

CWFhearing

From: Irvine, Catharine <cirvine@DowneyBrand.com>
Sent: Friday, January 22, 2016 11:08 AM
To: CWFhearing; Ron Bernal; Anna Swenson; Barbara Vlamis; Kelweg
Subject: FW: CalWaterFix 1/28/2016 Pre-Hearing Conference
Attachments: SVWU Pre-Hearing Conference letter.pdf

Please see attached.

From: Irvine, Catharine
Sent: Friday, January 22, 2016 10:52 AM
To: Aaron Ferguson; Alan Lilly; Alex Peltzer; Amy Aufdemberge; Andrew Hitchings; Anna Swenson; Barbara Barrigan-Parilla; Barbara Daly; Barbara Vlamis; Barry Sgarrella; Bill Jennings; Bill Wells; Brad & Emily Pappalardo; Brad Pappa; Brett G. Baker; Carolee Krieger; Chris Shutes; Colin Bailey; CWF Hearings; Daniel Kelly; Daniel Wilson; David Aladjem; David Orth; Dean Ruiz; Deirdre Des Jardins; Dustin Cooper; F. Morrissey; Fred Etheridge; Gregory Adams; James Mizell; Jennifer Buckman; Jennifer Spaletta; Joe Robinson; John Herrick; John Luebberke; Jon Rubin; Jonathan Salmon; JPH; Karna Herrigfeld; Kelwig; Kevin O'Brien; Kurtis Keller; Lauren Caster; M. Hagman; M. Larsen; Marcos Kropf; Mark Atlas; Martha Lennihan; Michael Jackson; Micheal Van Zandt; Nicole Suard; Nikkel, Meredith (mnikkel@downeybrand.com); Osha Meserve; Patrick Porgans; Paul Minasian; Paul Simmons; Paul Weiland; Philip Pogledich; Philip Williams; Roland; Ron Bernal; Ryan Bezerra; Ryan Hernandez; S. Dalke; S. Geivet; Sae; Scott Shapiro; Stefanie Morris; Stephen Volker; Steve Saxton; Tara Mazzanti; Thomas Esqueda; Tim O'Laughlin; Tom Gohring; Trent Orr; Valerie Kincaid; William Emlen (wfemlen@solanocounty.com)
Subject: CalWaterFix 1/28/2016 Pre-Hearing Conference

Please see attached letter.

Catharine Irvine
Legal Secretary to David R.E. Aladjem,
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January 22, 2016

VIA ELECTRONIC MAIL: CWFhearing@waterboards.ca.gov

Felicia Marcus, Chair and Co-Hearing Officer
Tam Doduc, Member and Co-Hearing Officer
State Water Resources Control Board
1001 I Street
Sacramento, California 95814

Re: California WaterFix – Pre-Hearing Conference, January 28, 2016

Dear Chair Marcus and Member Doduc:

Pursuant to the SWRCB's January 15, 2016 notice, the Sacramento Valley Water Users (the "SVWU"), on behalf of the parties listed in Attachment 1 hereto, provide the State Water Resources Control Board (the "SWRCB" or the "Board") with the following comments on how the Board may most efficiently conduct the hearing on the water right change petition for the California WaterFix Project (the "Project"). Counsel for the SVWU will be appearing during the Pre-Hearing Conference and we will be glad to amplify these comments or answer any questions that you or your staff may have at that time.

1. *Timing of Hearing*

The SVWU, and we believe other parties, intend to offer expert testimony to the SWRCB that will demonstrate that the Project, as proposed, would have significant and adverse effects on the quantity and quality of water that could be diverted by members of the SVWU and other parties. In comments on the Project's environmental documents, both in July 2014 and in October 2015, the SVWU pointed out the adverse effects of the Project on water quantity and quality for other legal users of water. Under the California Environmental Quality Act ("CEQA"), the California Department of Water Resources ("DWR") is required to mitigate the significant adverse effects of the Project to the extent feasible.

Based on the water rights change petition that DWR and Reclamation have filed for the Project and their Revised Draft EIR/Supplemental Draft EIS, it is unclear how DWR and Reclamation will operate the Project. The Final EIR/EIS may include a refined Project description and additional details on the plan of operations. Also, the Biological Opinions for the Project may materially alter the Project and Project operations, and, as a result, the degrees and types of injury that the Project will cause. If DWR modifies the Project, provides more

details regarding Project operations or develops and commits to implementing mitigation measures, as necessary to satisfy its legal obligation under CEQA to eliminate the adverse effects of the Project on water quantity and quality, there will be less need for expert testimony on the part of the SVWU describing the injuries that will occur as a result of the Project. We believe that this could shorten and simplify the issues in Part I and also in Part II.

For these reasons, if DWR believes that it will be able to release the Final EIR in April 2016 (which we understand is its current schedule), we believe that it would be prudent for the SWRCB to continue the dates for submission of testimony and the subsequent commencement of the water right hearing for 60 days, so that these dates will be after the date on which DWR releases the Final EIR, and potentially after the dates on which the fishery agencies release their Biological Opinions. Accordingly, it makes sense to continue the deadline for submission of testimony and the hearing commencement date each for 60 days. We believe that if DWR releases the Final EIR and its modeling results for the Final EIR's conclusions about the Project's impacts on water quantity and quality for other legal users of water in April 2016, the sixty-day period would be sufficient for us to revise our expert testimony to address the changes in the Project and Project operations described in the Final EIR. Although this would mean that the hearing would commence in June rather than April, we believe that the benefit would be significantly fewer days of hearing, therefore allowing the Board to issue a final decision earlier than otherwise would be possible.

2. *SWRCB Processing of Application for Clean Water Act Section 401 Certification*

The hearing on the California WaterFix water rights change petition probably will be one of the largest and most extensive hearings that the SWRCB ever has held. The administrative record for this petition, and particularly the evidentiary record of expert testimony that will be tested under cross-examination, will be very extensive and should provide sufficient information for the SWRCB to determine whether the SWRCB should grant the DWR/Reclamation application for Clean Water Act section 401 water quality certification, and, if the SWRCB decides to grant this petition, to determine what conditions should be included in the certification. For these reasons, the record for this certification decision should be the same as the record for the water rights change petition.

Because the issues relevant to the California WaterFix water right change petition and the issues relevant to the California WaterFix application for Clean Water section 401 certification will concern the same proposed project and overlap extensively, the SVWU believe that the SWRCB, and not its Executive Director, should decide whether to grant the application, and, if so, what conditions to include in the decision on the application. The SWRCB's regulations reserve the authority for the SWRCB itself to make that decision. (See Cal. Code Regs., tit. 23, §§ 3855(b) and 3859(c).) California WaterFix could be the most significant water project in this state in the last half-century. The SWRCB's members should make all of the decisions about it.

The SWRCB may issue its decision on the water right change petition and the Clean Water Act section 401 certification in one decision or two decisions. If the SWRCB decides to issue separate decisions on the petition and the application, then the SWRCB should process the two draft decisions concurrently, and adopt the final decisions during the same SWRCB meeting. Otherwise, there would be a substantial risk that two different processes applying to the same project with different timetables, different administrative records and different decision-makers could lead to inconsistent or conflicting decisions.

3. *Efficiency of the Hearing*

The SVWU appreciate the SWRCB's desire to conduct an efficient hearing; given the number of parties, and the complexity of the issues, we believe that this is an important consideration. The SVWU note that there are likely to be several large groups of parties in the Hearing: DWR, the U.S. Bureau of Reclamation ("Reclamation"), the San Luis Delta-Mendota Water Authority and the State Water Contractors (collectively, the "Project Proponents"); the SVWU; the San Joaquin Tributaries Agencies; Central and South Delta Water Agencies, the County of San Joaquin, Stockton East Water District, North Delta Water Agency, Contra Costa Water District and other Delta parties, and a number of environmental groups such as California Sportfishing Protection Alliance and the Pacific Coast Federation of Fishermen's Associations. We understand that the Project Proponents, the SVWU, the SJTA and perhaps the Central/South Delta Parties are all planning coordinated presentations to the SWRCB; it would be helpful for the Board to seek confirmation of these coordinated presentations during the Pre-Hearing Conference.

In the interest of the efficient presentation of a very large quantity of technical information, the SVWU propose the following ground rules for the presentation of evidence:

- a. Before the start of the hearing the SWRCB should issue a hearing schedule that includes the order of testimony. The Project Proponents should present their cases-in-chief first and be subject to cross-examination by all parties before protestants are required to present their cases-in-chief.
- b. The Project Proponents should be treated like the other large groups of parties, with no more – and no less – time for the presentation of a case-in-chief, cross-examination, or rebuttal.
- c. As a general rule, expert witnesses should have up to 30 minutes to summarize their written testimony, rather than the 20 minutes that the SWRCB has proposed. The complexity of the information that is likely to be presented, as well as giving the SWRCB Members and staff the opportunity to ask clarifying questions during these presentations, merits the extra ten minutes per expert witness.

d. The major groups of parties (the Project Proponents, the SVWU, the SJTA and the Central/South Delta Parties) should be strongly encouraged to coordinate and consolidate the presentation of testimony to the maximum extent possible. In this regard the SVWU intends to present joint testimony as a group with each individual member of SVWU, or in some cases sub-groups of SVWU (such as, for example, the Sacramento River Settlement Contractors, the Feather River Contractors and the American River Water Agencies), also probably presenting additional coordinated testimony specifically addressing their unique concerns. The Notice of Hearing states at page 35 that “[e]ach party will be allowed up to one (1) hour total to present all of its direct testimony.” (See also January 15, 2016 letter at page 5.) While the SVWU intend to coordinate their presentation of direct testimony and to achieve efficiencies in the hearing process to the maximum extent possible, each individual member of SVWU reserves the right to take up to one full hour to present its direct testimony.

e. With respect to cross-examination time allocations, the Notice of Hearing states at page 35: “Cross-examiners will be limited to one (1) hour per witness or panel of witnesses.” Similar to the concerns raised in sub-paragraph d above, while the SVWU intend to coordinate their cross-examinations and to achieve efficiencies in the hearing process to the maximum extent possible, each individual member of SVWU reserves the right to take up to one full hour for cross-examination.

f. Any party should be able to request additional time for cross-examination upon an offer of proof and a determination by the Hearing Officers. This is the procedure that the SWRCB used quite successfully during the hearings that led up to Water Right Decision 1641.

g. The SWRCB should determine that it will exercise its discretion under Section 648.3 of the SWRCB regulations (title 33 Cal. Code Regs.) to receive exhibits by reference, including public records of the SWRCB. Specifically, SVWU requests that SWRCB confirm that it will so exercise its discretion for all documents publicly available on eWRIMS so that the parties will not be required to submit hard copies of licenses and permits, reports and statements of diversion and use. The SWRCB’s determination in this regard should identify the documents the SWRCB has received by reference, and these documents should be added to the administrative record for this proceeding.

h. The January 15, 2016 letter states at page 5 that “[a]s a general rule, witnesses will be allowed up to twenty (20) minutes to summarize or emphasize their written testimony on direct examination. Each party will be allowed up to one (1) hour total to present all of its direct testimony.” We foresee that certain witnesses will take minimal time (5 or 10 minutes) to present their direct testimony and then propose to yield the remainder of their allotted time to other witnesses on the same panel who may exceed the applicable per-witness time limitation. The SWRCB should clarify that this is permissible so long as the party does not exceed the one hour limitation for presentation of direct testimony.

4. *Opening statements*

The SWRCB's January 15 letter proposes that written opening statements be submitted by the March 1 date for the submittal of testimony. This proposal may not result in the parties and the SWRCB using their time and resources in the most productive way because no one will have seen each other's case-in-chief by March 1. The SWRCB should either set the deadline for filing of opening statements to a date like April 1, which would be shortly before the hearing begins on April 7, or dispense with opening statements and rely on post-hearing briefs for the parties' legal arguments. Moreover, the SWRCB must not limit parties' argument to those arguments raised in opening statements, which necessarily will not address all of the evidence presented in the hearing. Due process and practical reality require that parties be allowed to address additional issues after the testimony portion of the hearing has been completed. Whatever the SWRCB decides about opening statements, the SWRCB should follow its normal practice and allow the filing of post-hearing briefs addressing factual and legal issues.

5. *Staff Exhibits*

The January 15, 2016 letter at page 6 references certain proposed Staff Exhibits that have been posted on the Hearings website. SVWU note that the following proposed Staff Exhibits have not been posted: Staff Exhibits 3-5, 27, 33, 102 and 103. The SWRCB's decision may not rely on these exhibits unless they are posted.

The SWRCB should clarify whether any witnesses will testify at the hearing to explain the technical basis for proposed Staff Exhibits. SVWU reserve all rights to object to the admission of all Staff Exhibits on grounds of hearsay or otherwise. The SWRCB's regulations state that "[h]earsay evidence is admissible subject to the provisions of Government Code section 11513." Government Code section 11513 states, in part, "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

Thank you for the opportunity to provide the SWRCB with these comments. We look forward to the Pre-Hearing Conference next week.

Very truly yours,

DOWNEY BRAND LLP



Kevin M. O'Brien



David Aladjem

NORTHERN CALIFORNIA WATER ASSOCIATION

/s/David J. Guy
David J. Guy, President

BARTKIEWICZ, KRONICK & SHANAHAN

/s/Alan Lilly
Alan Lilly

/s/Ryan Bezzerra
Ryan Bezzerra

SOMACH, SIMMONS & DUNN, PC

/s/Andrew M. Hitchings
Andrew M. Hitchings

/s/Daniel Kelly
Daniel Kelly

MINASIAN, MEITH, SOARES, SEXTON & COOPER, LLP

/s/Dustin C. Cooper
Dustin C. Cooper

LENNIHAN LAW
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/s/Martha H. Lennihan
Martha H. Lennihan

cc: Service List
Enclosure: Attachment 1 – SVWU Parties

Attachment 1—Sacramento Valley Water Users

Northern California Water Association

Clients represented by Downey Brand LLP

Carter Mutual Water Company
El Dorado Irrigation
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

Clients represented by Somach Simmons & Dunn

Glenn-Colusa Irrigation District
Biggs-West Gridley Water District
Sacramento County Water Agency
Placer County Water Agency
Carmichael Water District

Clients represented by Bartkiewicz, Kronick & Shanahan

City of Folsom
City of Roseville
San Juan Water District
Sacramento Suburban Water District
Yuba County Water Agency

Clients represented by Minasian, Meith, Soares, Sexton & Cooper, LLP

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

Clients represented by Lennihan Law, APC

City of Sacramento