DEPARTMENT OF
WATER RESOURCES, an agency of the
20 State of California, LESTER SNOW, an
individual in his official capacity, RALPH
21 TORRES, an individual in his official
capacity, DAVID STARKS, an individual in
22 his official capacity, DAVID DUVAL, an
individual in his official capacity,
23 L.D. ELMORE, an individual in his official
capacity,

24 Respondents.
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CASE NO. RG06292124

**CALIFORNIA DEPARTMENT OF
WATER RESOURCES' REQUEST
FOR HEARING; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF REQUEST FOR
HEARING**

Date: TBD
Time: TBD
Dept.: 31
Judge: Hon. Frank Roesch

**[NO FILING FEE REQUIRED
PURSUANT TO GOV'T CODE
§ 6103]**

1 **REQUEST FOR HEARING**

2 California Department of Water Resources, Lester Snow, Ralph Torres, David
3 Starks, David Duval, and L.D. Elmore (collectively, "Respondents" or "DWR") hereby request
4 that the Court set a hearing in this matter pursuant to California Rule of Court, Rule 3.1590(i) for
5 the purpose of (1) addressing DWR's Objections to Proposed Statement of Decision, filed April
6 11, 2007, and any other objections filed by other parties to this action, and (2) providing DWR an
7 opportunity to apprise the Court of the status of the request for consistency determination DWR
8 submitted to DFG on April 9, 2007. DFG supports DWR's request for this hearing.

9 DWR asks the Court to set the requested hearing approximately 30 days from this
10 filing on a date and at a time convenient with the Court's schedule. DWR seeks this hearing on
11 the basis of this Request, the accompanying Memorandum of Points and Authorities in Support of
12 Request for Hearing, the accompanying declarations filed herewith, and all other pleadings and
13 papers on file in this matter.

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15 Dated: April 11, 2007

NORMAN C. HILE
MARGARET CAREW TOLEDO
MICHAEL C. WEED
Orrick, Herrington & Sutcliffe LLP

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19 _____
Norman C. Hile
Attorneys for Respondents
California Department of Water Resources, Lester
20 Snow, Ralph Torres, David Starks, David Duval,
21 and L.D. Elmore.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 **INTRODUCTION**

4 California Department of Water Resources, Lester Snow, Ralph Torres, David
5 Starks, David Duval, and L.D. Elmore (collectively, "Respondents" or "DWR") request that the
6 Court set a hearing in this matter to address Respondents' concurrently filed Objections to
7 Proposed Statement of Decision and to permit DWR to apprise the Court of the status of DWR's
8 actions taken to confirm its compliance with the California Endangered Species Act ("CESA") in
9 response to the Court's Proposed Statement of Decision. As stated in the accompanying
10 Declaration of Ryan Broddrick, the Director of the California Department of Fish and Game
11 ("DFG"), DFG supports DWR's request for a hearing. DWR respectfully requests that the Court
12 schedule this hearing for approximately 30 days from the date of this filing, which would be the
13 week of May 14, 2007.

14 II.

15 **BACKGROUND**

16 On March 22, 2007, the Court issued its Proposed Statement of Decision. The
17 Court concluded, among other things, that DWR lacked incidental take authority under California
18 Fish and Game Code section 2081.1 in its operation of the Harvey O. Banks Pumping Plant
19 Operation (as defined in the Proposed Statement of Decision) with respect to Winter and Spring
20 run Salmon and Delta Smelt. Accordingly, the Court granted the petition for writ of mandate and
21 commanded Respondents "to cease and desist from further operation of the Harvey O. Banks
22 Pumping Plant Operation until and unless they have obtained authorization in compliance with
23 [CESA] from the Department of Fish and Game with regard to the incidental take of Chinook
24 Salmon – Winter-run, Chinook Salmon – Spring-run and Delta Smelt." Proposed Statement of
25 Decision, p. 33.

26 The Court stayed any effect of its order "for sixty days to provide Respondents the
27 time needed to comply with the CESA's mandatory incidental take authorizing requirements."
28 Proposed Statement of Decision, p. 33.

1 objections to the Proposed Statement of Decision were to be filed and served. DWR filed and
2 served its Objections on that date.

3 California Rule of Court 3.1590(i) provides that “the court may order a hearing on
4 proposals or objections to a proposed statement of decision or the proposed judgment if a
5 statement of decision is not required.” Cal. R. Ct. 3.1590(i). Given the importance of this matter,
6 and the complexity of the facts and issues involved, DWR believes that a hearing is warranted to
7 provide DWR and all parties an opportunity to discuss with the Court DWR’s objections to the
8 Proposed Statement of Decision, as well as any other objections filed by other parties. DWR
9 suggests and respectfully requests that a hearing be scheduled approximately 30 days from the
10 filing of objections, which would be on or around the week of May 14, 2007.

11 **B. DWR Also Requests This Hearing So That It Can Apprise The Court Of The Status**
12 **Of Its Request To DFG For A Consistency Determination.**

13 California Fish and Game Code section 2080.1 provides that DFG can give a
14 requesting party incidental take authorization under CESA for State-listed protected species by
15 determining that a federal biological opinion and incidental take statement that authorizes such
16 take under the federal Endangered Species Act (“FESA”) is consistent with the requirements of
17 CESA. *See* Cal. Fish & Game Code § 2080.1. As the Court is aware, this process is commonly
18 referred to as seeking and obtaining a consistency determination. Upon receipt of a request for a
19 consistency determination, DFG is required to publish notice of its receipt of the request in the
20 California Regulatory Notice Register. *Id.* § 2080.1(b); Brodrick Decl., ¶ 4. Fish and Game
21 Code section 2080.1 further provides that DFG “shall determine whether the incidental take
22 statement or incidental take permit [under FESA] is consistent with [CESA]” within 30 days after
23 receipt of the request. *Id.* § 2080.1(c); Brodrick Decl., ¶ 4.

24 On April 9, 2007, DWR submitted to DFG a request for a consistency
25 determination under CESA on the existing federal biological opinions and incidental take
26 statements addressing SWP Delta operations with respect to Winter-run and Spring-run Chinook
27 Salmon and Delta Smelt. *See* Weed Decl., Exh. A; Brodrick Decl., ¶ 3. Pursuant to Fish and
28 Game Code section 2080.1(c), DFG must determine within 30 days of receipt and publishing of

1 DWR's request whether it will issue the consistency determination. Cal. Fish & Game Code
2 § 2080.1(c); Brodrick Decl., ¶ 4.

3 DWR believes that a hearing approximately 30 days from this filing will allow
4 DFG sufficient time to act on DWR's consistency determination request. DFG supports DWR's
5 request for a hearing. Brodrick Decl., ¶ 6. If DFG approves DWR's request and issues the
6 consistency determination, DWR will have obtained the appropriate authorization under CESA
7 for Winter and Spring run Salmon and Delta Smelt in connection with the Harvey O. Banks
8 Pumping Plant Operation. In that event, DWR will have satisfied the Court's intended order as
9 provided in its Proposed Statement of Decision, i.e., that DWR "obtain[] authorization in
10 compliance with [CESA] from [DFG] with regard to their incidental take of Chinook Salmon –
11 Winter-run, Chinook Salmon – Spring-run and Delta Smelt" for the Harvey O. Banks Pumping
12 Operation. Proposed Statement of Decision, p. 33. Setting the requested hearing 30 days from
13 this filing will provide the Court and the parties the opportunity to confirm the status of DWR's
14 request for DFG's consistency determination.

15 **C. Allowing 30 Days For The Requested Hearing Will Not Significantly Delay The**
16 **Court's Intended Time-Line.**

17 As DWR demonstrated in this proceeding, DWR, in concert with DFG, the United
18 States Bureau of Reclamation, and many other responsible public and private entities, undertakes
19 substantial mitigation measures for the protection of species in the Delta, including the Winter
20 and Spring run salmon and Delta Smelt. Those measures continue and will continue until and
21 after this Court holds the requested hearing.

22 Scheduling a hearing 30 days from this filing is consistent with the 60 day stay
23 period the Court on its own motion provided in its Proposed Statement of Decision. As noted
24 above, the Court stayed the effect of its intended order "for sixty days to provide Respondents the
25 time needed to comply with the CESA's mandatory incidental take authorizing requirements."
26 Proposed Statement of Decision, p. 33. Consistent with the express purpose of the Court's 60 day
27 stay, DWR has submitted a consistency determination request to DFG and is now requesting that

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1 the Court schedule a hearing 30 days from this filing so that DFG has time to make that
2 determination. DFG supports DWR's request for this hearing. *See* Broddrick Decl., ¶ 6.

3 Further, the terms of the Court's intended order, if enforced, would result in the
4 shut-down of the Harvey O. Banks Pumping Facility "until and unless [DWR has] obtained
5 authorization in compliance with [CESA] from [DFG]. . . ." *See* Proposed Statement of Decision,
6 p. 33 (commanding DWR to "cease and desist from further operation of the Harvey O. Banks
7 Pumping Plant Operation . . ."). In such an event, severe to catastrophic consequences would
8 result. *See* Declaration of Carl Torgerson, ¶¶ 3-49 (detailing negative impacts that would result
9 from a shut-down of the Harvey O. Banks Pumping Plant Operation). Given that DWR has
10 already submitted to DFG a consistency determination request that should be acted upon within
11 30 days, there is no justification for creating or even risking these adverse consequences without
12 giving DWR the opportunity to apprise the Court of the status of its consistency determination
13 request.

14 IV.

15 CONCLUSION

16 For the reasons discussed above, DWR respectfully requests that the Court
17 schedule a hearing approximately 30 days from this filing to address DWR's and any other
18 party's objections to the Proposed Statement of Decision and to allow DWR to apprise the Court
19 of the status of DWR's request to DFG for a consistency determination.

20 Dated: April 11, 2007

NORMAN C. HILE
MARGARET CAREW TOLEDO
MICHAEL C. WEED
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24 _____
Norman C. Hile
Attorneys for Respondents
California Department of Water Resources, Lester
25 Snow, Ralph Torres, David Starks, David Duval,
26 and L.D. Elmore.

1 **DECLARATION OF SERVICE BY U.S. MAIL**

2 I am more than eighteen years old and not a party to this action. My place of
3 employment and business address is 400 Capitol Mall, Suite 3000 Sacramento, California, 95814.

4 On April 11, 2007, I served the following documents:

- 5 • **CALIFORNIA DEPARTMENT OF WATER RESOURCES' REQUEST FOR**
6 **HEARING; MEMORANDUM OF POINTS AND AUTHORITIES IN**
7 **SUPPORT OF REQUEST FOR HEARING;**
8 • **DECLARATION OF CARL TORGERSEN IN SUPPORT OF REQUEST FOR**
9 **HEARING;**
10 • **DECLARATION OF L. RYAN BRODDRICKIN SUPPORT OF CALIFORNIA**
11 **DEPARTMENT OF WATER RESOURCES' REQUEST FOR HEARING; and**
12 • **DECLARATION OF MICHAEL WEED IN SUPPORT OF REQUEST FOR**
13 **HEARING**

14 on the interested parties in this action by place a true and correct copy thereof in a sealed
15 envelope addressed as follows:

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Water Authority and Westlands

10 I deposited such envelopes with postage thereon fully prepaid in the United States
11 mail at a facility regularly maintained by the United States Postal Service at Sacramento,
12 California on the date indicated above.

13 I declare under penalty of perjury of the laws of the State of California that the
14 foregoing is true and correct. Executed at Sacramento, California, on April 11, 2007.

15 _____
16 Wanda Peters

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