

February 25, 2016

VIA E-MAIL (CWFhearing@waterboards.ca.gov)

Co-Hearing Chair Tam Dudoc
Co-Hearing Officer Felicia Marcus
State Water Resources Control Board
Post Office Box 100
Sacramento, California 95812-0100

Re: **Sacramento Valley Water Users' Response to State Water Contractors' and Petitioners' Objections to the California WaterFix Project Pre-Hearing Conference Ruling; Request for Equivalent Extension of Time for Submittal of Protestants' Cases-In-Chief and Commencement of Part 1B**

Dear Co-Hearing Officers Doduc and Marcus:

The undersigned counsel collectively represent the parties ("Protestants") comprising the Sacramento Valley Water Users ("SVWU"). This letter responds to: (i) the objections and motion for reconsideration submitted by the State Water Contractors ("SWC") on February 22, (ii) the objections submitted by Petitioners California Department of Water Resources and U.S. Bureau of Reclamation on February 23, and (iii) the 30-day extension that the State Water Resources Control Board (the "Board") granted today to Petitioners for submission of their case-in-chief. In light of that extension, the SVWU respectfully request an equivalent extension of the date to submit our testimony and exhibits, from May 16, 2016 to June 16, 2016, with a similar extension for the commencement of Part 1B.

1. *Request to Extend the Start Date of Part 1B Commensurate with the Start Date of Part 1A*

This morning, the Board granted Petitioners' request for a 30-day extension of the deadline for Petitioners to submit their written testimony, and the Board continued the commencement of Part 1A of the Hearing from April 7, 2016 to May 5, 2016. When the Board issued its February 11 California WaterFix Pre-Hearing Ruling (the "Ruling"), the Board allowed 76 days between the date on which the Petitioners would submit their testimony and exhibits and the date on which the parties participating in Part 1B would submit their testimony and exhibits.

Petitioners apparently plan to submit a very large amount of testimony as their case-in-chief, having requested 13 hours of hearing time just to summarize it. The Ruling “strongly suggest[ed]” that Petitioners “develop proposed permit conditions for the change as part of their exhibits” (Notice, p. 6) and “encouraged” all protestants to propose specific permit conditions as part of their cases (Notice, p. 6). Protestants therefore expect that Petitioners will be submitting a significant amount of *new* material and technical analysis, including proposed permit conditions, on their March 30 submission date.

Even if Protestants had received all of the Section 7 modeling runs, input and export data files, and Petitioners’ proposed permit conditions on March 1, it would have been a challenge for Protestants to complete their exhibits and testimony, including their proposed permit conditions, by May 16, due to the fact that much of Petitioners’ testimony and exhibits apparently will be new. To reduce the time between Petitioners’ filing deadline and Protestants’ filing deadline by 30 days, especially when cross-examination of the more than the 50 witnesses listed by Petitioners is likely to yield additional important information relating to the effects of the California WaterFix Project on Protestants, would discourage the type of thoughtful and careful evaluation of the data that will be of greatest assistance to the Board in evaluating that project.

The development of permit conditions is crucial to the Board's understanding of the injury and other issues asserted by Protestants and warrants careful consideration. In addition to reviewing the voluminous written testimony submitted by Petitioners, Protestants will need sufficient time to evaluate and analyze Petitioners’ proposed permit terms and conditions and to develop our own proposed permit terms and conditions. The specifics of those permit terms and conditions will be highly dependent not only on Petitioners’ prepared testimony, exhibits and proposed permit conditions submitted as their case-in-chief, but also on the information revealed during the cross-examination of Protestants’ witnesses that will occur during Part 1A. In the Ruling, the Board properly recognized the complexity of these issues and gave all protestants sufficient time to prepare careful responses to Petitioners’ evidence after the anticipated completion of Part 1A.

For these reasons, the SVWU respectfully request that the Board extend the deadline for the submission of all other parties’ cases-in-chief from May 16, 2016 to June 16, 2016 and continue the commencement of Part 1B of the Hearing from June 23, 2016 to July 25, 2016. These correlative time extensions are warranted and needed to maintain the original spacing of Parts 1A and 1B set forth in the Ruling, including the potential to complete Part 1A before moving into Part 1B.

The SVWU also request that the Hearing Officers require Petitioners to respond by March 1, 2016 to the SVWU’s February 17, 2016 letter requesting confirmation of the California WaterFix Project hydrological modeling that will be relied upon by Petitioners during the Hearing. Although the Petitioners asserted on February 2, 2016 that additional modeling information is presently available for review, the Board should require Petitioners to clarify now,

before the March 30 filing deadline, whether Petitioners will rely on that modeling or some other modeling during the Hearing.

2. *The Staggered Schedule for Part 1 Comports with Due Process*

The SWC assert that the staggered schedule adopted by the Board in the Ruling gives Protestants an unfair advantage and violates the due process rights of the project proponents. The SWC must (and do) acknowledge that the Board has discretion to conduct adjudicative hearings in a manner it deems “suitable” and “expeditious[.]” Cal. Code Regs., tit. 23, § 648.5(a). The staggered schedule simply is an instance of the Board exercising its discretion.

The staggered approach is entirely consistent with the rules of civil procedure that govern trials in California. Section 607 of the Code of Civil Procedure sets forth the order of proceedings for jury and non-jury trials and requires that a plaintiff produce the evidence supporting its case *before* the defendant opens its defense. In this administrative proceeding – where there is no pre-hearing discovery, where the Petitioners have the burden of proof, where the proposed project is of enormous magnitude, where proposed project operations so far are undefined and, depending on their definition, may affect whether injury to others will occur, and where the project hydrologic modeling has been recently changed from the CEQA/NEPA modeling to the “Section 7” modeling -- it is entirely appropriate to follow the order of proceedings for a trial and to stagger the submission of written testimony and exhibits. In doing so, the Board is providing that the Petitioners meet their burden of demonstrating their facts regarding whether the California WaterFix Project would injure other legal users of water before requiring Protestants to put on their cases in chief. Moreover, by reserving rebuttal to a time after the presentation of *all* parties’ cases in chief, the Board’s order of proceedings enables Petitioners to respond to both cross-examination of their witnesses as well as to the Protestants’ cases in chief. Consequently, the Ruling fully comports with due process.

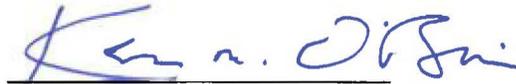
3. *The Board Should Clarify the Ruling on Flow Criteria and the Water Quality Control Plan Updates*

The SWC object to a statement in the Ruling concerning the appropriate Delta flow criteria on the ground that the statement is pre-decisional. The statement in the Ruling was made in connection with the 2009 Delta Reform Act requirement that any order approving a change in the point of diversion of the State Water Project or the federal Central Valley Project from the southern Delta to a point on the Sacramento River shall include “appropriate Delta flow criteria.” Cal. Water Code § 85086(c)(2). No such order has yet been issued and so no ruling from the Board on this subject is necessary at this time. The Board, therefore, can easily revise the Ruling (formally or via a subsequent clarifying letter) to state that there has not been a decision on any flow criteria to date, and clarify that there has not been any determination regarding the processes for Phases 2 and 3 of the Bay Delta Water Quality Control Plan update, which in any case are not part of the current proceeding.

Thank you for your consideration and attention to these matters.

Very truly yours,

DOWNEY BRAND LLP



Kevin M. O'Brien



David R. E. Aladjem

Northern California Water Association

/s/David J. Guy

David J. Guy, President

Bartkiewicz, Kronick & Shanahan

/s/Alan Lilly

Alan Lilly

/s/Ryan Bezerra

Ryan Bezerra

Somach, Simmons & Dunn, PC

/s/Andrew M. Hitchings

Andrew M. Hitchings

/s/Daniel Kelly

Daniel Kelly

Minasian, Meith, Soares, Sexton & Cooper, LLP

/s/Dustin C. Cooper

Dustin C. Cooper

Lennihan Law, a Professional Corporation

/s/Martha H. Lennihan

Martha H. Lennihan

cc: Service List of Hearing Parties as Revised on February 10, 2016