

August 14, 2017

**VIA EMAIL**

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

Re: Sacramento Valley Water Users' Reply to DWR Response to Save the California Delta Alliance Opposition to Noticing Part 2

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

The Sacramento Valley Water Users (SVWU) submit this reply to the Department of Water Resources' (DWR) August 11, 2017 letter, responding to Save the California Delta Alliance's (SCDA) opposition to DWR's request that the Hearing Officers issue notice of Part 2 of the California WaterFix water rights change petition hearing.

DWR seeks to proceed with Part 2 of the hearing before its Co-Petitioner, the United States Department of the Interior (DOI), has completed its environmental review processes and approved a final project. Unable to provide any clear assurances to the Board that DOI will approve a final project comparable to its own, DWR contends "[t]here is no evidence presented that potential changes to the project description are being contemplated if and when Reclamation eventually issues a record of decision...." However, this statement is incorrect and misstates Reclamation's obligations under the federal Endangered Species Act (ESA) and National Environmental Policy Act (NEPA).

As noted in the SVWU's August 11 letter, DOI's operations witness gave sworn testimony that such discussions were taking place as of April, 2017. (Transcript, April 27, 2017 49:12-53:7 [testimony of Ron Milligan].) Further, DOI's modeling witness offered rebuttal testimony in May that she was actively involved in such negotiations between Petitioners as to how they would utilize the additional capacity provided by WaterFix. (Transcript, May 5, 2017 58:19-24 [cross-examination of Nancy Parker].) SVWU also has reason to believe that discussions are currently taking place amongst DOI and Central Valley Project (CVP) contractors that could result in changes to the project description.

DWR suggests that “the Hearing Officers have discretion to move forward” before DOI makes its final decision by issuing a record of decision (ROD). While this might be accurate, any such action by the Board could force DOI to confront a Hobson's choice between declining to participate in Part 2 of the hearing or violating NEPA by advocating specific project proposals before it has issued a ROD. Until it has completed its ROD, DOI cannot meaningfully participate in Part 2 of the California WaterFix hearings without rendering itself vulnerable to arguments that it has improperly prejudiced its selection of alternatives before completing the NEPA process. Until the federal action agency has made a final decision by issuing a ROD, NEPA forbids it from taking any action that would have an adverse environmental impact or prejudice its selection of alternatives. 40 C.F.R. §§ 1502.2(f), 1506.1(a); *Ground Zero Ctr. for Non-Violent Action v. United States Dep't of the Navy*, 860 F.3d 1244, 1257 n.7 (9th Cir. 2017). NEPA prohibits agencies from committing resources to a plan before issuing an ROD; an agency cannot act to further a specific proposal before analyzing the environmental effects of that proposal. *Theodore Roosevelt Conservation P'ship v. Salazar*, 605 F. Supp. 2d 263, 280 (D.D.C. 2009). Here, DOI's participation in Part 2 would require it to commit resources and advance the analysis of the environmental effects of a particular project alternative prior to completing the NEPA process.

DOI's ROD for the California WaterFix project is also a critical component of its ESA permitting process. DOI's ROD will determine not only whether the existing environmental impact statement (EIS) complies with NEPA in its analysis of Alternative 4, but also whether that EIS adequately analyzes the revised project features that have been added, for the first time, in the June 2017 Biological Opinions. When DOI issues its ROD, it will indicate the results of the Section 7 consultation and whether DOI will adopt and implement the Biological Opinions and their Reasonable and Prudent Measures. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 642-43 (9th Cir. 2014) (action agency must determine whether to adopt and implement the Biological Opinions), and cases cited therein. A clearly defined final project approval is crucial for the Board to have a meaningful understanding of potential environmental impacts from the actual WaterFix project that has been approved by both Petitioners.

Moreover, the impacts of the proposed project, as amended by the biological opinions, must be analyzed under NEPA. When a biological opinion recommends changes to a project and the federal action agency accepts them, the environmental impacts that would result from implementing the project as revised by the biological opinion must be analyzed under NEPA. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 647-48 (9th Cir. 2014). The June 2017 Biological Opinions contain over 1800 pages of text and appear to make significant changes to the scope of operations for the proposed California WaterFix project. While SVWU believes Reclamation staff are working diligently to analyze the effects of those changes and determine whether they are within the scope of the previously prepared NEPA analysis, it is understandable that the analysis is not yet complete.

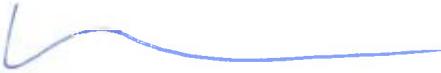
Requiring DOI to proceed and potentially to commit to a particular alternative before its NEPA review is complete and a decision document is signed would be pre-decisional. Indeed, the

Board acknowledged from the very beginning of this hearing process that a record of decision would be necessary to assess environmental impacts, stating in January 2016 that Part 2 would: "not commence until at least 30 days after completion of the NEPA/CEQA and ESA/CESA processes." (January 15, 2016 Ruling, p. 3; *see also* California WaterFix Project Pre-Hearing Conference Ruling, Feb. 11, 2016, p. 3.) Likewise, from the outset of these proceedings, DWR has acknowledged the importance of DOI's ROD: in its September 22, 2015 email to SWRCB staff, DWR represented that "a final decision on this Petition is not requested until DWR and Reclamation complete[ ] preparation of the Final EIR/EIS, make[ ] a decision on the project, and issue[ ] the NOD and ROD (which includes completion of [ ] Section 7 of the ESA)." Message from DWR Re: Schedule Information Related to California WaterFix, [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/docs/dwr\\_kenbogdan092215.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/dwr_kenbogdan092215.pdf), p. 2.

The Board needs a full and complete picture of the potential environmental impacts under WaterFix in order to satisfy its own independent duties as a responsible agency. Proceeding prior to the issuance of a final decision by DOI simply creates more uncertainty as to the elements of the proposed project and the potential impacts of that project on the environment. Accordingly, to avoid duplication and confusion, the SVWU respectfully request that the Hearing Officers wait until a ROD is finalized before noticing Part 2 of the hearing.

Very truly yours,

DOWNEY BRAND LLP



David R.E. Aladjem  
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cc: CalWaterFix 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 August 14, 2017 Re: Sacramento Valley Water Users' Reply to DWR  
Response to Save the California Delta Alliance Opposition to Noticing Part 2**

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 August 11, 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](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 <b>hard copy</b> 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:  <b>Method of Service:</b> _____
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I certify that the foregoing is true and correct and that this document was executed on August 14, 2017.

Signature: 

Name: Catharine Irvine

Title: Legal Secretary

Party/Affiliation: Downey Brand, LLP

Address: 621 Capitol Mall, Sacramento, CA 95814