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February 16, 2017

SENT VIA EMAIL (CWFhearing@waterboards.ca.gov)

Hearing Chair Tam Doduc
Hearing Officer Felicia Marcus
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

**RE: New Information Pertaining to CWF Hearing Process in BDCP/CWF
Final Environmental Impact Report/Statement**

Dear Hearing Officers and Board Hearing Staff:

This office represents Protestants Local Agencies of the North Delta, Bogle Vineyards/Delta Watershed Landowner Coalition, Diablo Vineyards and Brad Lange/Delta Watershed Landowner Coalition, and Stillwater Orchards/Delta Watershed Landowner Coalition (“LAND, et al. Protestants”). We are writing regarding the Final Environmental Impact Report/Environmental Impact Statement (“FEIR/S”) released on December 22, 2016, as it relates to the development of rebuttal cases for the ongoing hearings before the Board regarding proposed Changes in Water Rights for the California WaterFix Project (“Delta Tunnels”). On January 31, 2017, the parties submitted information regarding the topics that may be included in closing briefs. There has been no discussion or briefing, however, on the issue of the effect of FEIR/S release on the ongoing hearing process.

Environmental reports must be written in plain language so decision makers and the public can readily understand them.¹ In the spirit of this rule, when the California Department of Water Resources (“DWR”) and the U.S. Bureau of Reclamation (collectively, “lead agencies” or “Petitioners”) published the Partially Recirculated Draft Environmental Impact Report/Supplemental Environmental Impact Statement (“RDEIR/S”) for the BDCP in 2015, the agencies appended a version of the document that showed in redline all the changes that had been made from the original Draft EIR/S.²

¹ See 40 C.F.R. § 1502.8; see also *Oregon Env'tl. Council v. Kunzman* (9th Cir. 1987) 817 F.2d 484,494.

² See, e.g., California Department of Water Resources, Bay Delta Conservation Plan, RDEIR/SDEIS Appendix A: Revisions to the Draft EIR/EIS, Chapter 12:

This redline version allowed the reader to find changes from the 2013 version of the document.

This time, the FEIR/S includes no redline or other summary of changes from the RDEIR/S. The FEIR/S contains tens of thousands of pages and is a complete-stand-alone document, not a compilation of changes to the 2015 document. The only way I have found to find changes between the 2015 and 2016 analyses is to excerpt out sections from the 2015 and 2016 documents and run Word “compare” documents, which is a laborious and painstaking process.³

As the representative of several protestants in the California WaterFix Change Petition proceedings, I am concerned that the lack of redlined changes in the FEIR/S, coupled with the volume of information in the document, obfuscates changes that may be relevant to the water rights change proceedings before the Board.⁴ Protestants have based their cases in chief on the information presented in the original Petition and Addendum an Errata (submitted in August and September 2015), as well as the Petitioners’ cases in chief (submitted on May 31, 2016). Where the lead agencies have made changes in the FEIR/S that relate to potential injury to water users, it is necessary for protestants to have the opportunity to meaningfully consider those changes for the purposes of formulating their rebuttal cases.

To illustrate the problem, here is an example of how these changes impact Petitioners’ cases in chief. We discovered that the FEIR/S contains new information regarding a substantial lowering of groundwater beneath the Sacramento River as a result of project operation. For the first time, the FEIR/S reveals that operation of the project (Alternative 4A) would result in:

Up to 5-foot episodic lowering of groundwater levels beneath the Sacramento

Terrestrial Biological Resources

<http://baydeltaconservationplan.com/RDEIRS/Ap_A_Rev_DEIR-S/12_Bio.pdf>.

³ In addition, DWR further frustrated public review by attempting to impose an artificial deadline ending the public review period for the FEIR/S on January 30, 2017, less than six weeks after the FEIR/S became available. (See 81 Fed Reg. § 96486; Cal. Dept. of Water Resources, Bay Delta Conservation Plan, FEIR/S <<http://bavdeltaconservationplan.com/FinalEIREIS.aspx>>.)

⁴ The SWRCB is acting as a responsible agency pursuant to CEQA with respect to the EIR/S and has a more limited role than a lead agency would in that context. (See CEQA Guidelines, § 15096.) This letter focuses on the implications of information contained in the FEIR/S to these water rights proceedings.

River due to lower flows in the river as a result of diversions at the north Delta intakes that result in a reduction in river flows and elevations.... The groundwater level changes would be 5-feet or less on nearby shallow domestic well yields. Due to the implementation of Mitigation Measure GW-1, no additional mitigation measures are required.

(FEIR/S, p. 7-119.)⁵ It is unclear from the text what this new information is based on (e.g. whether it is based on new groundwater modeling). Nonetheless, the FEIR/S concludes that Mitigation Measure GW-1 is sufficient to mitigate impacts to a less than significant level; Petitioners' relied on this same mitigation measure to allegedly avoid any injury to legal users of water. (See, e.g., DWR-57, pp. 3, 15-16.) We believe this newly disclosed episodic lowering would likely injure users of groundwater in the vicinity of the river.

Instances such as this, where the lead agencies have introduced new information and conclusions regarding subjects that directly relate to legal injury would be appropriate for inclusion in protestants' rebuttal cases before the Board. However, protestants cannot reasonably be expected to identify such changes by comparing, line for line, tens of thousands of pages across two versions of the EIR/S. Similarly, some protestants' comments on the RDEIR/S related directly to legal injury (for instance in the form of water quality degradation), yet the responses to comments in the FEIR/S refer only vaguely to changes in an entire chapter or appendix of the FIER/S that may be hundreds or even thousands of pages long. Thus, it is practically impossible for protestants to identify significant changes that may be relevant to the development of their rebuttal cases for Part 1 before the Board.

The Hearing Officers' December 19, 2016 Ruling on Submittal Deadlines, Rebuttal Process, and Scheduling indicated that the deadline for rebuttal would likely be 30 days following its ruling on Part 1 evidence. (See p. 2.)⁶ Even including the time elapsed since December 22, 2016, this is insufficient time to determine what changes in the proposed project and/or its mitigation relate directly to Petitioners' cases in chief. Without a redline version of the FEIR/S, or another equivalently precise description of

⁵ Available at:
http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Final_EIR-EIS_Chapter_7_-_Groundwater.sflb.ashx.

⁶ Available at:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20161219_cwf_ruling.pdf.

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the changes contained therein, it is not possible to meaningfully formulate protestants' rebuttal cases.

Therefore, we respectfully request that the Hearing Officers direct Petitioners to provide a redline version of the FEIR/S and identify which changes to the FEIR/S modify their cases in chief presented in 2016. In addition, Petitioners should disclose whether and when they plan to submit the FEIR/S into evidence. Last, additional time to formulate protestants' rebuttal cases beyond 30 days will be necessary.⁷ We suggest that the proper amount of time be determined after Petitioners provide the above information so that the Hearing Officers, Board staff and the protestants can assess the extent of the changes being proposed to Petitioners' cases in chief via the FEIR/S.

Thank you for your attention to this matter.

Very truly yours,

SOLURI MESERVE
A Law Corporation

By: 
Osha R. Meserve

ORM/std

cc: See Attached Statement of Service

⁷ While we understand that Part 2 of the hearing process may also address issues with Petitioners' environmental documentation, this information is also very relevant to the Part 1 protestants' cases in chief.

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

STATEMENT OF SERVICE

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 16, 2017, addressed to Hearing Chair Tam Doduc and Hearing Officer Felicia Marcus regarding new information pertaining to CWF hearing process in BDCP/CWF Final Environmental Impact Report/Statement

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 13, 2017, posted by the State Water Resources Control Board at

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

I certify that the foregoing is true and correct and that this document was executed on February 16, 2017

Signature:  _____

Name: Mae Ryan Empleo

Title: Legal Assistant for Osha R. Meserve
Soluri Meserve, A Law Corporation

Party/Affiliation:

Local Agencies of the North Delta

Bogle Vineyards/DWLC

Diablo Vineyards and Brad Lange/DWLC

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