

February 13, 2018

VIA EMAIL

State Water Resources Control Board
Division of Water Rights
Attn: California WaterFix Hearing Team
P.O. Box 2000
Sacramento, California 95812-2000
CWFhearing@waterboards.ca.gov

Re: California WaterFix Hearing - Corrected Response of Protestants Reclamation District No. 108, et al., to Department of Water Resources Consolidated Opposition to Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute's Renewed Motion to Stay Part II of WaterFix Hearing Due to Changes in Proposed Project

Dear Hearing Chair Doduc, Hearing Officer Marcus, and California WaterFix Hearing Staff:

Protestants Reclamation District No. 108, et al., are submitting a corrected version of their Response to Department of Water Resources Consolidated Opposition to Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute's Renewed Motion to Stay Part II of WaterFix Hearing Due to Changes in Proposed Project, that makes no substantive changes but merely corrects minor typographical errors that appeared on the following pages:

- Caption page, footer: correct to read "Response to DWR's Opposition to Stay"
- Page listing additional counsel and parties, line 11.5: after "City of Stockton" add "Glenn-Colusa Irrigation District; Biggs-West Gridley Water District; Sacramento County Water Agency; Placer County Water Agency; Carmichael Water District"
- Page 2, line 18: add "In" before "DWR's January 30, 2018 Opposition . . ."
- Page 2, lines 20-21: should read ". . . Project construction contract, DWR argued . . ."
- Page 12, lines 7-24: delete paragraph in its entirety. Is duplicative of text on page 9, line 27 to page 10, line 16.

- Page 17, line 24.5: after “Attorneys for” add “County of Sacramento, Sacramento County Water Agency, Sacramento Regional County Sanitation District, City of Stockton”
- Page 17, line 16: after “Livestock Company,” add “North Delta Water Agency, Reclamation District 999, Reclamation District 2060, Reclamation District 2068, Brannan-Andrus Levee Maintenance District, Reclamation District 407, Reclamation District 2067, Reclamation District 317, Reclamation District 551, Reclamation District 563, Reclamation District 150, Reclamation District 2098, Reclamation District 800 (Byron Tract), Tehama-Colusa Canal Authority.”

Very truly yours,

DOWNEY BRAND LLP



David R.E. Aladjem
Kevin M. O'Brien
Meredith E. Nikkel

cc: CA WaterFix Service List

STATEMENT OF SERVICE

**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document:

Letter Dated February 13, 2018 re Corrected Response of Protestants Reclamation District No. 108, et al., to Department of Water Resources Consolidated Opposition to Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute's Renewed Motion to Stay Part II of WaterFix Hearing Due to Changes in Proposed Project

to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated January 24, 2018, posted by the State of Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

	I caused a true and correct hard copy of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818: Method of Service: _____
--	--

I certify that the foregoing is true and correct and that this document was executed on February 13, 2018.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814

1 DOWNEY BRAND LLP
2 KEVIN M. O'BRIEN (Bar No. 122713)
3 DAVID R.E. ALADJEM (Bar No. 152203)
4 MEREDITH E. NIKKEL (Bar No. 254818)
5 REBECCA R.A. SMITH (Bar No. 275461)
6 621 Capitol Mall, 18th Floor
7 Sacramento, CA 95814-4731
8 Telephone: 916.444.1000
9 Facsimile: 916.444.2100
10 kobrien@downeybrand.com
11 daladjem@downeybrand.com
12 mnikkel@downeybrand.com
13 rsmith@downeybrand.com

14 Attorneys for Protestants
15 RECLAMATION DISTRICT NO. 108, et al.

16 *Additional counsel and parties listed*
17 *on following page*

18 BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

19 In the matter of Hearing re California
20 WaterFix Petition for Change

21 **RESPONSE TO DEPARTMENT OF**
22 **WATER RESOURCES CONSOLIDATED**
23 **OPPOSITION TO NATURAL**
24 **RESOURCES DEFENSE COUNCIL,**
25 **DEFENDERS OF WILDLIFE, AND THE**
26 **BAY INSTITUTE'S RENEWED MOTION**
27 **TO STAY PART II OF WATERFIX**
28 **HEARING DUE TO CHANGES IN**
PROPOSED PROJECT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DOWNEY BRAND LLP
KEVIN M. O'BRIEN (Bar No. 122713)
DAVID R.E. ALADJEM (Bar No. 152203)
MEREDITH E. NIKKEL (Bar No. 254818)
REBECCA R.A. SMITH (Bar No. 275461)
621 Capitol Mall, 18th Floor
Sacramento, CA 95814-4731
Telephone: 916.444.1000
Facsimile: 916.444.2100
kobrien@downeybrand.com
daladjem@downeybrand.com
mnikkel@downeybrand.com
rsmith@downeybrand.com

Attorneys for
CARTER MUTUAL WATER COMPANY; EL DORADO
IRRIGATION DISTRICT; EL DORADO WATER &
POWER AUTHORITY; HOWALD FARMS, INC.;
MAXWELL IRRIGATION DISTRICT; NATOMAS
CENTRAL MUTUAL WATER COMPANY; MERIDIAN
FARMS WATER COMPANY; OJI BROTHERS FARM,
INC.; OJI FAMILY PARTNERSHIP; PELGER
MUTUAL WATER COMPANY; PLEASANT-GROVE
VERONA MUTUAL WATER CO.; PRINCETON-
CODORA-GLENN IRRIGATION DISTRICT;
PROVIDENT IRRIGATION DISTRICT;
SACRAMENTO MUNICIPAL UTILITY DISTRICT;
HENRY D. RICHTER, ET AL.; RIVER GARDEN
FARMS COMPANY; SOUTH SUTTER WATER
DISTRICT; SUTTER EXTENSION WATER DISTRICT;
SUTTER MUTUAL WATER COMPANY; TISDALE
IRRIGATION AND DRAINAGE COMPANY;
WINDSWEPT LAND AND LIVESTOCK COMPANY;
NORTH DELTA WATER AGENCY; RECLAMATION
DISTRICT 999; RECLAMATION DISTRICT 2060;
RECLAMATION DISTRICT 2068; BRANNAN-
ANDRUS LEVEE MAINTENANCE DISTRICT;
RECLAMATION DISTRICT 407; RECLAMATION
DISTRICT 2067; RECLAMATION DISTRICT 317;
RECLAMATION DISTRICT 551; RECLAMATION
DISTRICT 563; RECLAMATION DISTRICT 150;
RECLAMATION DISTRICT 2098; RECLAMATION
DISTRICT 800 (BYRON TRACT); TEHAMA-COLUSA
CANAL AUTHORITY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SOMACH, SIMMONS & DUNN, PC
Andrew M. Hitchings (Bar No. 154554)
Kelley M. Taber (Bar No. 184348)
Aaron A. Ferguson (Bar No. 271427)
Kristian C. Corby (Bar No. 296146)
500 Capitol Mall, Suite 100
Sacramento, CA 95814
Telephone: (916) 446-7979
Facsimile: (916) 446-8199
ahitchings@somachlaw.com
ktaber@somachlaw.com
aferguson@somachlaw.com
kcorby@somachlaw.com

Attorneys for COUNTY OF SACRAMENTO;
SACRAMENTO COUNTY WATER AGENCY;
SACRAMENTO REGIONAL COUNTY SANITATION
DISTRICT; CITY OF STOCKTON; GLENN-COLUSA
IRRIGATION DISTRICT; BIGGS-WEST GRIDLEY
WATER DISTRICT; PLACER COUNTY WATER
AGENCY; CARMICHAEL WATER DISTRICT

MINASIAN, MEITH, SOARES, SEXTON &
COOPER, LLP
Dustin Cooper (Bar No. 245774)
Emily E. LaMoe (Bar No. 232485)
1681 Bird Street
Oroville, CA 95965
Telephone: (530) 533-2885
Facsimile: (530) 533-0197
Dcooper@minasianlaw.com
elamoe@minasianlaw.com

Attorneys for ANDERSON-COTTONWOOD
IRRIGATION DISTRICT, BUTTE WATER DISTRICT,
NEVADA IRRIGATION DISTRICT, PARADISE
IRRIGATION DISTRICT, PLUMAS MUTUAL WATER
COMPANY, RECLAMATION DISTRICT NO. 1004,
RICHVALE IRRIGATION DISTRICT, SOUTH
FEATHER WATER & POWER AGENCY, WESTERN
CANAL WATER DISTRICT

1 The Department of Water Resources (“DWR”) has made changes to the
2 California WaterFix Project that are so fundamental, the interests of justice demand that
3 this Hearing be stayed in order to address and understand them. The Parties are
4 entitled to understand the environmental impacts of the Project before Part 2
5 commences; this Hearing cannot proceed until DWR’s supplemental environmental
6 analysis is complete.

7 On February 7, fifteen minutes before the close of business and mere hours
8 before the commencement of Part 2 of this Hearing, DWR provided an “update” to its
9 approach to the Project, conceding that funding for the federal components of the project
10 has not yet materialized and that further environmental review is planned. DWR
11 characterizes this “update” as “phasing” in an effort to downplay the fact that it is
12 fundamentally different from the project as identified in the final Environmental Impact
13 Report (“EIR”), and that it will have a fundamentally different environmental impacts.

14 This is a different Project, more akin to Alternatives previously considered and
15 rejected by DWR in its prior environmental analysis than to anything previously
16 presented to the SWRCB or the public. It is not, as DWR characterizes it, merely an
17 issue of timing or the availability of funds: in fact, the preliminary modeling provided by
18 DWR on the eve of Part 2 demonstrates that the phased approach will have impacts well
19 outside the range considered by DWR in prior analyses. Physically, institutionally, and
20 practically, DWR has proposed a changed Project and admits that this Project has not
21 yet been fully analyzed. DWR promises to issue a Supplemental Environmental Impact
22 Report (“SEIR”) this summer: justice, equity, and the law (including the State Water
23 Board’s own hearing requirements for this proceeding) require that this Hearing be
24 stayed until that analysis is complete.

25 PROCEDURAL BACKGROUND

26 In the initial Hearing Notice on October 30, 2015, the Hearing Officers recognized
27 the critical role of environmental documentation under the California Environmental
28 Quality Act (“CEQA”), California Endangered Species Act (“CESA”), federal Endangered

1 Species Act (“ESA”), and National Environmental Policy Act (“NEPA”) would serve in
2 Part 2. Indeed, from the start of this hearing, the Hearing Officers have been generally
3 consistent with their original proposal that Part 2 not begin until “at least 30 days after
4 the CEQA, ESA, and CESA processes have been completed,” to ensure those
5 associated documents would be part of the hearing record. (Hearing Notice, October 30,
6 2015, p. 2.; see *also* January 15, 2016 Pre-Hearing Conference Agenda, p. 3 (“The
7 Hearing Notice specifies that Part II will not commence until at least 30 days after
8 completion of the NEPA/CEQA and ESA/CESA processes.”); February 11, 2016 Ruling,
9 p. 3 (“Part 2 of the hearing will commence following completion of the CEQA/NEPA and
10 ESA/CESA processes.”); *id.* at 9 (“We recognize that ultimately the final EIR must be
11 adequate to support the State Water Board’s decision in this proceeding.”); March 4,
12 2016 Ruling, p. 2 (“These regulatory processes must be complete before we begin Part
13 2 of the hearing.”); June 27, 2017 Ruling, p. 2 (“Rather than addressing this issue
14 piecemeal as new information becomes available, it would be more efficient to address
15 this issue based on all of the information that is presented in Part 2.”).)

16 DWR’s EIR, which was approved and certified in 2017, considered, and rejected,
17 the “phased” approach that is now contemplated in the revised Project description.

18 In DWR’s January 30, 2018 Opposition to the City of Antioch’s Motion to Continue
19 this hearing, which was based in part on a staged construction approach revealed in
20 documents intended for parties bidding on the Project construction contract, DWR
21 argued that it “has not altered its water rights petition” and coyly offered that, “[s]hould
22 additional information become available regarding the project description, Antioch has
23 the ability to cross-examine Petitioners’ witnesses with authenticated copies of that
24 information.” (DWR’s Consolidated Opposition to City of Antioch’s Motion to Continue –
25 Motion For Continuance of Phase 2 and Reconsideration of Reopening Part 1, January
26 30, 2018, pp. 5:12, 18-20.) In suggesting on January 30 that it intended no changes to
27 the Project, and arguing vigorously that such information about apparent changes should
28 not affect the start of Part 2, DWR gave the Hearing Officers and parties no indication

1 that it had progressed so far down the path towards phasing that it had, in fact, already
 2 modeled a phased approach, met with other responsible agencies about those changes,
 3 and determined to prepare an SEIR.

4 DWR's February 7, 2018 letter to Project participants notes that while DWR "does
 5 not expect substantial change to" the Biological Opinions or the Section 2081 Incidental
 6 Take Permit, it "*will fully evaluate the potential environmental impacts of the staged*
 7 *implementation option*" and expects to issue a draft SEIR in June of 2018, when that
 8 process is complete. (February 7, 2018 Letter to Stakeholders, p. 2 (emphasis added).)
 9 That additional information, required by CEQA, "will also be used to supplement the
 10 Endangered Species Act, Section 7 and California Endangered Species Act, Section
 11 2081 record." (*Ibid.*) DWR goes on to explain that it "expects no changes in impact
 12 determinations and no changes to mitigation," based on its preliminary modelling, and
 13 thus "will be able to immediately implement this option, *in addition to the project already*
 14 *analyzed under CEQA.*" (*Ibid.* (emphasis added).)

15 Based on this significant new development, and in light of the Hearing Officers'
 16 statements that Part 2 should not commence until environmental review is complete,
 17 Protestants Natural Resources Defense Council *et al.* and the County of Sacramento *et*
 18 *al.* submitted renewed motions stay the proceedings (the "Motions"). These Motions
 19 were joined by a host of other parties.

20 In light of this development, and in response to a request that the Hearing be
 21 stayed until the release of the SEIR in June 2018, the Hearing Officers directed parties
 22 to respond to six questions relating to the significant legal and procedural implications of
 23 DWR's late-breaking announcement. The undersigned Protestants' responses to those
 24 questions are indicated below.

25 **I. A STAY IS REQUIRED TO APPROPRIATELY ANALYZE THE CHANGED**
 26 **PROJECT**

27 DWR's change petition described a project that would "introduce new
 28 operational flexibility into the SWP and CVP," by using three intakes with a cumulative

1 capacity of 9,000 cfs to convey water from North to South Delta facilities through two
2 twin tunnels. In that approach, “operating criteria applicable to [Waterfix] that are in
3 addition to the criteria that govern CVP and SWP operations without the California
4 Waterfix will only take effect once the North Delta Diversion facilities become
5 operational.” (SWRCB-110, p. 39.) DWR is now considering a single-tunnel project,
6 with additional phases to be constructed if funding materializes, and on that basis claims
7 that the Project is unchanged. DWR fails to acknowledge or evaluate the repercussions
8 if such funding does not materialize, however. The shift from the two-tunnel, three-
9 intake joint project identified in the EIR and in Part 1 testimony, to a phased project
10 construction starting with one tunnel and two intakes, reduced stakeholder participation,
11 and significantly reduced capacity, necessarily implicates changes to the operational
12 criteria. DWR’s decision to pursue a Supplemental EIR is an acknowledgement of that
13 fact, having previously found in its EIR that such an approach would result in greater
14 impacts and ultimate infeasibility

15 The full extent of impacts from constructing and operating the Project in multiple
16 stages is impossible to discern, as DWR now holds almost all the information (and
17 Protestants almost none of it). However, the available evidence, including the WaterFix
18 final environmental impact report (FEIR) that DWR certified on July 21, 2017 and the
19 preliminary modeling data it disclosed for the first time last Thursday, indicates that
20 constructing and operating the Project in phases will result in new or substantially more
21 severe significant impacts to the environment as well as legal users of water both North
22 and South of the Delta.

23 As recently as July 2017, DWR dismissed phased construction and anything less
24 than a three-intake, two-tunnel project as infeasible. The parties’ participation in the
25 Hearing was predicated on those representations by DWR. Part 1 and Part 2 testimony
26 that has already been submitted is subject to change under the phased implementation
27 approach. Testimony throughout Part 1, and submitted for Part 2, was based on various
28 operations assumptions that did not include a staged construction approach. Recently,

1 Protestants, including Sacramento Regional County Sanitation District, Sacramento
2 County Water Agency (as part of the American River Water Agencies), and County of
3 Sacramento submitted Part 2 testimony that includes modeling results based on a three-
4 intake, two-tunnel project. In this testimony, conclusions regarding, flows, water levels,
5 water quality, groundwater movement, and reservoir storage were drawn assuming a
6 three-intake, two-tunnel configuration, rather than a two-intake, one tunnel layout.

7 The parties to this hearing have not addressed the serious impacts that extending
8 the construction period, or the potential re-opening of multiple construction periods
9 (multiplying the impacts of mobilizing the equipment and supplies needed to construct
10 the Project), would have on Delta residents, the environment or legal users of water in,
11 above and below the Delta. All the available evidence shows that the staging “option”
12 would have new significant impacts, would be so expensive as to compromise
13 Petitioners’ ability to ever construct the project described in their petition, and would not
14 be in the public interest. Relevant to DWR’s opposition, the evidence demonstrates why
15 the State Water Board should not proceed with this hearing until after the details of the
16 phased approach, and its significant impacts, are disclosed to the Board and public
17 through a certified SEIR.

18 **A. Phase 2 Cannot Go Forward Until the Environmental Impacts of the**
19 **Revised Project Are Fully Analyzed and Disclosed.**

20 The order of these proceedings is fundamental to a just outcome. Environmental
21 review of the Project, as it will actually be built, must be completed before Part 2
22 commences. The Hearing Officers have previously explained that “[w]ith the exception
23 of the certified, final EIR, the environmental review documents are not legally required
24 for the State Water Board to process the water right change petition for the WaterFix
25 Project.” (August 31, 2017 Ruling, p. 4). In November 2017, the Hearing Officers
26 recognized that “[w]hether a revision to the proposed project would trigger the need for a
27 revision to the petition or additional administrative procedures before the Board depends
28 on the nature of the proposed change.” (November 8, 2017 Ruling, p. 1.) There is no

1 need to deviate from the order of proceedings as directed by the Hearing Officers;
 2 indeed, to do so would be nonsensical, impractical, and unfair.

3 **B. The Phased Approach is a significant departure from the Project**
 4 **described in DWR and Reclamation's joint change petition**

5 The project now contemplated by DWR is both physically and institutionally
 6 different than the one presented in the change petition, and analyzed in its Final EIR.
 7 The revised Project requires additional environmental review, and that review must be
 8 completed before the Hearing Officer can resolve the issues in dispute in Part 2.

9 1. The Project Before the Board Today is Physically and Institutionally
 10 Distinct From the One Previously Proposed by DWR and
 11 Reclamation.

12 When it certified the EIR and approved the Project, DWR explicitly found that a
 13 two-intake, one-tunnel project alternative with 6,000 cfs of diversion capacity (Alternative
 14 3) – was infeasible and instead approved Alternative 4A as the project, reasoning that:

15 Because of [Alternative 3, 5, and 5A's] reduced north Delta diversion
 16 capacity compared with the Project (Alternative 4A), which has three north
 17 Delta intakes, reverse flows in the south Delta would persist under
 18 Alternatives 3, 5, and 5A, and fish losses in the south Delta would
 continue, though to a lesser degree than at present . . . [B]ecause they
 include fewer intakes, Alternatives 3, 5 and 5A would not meet the project
 objective of "develop[ing] projects that restore and protect water supply
 and ecosystem health and reduce other stressors on the ecological
 functions of the Delta in a manner that creates a stable regulatory
 framework under the ESA and either the CESA or NCCPA . . .

19 (SWRCB-110, p. 71.) A project scaled at this size, DWR concluded, "would result in an
 20 increase in reverse flows in April-May, and Alternative 3 would also increase reverse
 21 flows in October compared to Existing Conditions;" would provide "less operational
 22 flexibility compared to the Project;" would "have lower capacity than three-intake dual
 23 conveyance alternatives like the Project, and would be more susceptible to system
 24 failure, which would translate into greater reliance on the existing south Delta facilities
 25 than the Project would afford, which would in turn result in a greater persistence in the
 26 ecological problems current [sic] experienced with the current system." (SWRCB-110,
 27 pp. 70-72.)

28 Moreover, federal participation in this Project, which was assumed in the original

1 petition, is now speculative at best. The original Project and the analysis provided to
2 date was premised on a jointly executed state and federal Project. On February 8,
3 Director Nemeth represented to the Hearing Officers that the phased approach would
4 “allow implementation in the near term of a first stage that would include those elements
5 of WaterFix *fundable by south-of Delta State Water Project contractors.*” The remaining
6 elements would be constructed when (and if) “additional funding materializes.” (*Ibid.*).
7 While Reclamation remains a party to the hearing, it has been altogether silent on this
8 point, and in fact declined to answer the Hearing Officers’ specifically pointed questions
9 regarding its future involvement in the Project.

10 DWR’s statements that staging the Project is not a change to the Project, and that
11 staging will not result in new significant impacts or mitigation, are belied by its
12 determination to prepare a SEIR. When an agency proposes changes to a previously
13 approved project, CEQA Guidelines section 15162 generally prohibits the agency from
14 requiring a subsequent or supplemental EIR unless the agency determines, “on the
15 basis of substantial evidence in the light of the whole record,” that “[s]ubstantial changes
16 ... will require major revisions of the previous EIR or negative declaration due to the
17 involvement of new significant environmental effects or a substantial increase in the
18 severity of previously identified significant effects.” (*Friends of the College of San Mateo*
19 *Gardens v. San Mateo Community College District* (2016) 1 Cal.5th 937, 957; citing
20 CEQA Guidelines, § 15162(a).) When conditions triggering a supplemental EIR arise,
21 “no other responsible agency shall grant an approval for the project” until that
22 subsequent environmental review is complete. (Guidelines, §§ 15162(c), 15163; Pub.
23 Res. Code § 21166.)

24 Whatever this new “phased approach” may prove to be, it is not the Project that
25 DWR and Reclamation presented to the Hearing Team in their Change Petition, and it is
26 not the Project that was analyzed in the EIR.

1 2. DWR's "Preliminary" Modeling of the Staged Approach Reveals
2 Significant Changes in Project Operations Compared to the
3 Petitioned Project

4 DWR has asserted to the Hearing Officers that the Boundary 1 and Boundary 2
5 (B1 and B2) scenarios presented in this hearing encompass all the potential operational
6 impacts of the staged implementation. This is incorrect, and DWR's unsubstantiated
7 assertions are contradicted by the certified EIR for the WaterFix, as well as independent
8 analyses of the preliminary modeling by expert witnesses Dr. Susan Paulsen and Walter
9 Bourez. (See Exhibit A, February 13, 2018 Declaration of Susan Paulsen, Ph.D., P.E
10 and Exhibit B, February, 13, 2018 Declaration of Walter Bourez.). Dr. Paulsen's initial
11 analysis of DWR's staged project modeling results indicates that WaterFix operations
12 under the "Single Tunnel, Stage 1" scenario would result in *significantly different* export
13 flow rates than the WaterFix project versions presented by Petitioners in this hearing.
14 Mr. Bourez's analysis reveals substantial changes in south of Delta deliveries as
15 compared to the H3+ scenario, and increased use of the North Delta diversion, among
16 other concerns.

17 DWR's preliminary modeling results provided show that in many months of the
18 16-year DSM 2 simulation period, the flow rate exported from the South Delta is *greater*
19 in the new staged single tunnel scenario than in *all other* WaterFix project scenarios; this
20 includes both B1 and B2, which DWR has stated represent the outer limits, or
21 "bookends" of potential WaterFix operational impacts. In addition, the annual average
22 export flow rate from the South Delta is greater for the staged approach than for all other
23 Project scenarios in at least five of the 16 years. Dr. Paulsen's initial analysis of the
24 preliminary modeling indicates there are many months over the 16-year model period
25 (61 total) in which total export flow rate (both North and South Delta) is greater for the
26 single tunnel staged approach than for either the B1 or B2 scenarios. In three of the 16
27 years, the total export flow rate is greater than either the B1 or B2 scenarios for 33
28 percent of the year. In six of the 16 years, the total export flow rate is greater than either
 the B1 or B2 scenarios for 25 percent or more of the year. In five months during the 16

1 year period, the monthly average export flow rate is greater for scenario the single tunnel
2 staged approach than for all the project scenarios (Alternative 4A H3, H4 and H3+, B1
3 and B2) and greater than for the no-project scenarios (EBC2 and NAA).

4 As discussed in Mr. Bourez's declaration, DWR's modeling shows south of Delta
5 CVP deliveries under the Single Tunnel Stage 1 scenario are reduced by 120,000 acre
6 feet as compared to a reduction of only 8,000 acre feet under scenario H3+. Insofar as
7 reduced south of Delta deliveries have water supply impacts, this result alone contradicts
8 DWR's claim that the phased approach results in "no additional (or even a reduction in)
9 environmental impacts from California WaterFix H3+." Mr. Bourez's analysis also shows
10 that use of the North Delta diversion in the Single Tunnel Stage 1 modeling results is
11 greater than in H3+, Boundary 1 and Boundary 2 in July and August. There has been no
12 analysis of the water supply or environmental impacts of this increase in diversions, and
13 any such impacts are outside of the boundary analysis presented in this hearing. Finally,
14 contrary to the suggestion that a phased project would serve SWP contractors, DWR's
15 Single Tunnel Stage 1 modeling allocates North Delta diversion capacity between the
16 SWP and CVP, with 1,000 cfs dedicated to the CVP and 5,000 cfs dedicated to the
17 SWP. It is unclear, and Petitioners have presented no evidence to demonstrate, whether
18 allocating exports in this manner is consistent with Petitioners' Coordinated Operating
19 Agreement, especially given that CVP deliveries under the "phased option" are reduced
20 by a significant margin (120,000 acre feet).

21 **C. Contrary to DWR's Unsubstantiated Assertions, there is Substantial**
22 **Evidence that the Staged Approach Will Result in New or**
23 **Substantially More Severe Significant Impacts to the Environment,**
Including Public Trust Resources.

24 On February 8, 2018, DWR Director Karla Nemeth acknowledged to the Hearing
25 Team that the timing of future phases of the WaterFix construction period was uncertain
26 and dependent on future funding under DWR's new phased option. For the same
27 reasons, DWR and Reclamation refused in 2017 even to evaluate a staged approach to
28 the Project in the WaterFix EIR/EIS. Petitioners rejected the Delta Stewardship

1 Council's suggestion that the EIR/EIS consider such an approach, on the grounds that
2 phasing the Project would be "extremely costly compared with an approach by which all
3 approved conveyance facilities were constructed during a single phase." (SWRCB-102,
4 Appendix 3A, p. 3A-93.) Specifically, the FEIR cites *additional costs of up to \$17.2*
5 *billion* (on top of the EIR's estimate of \$12.9 billion to construct the full Project). (*Id.*)
6 DWR found those additional costs "could well be prohibitive" and lead to Project
7 abandonment should financing for future phases fail to materialize. (*Id.* at p. 3A-94.)
8 Phasing is now being proposed because Petitioners have been unable to secure even
9 half the necessary funding commitments for the full Project (only \$6 billion has been
10 pledged, with no binding financing arrangements in place for even that). The FEIR
11 evidence strongly suggests that if the Project proceeds in phases, the full Project will
12 never be built, and thus many, if not most, of its purported benefits will never be realized.
13 This is, of course, the same situation that occurred when the SWP was constructed and
14 DWR was unable to secure sufficient funds or public support to complete the North Delta
15 diversions, despite repeated efforts between the late 1960s through early 1980s, when
16 voters overwhelmingly rejected the WaterFix predecessor, the Peripheral Canal.

17 The prohibitive expense, which could result in potential abandonment of the
18 Project, was not the only reason that Petitioners refused even to consider a phased
19 approach in the EIR/EIS. As DWR itself put it,

20 In addition to increased costs and perhaps more importantly, phasing
21 would greatly increase the number of years during which Delta residents
22 would have to endure construction activities in their midst. . . . Not only
23 would Delta residents be affected by longer construction periods, sensitive
24 species and habitats would experience negative impacts. Areas that will
be restored after construction would be affected a second or third time as
subsequent phases are constructed . . . Sensitive species would also be
exposed to much longer period of disturbance, which could have
substantial indirect effects. (FEIR Appendix 3 at p. 3A-94.)

25 For these reasons, DWR's certified EIR concluded that it would be "financially
26 imprudent" to "knowingly embark on a two-phase or two stage process. *Such an*
27 *approach could also result in needless environmental impacts and inconveniences to*
28

1 *Delta residents.*" (Id. at p. 3A-95 (emphasis added).)

2 In addition to its statements rejecting a phased approach, the certified FEIR
 3 identified potential impacts to fish and wildlife associated with construction and operation
 4 of the same intake/tunnel configuration that DWR now describes as its "staged"
 5 construction proposal, and concluded such an alternative was infeasible. DWR's CEQA
 6 Findings of Fact and Statement of Overriding Considerations adopted when it approved
 7 the Project identify FEIR Alternative 3 as a single tunnel, two-intake, 6,000-cfs project
 8 and declare that alternative to have potential adverse effects in the Delta, even relative
 9 to existing conditions. SWRCB-110, pp. 53, 70-72. Most notably, DWR found that:

10 Because of the[] reduced north Delta diversion capacity compared with the
 11 Project (Alternative 4A), which has three north Delta intakes, reverse flows
 in the south Delta would persist under Alternatives 3 ..., and fish losses in
 the south Delta would continue.... (SWRCB-110, p. 71.)

12 DWR also made the following findings relevant to a phased or single tunnel two intake
 13 option:

14 Alternative[] 3 ..., with [its] reduced diversion capacity in the north Delta,
 15 would result in more negative reverse flows in Old and Middle Rivers,
 16 compared to the Project, during critical periods where species such as
 salmonids and delta smelt are present in the south (SWRCB-110, p.
 17 71.)

18 Alternative 3 ... would result in an increase in reverse flows in April-May,
 19 and ... would also increase reverse flows in October compared to Existing
 Conditions (SWRCB-110, p. 71.)

20 Due to the 'limited diversion capacit[y] in the northern facilities, and
 21 therefore the[] heavier reliance on current water facilities in the south Delta,
 22 Alternative[] 3 ..., while improving on existing conditions, would entail a
 greater degree of entrainment of larval/juvenile delta smelt compared to the
 Project' (SWRCB-110, pp. 71-72.)

23 Alternative[] 3 ... would have lower capacity than three intake dual-
 24 conveyance alternatives like the Project, and would be more susceptible to
 25 system failure, which would translate into greater reliance on the existing
 south Delta facilities than the Project would afford, which would in turn
 26 result in a greater persistence in the ecological problems current [sic]
 experienced with the current system. (SWRCB-110, p. 72.)

27 Having made these statements regarding phased and single tunnel, two intake
 28

1 alternatives in its own certified EIR and CEQA Findings; DWR cannot now “unring the
2 bell” and credibly claim, with no additional evidence, that proceeding with the Project in
3 phases is not a substantial change to the Project described in the petition for change, or
4 that such an approach will have no greater impact. DWR’s statement that it “does not
5 expect” that proceeding with a phased project will result in new impacts or mitigation
6 measures is disingenuous, at best.

7 As recently as July 2017, DWR dismissed phased construction and anything less
8 than a three-intake, two-tunnel project, as infeasible; and the parties’ participation in the
9 Hearing was predicated on those representations by DWR. The parties to this hearing
10 have not addressed the serious impacts that extending the construction period, or the
11 potential re-opening of multiple construction periods (multiplying the impacts of
12 mobilizing the equipment and supplies needed to construct the Project), would have on
13 Delta residents, the environment or legal users of water in, above and below the Delta.
14 All the available evidence shows that the staging “option” would have new significant
15 impacts, would be so expensive as to compromise Petitioners’ ability to ever construct
16 the project described in their petition, and would not be in the public interest. Contrary to
17 DWR’s opposition, the evidence clearly demonstrates why the Hearing Officers should
18 not proceed with this hearing until after the details of the phased approach, and its
19 significant impacts, are fully disclosed through a certified SEIR.

20 **D. Moving Forward With the Hearing Prior to Completion of the SEIR**
21 **Confounds Judicial and Administrative Efficiency.**

22 Curiously, at the same time it presses the Hearing Officers to advance forward
23 through Part 2, DWR takes the position that the SEIR, rather than an addendum, would
24 be offered because an addendum “provides for no public or agency review and input.”¹
25 Public review and input is precisely why the hearing process should be stayed in order to

26 ¹ On January 23, 2018, DWR prepared an addendum to the WaterFix final EIR related to the
27 Project’s power supply; an addendum is appropriate only if “minor technical changes or additions are
28 necessary” to an EIR and none of the conditions triggering preparation of a SEIR are present. (CEQA
Guidelines, § 15162(b).) The decision to prepare a SEIR for the staged one tunnel, two intake “option,” by
contrast, constitutes an implied admission that phasing is a major change to the Project, and that change
must be fully analyzed in accordance with CEQA.

1 consider the entire project as it is now proposed (and not the now-outdated version
2 previously analyzed). Indeed, Part 2's start date was premised on the assumption that
3 environmental review of the Project would be complete, giving the Hearing Team, the
4 parties, and the public a meaningful opportunity to review and consider DWR's
5 environmental assessment of the Project.

6 California WaterFix is unique in its size and historic importance, and the project
7 deserves the degree of attention and serious consideration that the State Water Board
8 has afforded it. Now, DWR asks that the Hearing Officers reverse their longstanding
9 position that the Project's CEQA analysis must be complete before Part 2 of the Hearing
10 commences, and take on-faith, DWR's representation that the Project and its impacts to
11 legal users of water remain unchanged. DWR asks that the Hearing Officers disregard
12 the specific direction in the Hearing Notice that Part 2 would not begin until "at least 30
13 days after the CEQA, ESA, and CESA processes *have been completed*." (Hearing
14 Notice, October 30, 2015, p. 2.)

15 Pressing on with Part 2 in the manner that DWR suggests would result in a due
16 process violation that no measure of later participation in the hearing process could cure.
17 DWR acknowledges that it holds only preliminary modelling, that it is currently in the
18 process of evaluating the environment impacts of the Project, and that specific physical
19 and institutional changes to the Project are imminent. Despite this, DWR now asks that
20 the Hearing Team disregard its own Hearing Notice, ignore DWR's prior representations
21 about the feasibility and scope of the Project before it, and proceed with the Hearing,
22 with additional information to be presented at DWR's convenience. Proceeding in such
23 a manner would jeopardize the validity of these proceedings, violate the Hearing
24 Officers' own prior rulings in this matter, and unjustly impair the public and parties' ability
25 to participate in the process. That result is inconsistent with the importance and stature
26 of this hearing, and with due process under the law.

27 **II. PROPOSED SCHEDULE BASED UPON COMPLETION OF SEIR**

28 Based upon the foregoing, the undersigned Protestants respectfully request the

1 following:

2 First, that Part 2 of the Hearing be stayed until 60 days after DWR certifies a
3 Supplemental EIR and approves the modified Project.

4 Second, that the Hearing Officers direct both DWR and Reclamation to submit the
5 additional information required under Water Code section 1701.3(b)(1), (2) and (3) to
6 demonstrate that any changes to the project that are the subject of the certified
7 Supplemental EIR will not injure any other legal user of water and that the change will
8 comply with CESA, ESA and CEQA requirements. The additional information must be
9 submitted within 10 days after certification of a Supplemental EIR.

10 Third, that all parties should be allowed an opportunity to submit case-in-chief
11 evidence on any Part 1 or Part 2 issue that arises from changes described in the
12 Supplemental EIR, and in response to the information provided by Petitioners under
13 Water Code section 1701.3. All such case-in-chief evidence should be due 45 days
14 after certification of a Supplemental EIR.

15 Finally, during Part 2, parties should be permitted to cross-examine and present
16 rebuttal on all Part 1 or Part 2 issues that arise from changes in the Supplemental EIR.

17 **III. SUMMARY RESPONSES TO HEARING OFFICERS' QUESTIONS**

18 The undersigned Protestants' response to the Hearing Officers' February 8
19 questions essentially is contained in the above arguments. Our specific responses to
20 those questions are as follows:

21 **Question 1:** No, for the reasons discussed above, the EIR does not address all
22 potential impacts.

23 **Question 2:** This question is addressed to Petitioners. Protestants note that
24 Reclamation has not provided any additional information regarding its plans to
25 participate (or not participate) in the first stage of the new Project; and the recently filed
26 Opposition is signed only by DWR.

27 **Question 3:** DWR's proposal to phase or stage the Project is an amendment to
28 the Petition because such an incremental approach is both physically and institutionally

1 distinct from the prior proposals. DWR must acknowledge, and the Board must consider,
2 the potential impacts if the Project is completed over a longer time period, without
3 Federal participation, or perhaps never completed at all.

4 **Question 4:** Yes, there are significant potential impacts to all interests that would
5 warrant revisiting Part 1 and Part 2 issues if DWR attempted to carry out a phased or
6 staged approach, many of which were acknowledged in DWR's own findings on the EIR.
7 Of significant note, the only supporting materials that DWR has provided regarding this
8 approach (the preliminary modeling files), reflect impacts during the phased operations
9 that are outside the range originally considered by DWR and presented to the Hearing
10 Officers in Part 1 of these proceedings.

11 **Question 5:** The most efficient way to incorporate an SEIR into this hearing
12 would be to stay the hearing until DWR has certified the SEIR and approved the
13 modified project, and to restart the hearing on what would be a substantially revised
14 project at that time. Protestants have offered a suggested schedule above.

15 **Question 6:** DWR has not provided sufficient information for any Party to
16 adequately evaluate the potential impacts of a phased approach to legal users, fish and
17 wildlife, or the public, and has admitted in its February 7 correspondence to stakeholders
18 that analysis is on-going. Protestants expect that the changed impacts noted above, as
19 well as others yet undiscovered, would require conditions specifically tailored to address
20 them.

21 CONCLUSION

22 DWR acknowledges that it holds only preliminary modeling, that it is currently in
23 the process of evaluating the environment impacts of the Project, and that specific
24 physical and institutional changes to the Project are imminent. Forging ahead with the
25 proceedings at this stage would require tremendous duplication of efforts, unreasonable
26 additional expenditures, and a potentially enormous waste of money and resources from
27 all parties and the State Water Board. When prior questions were raised regarding the
28 timing of federal environmental review, the Hearing team reasoned that "[w]hether or not

1 to proceed with Part 2 without the benefit of these documents is a discretionary
2 determination based on a weighing of the informational benefits of having these
3 documents against the risks and costs of delaying this proceeding for an indefinite
4 period of time.” (Aug 31, 2017 Ruling, p. 4). The delay requested by Protestants is finite,
5 and tied to the on-going development of information regarding the Project by DWR that
6 is expressly relevant to the SWRCB’s consideration of the change petition. A stay of this
7 order offers the benefits of greater certainty and transparency, without any meaningful
8 increase in cost. That result can hardly be considered prejudicial to DWR, and is
9 necessary in order to provide the public and all parties with the opportunity to
10 meaningfully participate in the Hearing process.

11 For the reasons stated above, the undersigned Protestants respectfully request
12 that the Hearing Officers stay the hearing until 60 days after DWR certifies its proposed
13 SEIR and approves the modified project, consistent with the schedule identified above.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: February 13, 2018

DOWNEY BRAND LLP

By: 

Kevin M. O'Brien
David R.E. Aladjem
Meredith E. Nikkel
Rebecca R.A. Smith

Attorney for CARTER MUTUAL WATER COMPANY, EL DORADO IRRIGATION DISTRICT, EL DORADO WATER & POWER AUTHORITY, HOWALD FARMS, INC., MAXWELL IRRIGATION DISTRICT, NATOMAS CENTRAL MUTUAL WATER COMPANY, MERIDIAN FARMS WATER COMPANY, OJI BROTHERS FARM, INC., OJI FAMILY PARTNERSHIP, PELGER MUTUAL WATER COMPANY, PLEASANT-GROVE VERONA MUTUAL WATER COMPANY, PRINCETON-CODORA-GLENN IRRIGATION DISTRICT, PROVIDENT IRRIGATION DISTRICT, RECLAMATION DISTRICT 108, SACRAMENTO MUNICIPAL UTILITY DISTRICT, HENRY D. RICHTER, ET AL., RIVER GARDEN FARMS COMPANY, SOUTH SUTTER WATER DISTRICT, SUTTER EXTENSION WATER DISTRICT, SUTTER MUTUAL WATER COMPANY, TISDALE IRRIGATION AND DRAINAGE COMPANY, WINDSWEPT LAND AND LIVESTOCK COMPANY; NORTH DELTA WATER AGENCY; RECLAMATION DISTRICT 999; RECLAMATION DISTRICT 2060; RECLAMATION DISTRICT 2068; BRANNAN-ANDRUS LEVEE MAINTENANCE DISTRICT; RECLAMATION DISTRICT 407; RECLAMATION DISTRICT 2067; RECLAMATION DISTRICT 317; RECLAMATION DISTRICT 551; RECLAMATION DISTRICT 563; RECLAMATION DISTRICT 150; RECLAMATION DISTRICT 2098; RECLAMATION DISTRICT 800 (BYRON TRACT); TEHAMA-COLUSA CANAL AUTHORITY

STATEMENT OF SERVICE

**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document:

**RESPONSE TO DEPARTMENT OF WATER RESOURCES CONSOLIDATED
OPPOSITION TO NATURAL RESOURCES DEFENSE COUNCIL, DEFENDERS OF
WILDLIFE, AND THE BAY INSTITUTE'S RENEWED MOTION TO STAY PART II
OF WATERFIX HEARING DUE TO CHANGES IN PROPOSED PROJECT**

to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated January 24, 2018, posted by the State of Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

	I caused a true and correct hard copy of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818: Method of Service: _____
--	--

I certify that the foregoing is true and correct and that this document was executed on February 13, 2018.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814