

March 8, 2017

VIA EMAIL (CWFHEARING@WATERBOARDS.CA.GOV)

State Water Resources Control Board
Division of Water Rights
Attn: California WaterFix Hearing Team
P.O. Box 2000
Sacramento, CA 95812-2000

**Re: California WaterFix Hearing on Petition for Change: Request for Confirmation
Regarding Submittal of Proposed Terms and Conditions**

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

The Sacramento Valley Group,ⁱ Tehama-Colusa Canal Authority and water service contractors in its service area,ⁱⁱ North Delta Water Agency and certain reclamation districts,ⁱⁱⁱ the City of Brentwood, and the Delta Flood Control Group^{iv} (“Downey Brand Protestants”) submit this request for confirmation regarding the scope of the March 23, 2017 deadline for the submittal of Part 1 rebuttal evidence. Specifically, the Downey Brand Protestants request confirmation that proposed permit terms and conditions that address both Part 1 and Part 2 issues and any necessary supporting evidence will be accepted by the State Water Resources Control Board as part of the evidentiary record at an appropriate time (yet to be determined) after the March 23 deadline for the submittal of Part 1 rebuttal evidence.

This Hearing was originally divided into two parts to allow the hearing to proceed while the environmental review of the project under the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA) proceeded on a parallel track. In December 2016, the Hearing Officers declined to establish a final “Part 3” of the proceeding for the presentation of permit terms and conditions. Instead, parties were “encouraged to submit proposed permit terms and conditions and supporting evidence as part of their rebuttal testimony or, as appropriate, during Part 2 of the hearing.” December 2016 Ruling On Submittal Deadlines, Rebuttal Process, and Scheduling (“Dec. 2016 Ruling”), p. 4.¹ On March 3, 2017, in responding to a request from the American River Water Agencies, the Hearing Team instructed those agencies to submit evidence in support of their proposed permit terms and conditions during the appropriate part (e.g. Part 1 or Part 2) of the WaterFix hearing.

¹ The Hearing Officers reserved for themselves the right to revisit the need for subsequent “terms and conditions” phase of the hearing at a later date. Dec. 2016 Ruling, p. 4.

The Hearing Officers have repeatedly acknowledged that, as a practical matter, Part 1 and Part 2 issues may often intersect. *See* February 21, 2017 Procedural Ruling on Admission of Evidence, Rebuttal Deadline, and Hearing Dates at p. 15; October 7, 2016 Ruling on Written Testimony Outside the Scope of Part 1 and Other Procedural Matters, pp. 1-4. This is particularly apparent in the presentation of proposed permit terms, the purpose of which is to identify conditions that provide a basis for the withdrawal of a protest. For example, the Hearing Officers have explained that “at least in theory, Delta flow criteria could affect water flows or quality in a manner that causes impacts to other legal users of water. Conversely, it is also at least theoretically possible that any flow or water quality conditions necessary to avoid impacts to other legal users could affect the desirability or feasibility of implementing certain Delta flow criteria.” April 25, 2016 Ruling Re: Procedural Modifications Following the March 4, 2016 Ruling (“April 25, 2016 Ruling”), p. 3. Accordingly, the Hearing Officers anticipated in April 2016 that the intersection of these issues will be addressed together in the final order taking action on the petition and not separately. *Id.* By the same token, the Downey Brand Protestants expect that certain Part 2 issues, such as appropriate Delta flow criteria, will intersect with evidence presented in Part 1 in a manner that affects the analysis of their asserted injury. As a result, the Downey Brand Protestants intend to address the effect of Part 2 issues on their asserted injury by presenting proposed terms and conditions and supporting evidence after the presentation of Part 2 evidence.

Indeed, in order for permit conditions to address all aspects of potential injury and other key hearing issues, it continues to be the Downey Brand Protestants’ position that proposed terms and conditions are most appropriately submitted after the remaining Part 2 issues have been addressed before the Board. Due process requires a full and cogent presentation of *all* evidence related to injury under Water Code § 1702 before these parties (each of whom claim a property or contract right) can offer meaningful conditions under which that injury might be avoided. *See Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612 (adjudicative decisions of government agencies are subject to procedural due process). This timing is particularly significant because Petitioners have not provided any proposed permit conditions, despite the Hearing Officers’ strong encouragement. February 11, 2016 Pre-Hearing Conference Ruling, p. 6, 7 (“We also agree with some of the parties that, absent a more complete and succinct submittal of information by petitioners, project opponents will not be able to fully-develop their cases in chief, and much substantive content will be deferred to the rebuttal stage of the hearing.”)

Accordingly, we are seeking confirmation from the WaterFix Hearing Officers that proposed permit terms and conditions that address both Part 1 and Part 2 issues and any necessary supporting evidence will be accepted at some yet to be determined time after the March 23 deadline for the submittal of Part 1 rebuttal evidence. In this way, we understand the Hearing Officers’ December 19, 2016 direction to *encourage* the submission of proposed permit terms and conditions, but not to *require* the submission of such proposals that address the intersection of Part 1 and Part 2 issues. We also acknowledge the Hearing Officers’ decision to deny our request for a Part 3 to address proposed terms and conditions and do not seek reconsideration of that decision. Rather, the Downey Brand Protestants request that the Hearing Officers’ confirm that the presentation of terms and conditions, as well as evidence in support of those terms, will be accepted after a fully-informed review of all evidence in both Parts 1 and 2 are presented to the Hearing Officers.


If the Hearing Officers intend to preclude the submission of proposed permit terms and conditions relating to Part 1 issues after March 23, 2017, then we request clarification of this issue no later than March 15, 2017 so that we may have an opportunity to address the Hearing Officers' direction.

Nothing in this letter shall be construed as an admission, express or implied, that Petitioners have met their burden of proof in this proceeding or that the Petition should be approved. The Downey Brand Protestants reserve all rights to contest any approval of the Petition by the State Water Resources Control Board.

The Downey Brand Protestants appreciate your consideration of these requests.

Very truly yours,

DOWNEY BRAND LLP



Kevin M. O'Brien



David R.E. Aladjem

cc: CA WaterFix Service List

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ⁱ The Sacramento Valley Group consists of 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, 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. The Sacramento Valley Group protestants comprise a portion and not all of the protestants in the larger Sacramento Valley Water Users (SVWU).

ⁱⁱ The Tehama-Colusa Canal Authority member districts consist of Colusa County Water District, Corning Water District, Cortina Water District, Davis Water District, Dunnigan Water District, 4M Water District, Glenn Valley Water District, Glide Water District, Holthouse Water District, Kanawha Water District, Kirkwood Water District, La Grande Water District, Myers-Marsh Mutual Water Company, Orland-Artois Water District, Proberta Water District, Thomes Creek Water District, Westside Water District.

ⁱⁱⁱ Reclamation District 999, Reclamation District 2060 and Reclamation District 2068 are located within the boundary of the North Delta Water Agency.

^{iv} The Delta Flood Control Group consists of 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, and Reclamation District 800 (Byron Tract).

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:

**DOWNEY BRAND PROTESTANTS' LETTER TO SWRCB RE:
REQUEST FOR CONFIRMATION REGARDING SUBMITTAL OF
PROPOSED TERMS AND CONDITIONS**

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 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:
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	Method of Service: _____
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I certify that the foregoing is true and correct and that this document was executed on March 8, 2017.

Signature: _____

Name: Kathei Courtland

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814