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Via Electronic Mail
Hearing Chair Tam Doduc
Co-Hearing Chair Felicia Marcus
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
CWFhearing@waterboards.ca.gov

Re. Joinder in Request Regarding Setting of Briefing Schedule

Hearing Officer Doduc and Marcus:

Protestants County of Sacramento, Sacramento County Water Agency, City of Stockton, Sacramento Regional County Sanitation District, Carmichael Water District, Placer County Water Agency, Glenn-Colusa Irrigation District, and Biggs-West Gridley Water District join in the requests made at the conclusion of yesterday's hearing that the Hearing Officers not set any deadlines for briefing on the merits of the California WaterFix ("CWF" or "Project") Change Petition until after petitioner Department of Water Resources (DWR) certifies the California WaterFix Supplemental Environmental Impact Report (EIR), co-petitioner U.S. Bureau of Reclamation (Reclamation) issues a Record of Decision for the Project, and the Final Supplemental EIR/Environmental Impact Statement (SEIR/EIS) is entered into the evidentiary record. As noted by Ms. Meserve, DWR and Reclamation are required by law to *actually consider* public comments on the Draft SEIR/EIS (DSEIR/EIS) and determine whether those comments require changes to the proposed Project, through the adoption or modification of mitigation measures or alternatives to the Project, including the alternative of not proceeding with the Project.

The public comment period on the DSEIS began on September 21, 2018, and does not close until November 5, 2018. Counsel for the State Water Contractors and DWR argued yesterday that the Project is not likely to change as a result of public comment on the DSEIR/EIS. The Hearing Officers should be very skeptical of such representations as those comments suggest the DSEIR/EIS itself is a post hoc

rationalization for a predetermined decision by Reclamation to approve the Project as proposed, without actually considering the merits of the EIS alternatives. Those representations also suggest a predetermined decision by DWR to approve the Project described in the DSEIR, even though the modified Project has been shown in testimony presented in this hearing to result in new significant impacts not properly evaluated in the DSEIR/EIS. (*Laurel Heights Improvement Assn v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 394.)

Further, as noted yesterday by Mr. Ruiz, the release last week by DWR of a new economic analysis of CWF that relies on 100% of CWF capacity being committed to State Water Project deliveries presents significant concerns. That study has not been introduced into evidence in this proceeding (indeed its release appears designed to influence the decision by the Delta Stewardship Council in ruling on the nine (9) pending appeals of DWR's Delta Plan consistency determination). In addition, it is disingenuous for DWR to publicly boast about alleged benefits of the CWF that are predicated upon a project with *zero* federal participation, and at the same time argue to the Hearing Officers that the Project has not changed from the one described in the Change Petition. While there may be precedent for the State Water Resources Control Board (Board) to act on change petitions prior to a final agency decision on the underlying project, the CWF proceeding has been unprecedented in its scope and in the number of changes in every aspect of the Project during the three (3) years of this proceeding.

The Hearing Officers' procedural rulings suggest that the Final SEIR/EIS should be included in the evidentiary record before setting a briefing schedule. Specifically, in order for a party to cite the Final SEIR/EIS in a brief or for the Board to make the requisite California Environmental Quality Act findings in determining whether and under what conditions to approve the Project, the Final SEIR/EIS must be in the evidentiary record. (See September 10, 2018 Hearing Officers' Ruling, p. 2; see also Notice of Petition and Notice of Public Hearing and Pre-Hearing Conference, October 30, 2015, p. 36.) To ensure efficient briefing and proper consideration of the Final SEIR/EIS by the Board, the Board should await entry of the Final SEIR/EIS into the record before setting a briefing schedule.

For the efficiency of the hearing, and to afford due process to the dozens of protestants who will be devoting substantial time and money to the preparation of closing briefs, no briefing schedule should be set before the Final SEIR/EIS is certified,a federal Record of Decision for the CWF has been issued, and the Final SEIR/EIS has been entered into the evidentiary record.

Sincerely,
SOMACH SIMMONS & DUNN

Aaron A. Ferguson
Counsel to Protestants County of Sacramento, Sacramento County Water Agency, City of Stockton, Sacramento Regional County Sanitation District, Carmichael Water District, Placer County Water Agency, Glenn-Colusa Irrigation District, and Biggs-West Gridley Water District

cc: CWF Service List (*Via Electronic Mail*)

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