DESMOND, NOLAN, LIVAICH & CUNNINGHAM
ATTORNEYS AT LAW

April 18, 2022

SENT VIA U.S. MAIL & EMAIL

Executive Officer
California Water Commission
P.O. Box 942836
Sacramento, CA 94236-0001
cwc@water.ca.gov

Re: Statement of Written Objections to Adoption of Proposed Resolution of Necessity to Take Property Owned By M.L. Farms Inc.; APNs 042-260-021, DWR Parcel No. YBSH-141

To Executive Officer and Commission Members:

Our office represents M.L. Farms Inc. ("Owner"), owner of the above-referenced real property ("Property"). We are in receipt of the California Water Commission's ("Commission") Notice of Intent to Adopt Resolution of Necessity to Acquire Certain Real Property or Interest in Real Property by Eminent Domain for the Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project ("Big Notch Project"), dated March 24, 2022 ("Notice").

We submit this correspondence as a reservation of right for one or more of the Owner's representatives to appear and be heard at the Resolution of Necessity ("RON") Hearing scheduled for April 20, 2022 at 9:30 a.m.

We further submit on the Owner's behalf the following statement of written objections to be included in the official record of the proceeding.

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A resolution of necessity adequately supported by facts is required before an eminent domain action can be filed. DWR has requested the Commission adopt a resolution of necessity that for a number of reasons would be fatally deficient and ineffective to support condemnation of the property interests contemplated to be taken by the proposed permanent flowage easement ("Proposed Easement"). There are insufficient facts in the record to support the findings that must be made in the RON, and the Proposed Easement is overbroad in relationship to the Big Notch Project as approved and permitted. Most concerning to the Owner is that fact that DWR is now attempting to take a second easement within the Proposed Easement that has not been analyzed, adequately defined, or included in the approval and permitting process. In order to avoid committing a gross abuse of discretion and inviting challenge to the RON on the basis that the hearing will be nothing more than a pretense where the Commission rubber stamps a predetermined result without sufficient evidence, and in derogation of the Eminent Domain Law, the Commission should decline to adopt the RON and require DWR to resolve outstanding issues with the Proposed Easement. (See *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121, 1127.)

Statement of Objections

In all dialogue with the Owner and other stakeholders, and in public meetings, DWR has consistently represented that the operations of the Big Notch Project and annual period of inundation would be confined to November 1 to March 15, at a maximum flow of 6,000 cubic feet per second ("cfs"). The Big Notch Project, as studied in the environmental review process and described in the Environmental Impact Statement/Environmental Impact Report ("EIS/EIR") for the Big Notch Project referenced by the RON and permitted by the Central Valley Flood Protection Board is only planned and proposed to allow for such limited increased flow, through a gated notch on the east side of the Fremont Weir, from November 1 to March 15 each year, when it is supposed to have been determined that water surface elevations in the Sacramento River are amenable fish passage. The NMFS Biological Opinion for the Big Notch Project relies on such parameters, and such parameters were relied upon by the Department of the Interior in analyzing impacts upon federally threatened species and habitat and issuing a Biological Opinion.

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However, the Owner has now come to learn that DWR is attempting to expand the scope of the Proposed Easement's take of flowage rights beyond its prior representations and purported need for the presently planned and specified Big Notch Project. Rather, the Proposed Easement take includes no temporal limitations whatsoever. It allows for inundation 365 days a year, with no flow limitation.

At most, the Big Notch Project requires taking the right to increased flow on the Property from November 1 to March 15, up to 6,000 cfs. Because the Proposed Easement does not limit the flowage right commensurately, DWR is attempting to obtain authority to take an easement through condemnation that includes rights in excess of those necessary to meet the needs of the Big Notch Project.

The apparent reason DWR has drafted the Proposed Easement to take expanded rights is that DWR is attempting through subterfuge to take property rights for as-yet-undefined future projects, the impacts of which have not been analyzed or planned and for which no timeline to potential implementation has been estimated, and which has never been discussed with affected landowners. This is evidenced by DWR's recent filing of a Notice of Exemption for "Yolo Bypass Salmonid Habitat Restoration and Fish Passage Project – Flowage Easement Acquisitions for Potential Future Adaptive Management" ("NE"), in which DWR purports to have "initiated the process of acquiring flowage easement rights necessary to operate the Project," but indicates that it is also "acquiring adaptive management flowage easement rights for potential future Project operations" that would allow the Property to be "inundated post-March 15," and then states that its "flowage easement acquisition process includes acquisition of easement rights allowing for . . . potential future adaptive management." This "adaptive management flowage easement" appears to be an additional easement that has not been analyzed or disclosed to landowners.

What is meant by "potential future adaptive management?" Is this part of a properly adopted management plan? Has the Commission seen any plan? The Owner has not seen such a plan and do not know what it might encompass. The Owner has never been advised of it. As best they can ascertain from review of the NE, given the complete lack of notice or information from DWR on the subject, DWR has "adopted a Project Adaptive Monitoring Plan" that will involve monitoring the implementation of the Big Notch Project to determine whether it works as intended

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to meet its objectives, and that DWR intends to either alter and expand the scope of the Big Notch Project or implement new projects at an unknown time in the future, in a way that would increase the depths, duration, and lengths of periods of inundation for unspecified reasons.

In short, the Proposed Easement is unduly broad in scope because it has been expanded beyond such rights as may be necessary to serve the Big Notch Project to cover potential future needs for as-yet unidentified future projects that have not been defined or disclosed, let alone studied, analyzed, or approved in any fashion, and the RON is unsupported from an evidentiary and legal standpoint. Were the Commission to proceed with adoption of the RON in spite of these facts, the RON would be fatally deficient and ineffective to support a condemnation action for all of the following reasons:

1. **The Owner Has Not Been Provided Adequate Notice.**

"Identification of the project is an integral component of the property owner's right to procedural due process." (*City of Stockton v. Marina Towers LLC* ("*Marina Towers*") (2009) 171 Cal. App. 4th 93, 108.) "A governing body of a public entity may not adopt a resolution of necessity until it has given the owner proper notice and an opportunity to be heard on all matters that are the subject of the resolution of necessity." (*Id.* at 108-109.) "If the governing body does not have before it a definable project for which the property is sought to be taken, any discussion of the pros and cons of the condemnation would be an empty gesture and the necessity findings rendered at the conclusion of the hearing would be devoid of real meaning." (*Id.* at 109.)

The Owner has been denied meaningful, statutorily-compliant notice and a reasonable opportunity to appear and be heard on the matters referred to in California Code of Civil Procedure ("CCP") section 1240.030. The notice of the RON hearing did not identify any project other than the Big Notch Project as necessitating the taking of the Proposed Easement. Nor does the RON itself, which was not made public until mere days prior to the hearing. Acquisition of flowage easements for "potential future adaptive management" is not a project identified in the notice of RON as necessitating the taking of the Proposed Easement.

The Owner has not been made privy to any contemplated future modification of the

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Big Notch Project. Moreover, the Proposed Easement takes rights for future projects for which no details exist. Were the Commission to proceed in adopting a RON that authorizes a taking of rights for such future projects, the Owner would have been given absolutely no opportunity to comment on the necessity of such future projects, whether such projects are planned or will be located in a manner compatible with the greatest public good and least private injury, or whether the rights that will have been required are necessary.

2. Public Interest and Necessity Do Not Require the Project.

The evidence before the Commission is insufficient to support a finding that public interest and necessity require the Big Notch Project, or any future projects. (CCP § 1240.030(a).)

The Swanston Ranch Owners Association has filed a CEQA action against DWR (Case No. PT19-1724), which is currently pending in Yolo County. The property owners in that case allege that DWR has violated the California Environmental Quality Act ("CEQA") by failing to prepare an adequate EIR for the Project. Specifically, the Swanston Ranch owners allege, among other things, that the EIR fails to adequately describe the environmental setting and fails to adequately disclose, analyze, and/or mitigate the following: (1) the Project's environmental impacts, (2) the Project's impacts to terrestrial resources, (3) the Project's impacts to existing land uses, (4) the Project's impacts to recreational uses, and (5) the Project's environmental justice issues. The Owner believes the allegations are meritorious and will result in termination of the Project; and "a condemning entity must comply with CEQA prior to condemning property." (*Marina Towers*, *supra*, 171 Cal. App. 4th at 108.)

The unresolved CEQA challenges and the potential for a judicial determination that the environmental review process is deficient should also undermine the Commission's confidence in the justifications provided by DWR with respect to public interest and necessity. Further, DWR's "Project Adaptive Management Plan" and recitation in relation thereto in the NE suggest DWR has little confidence the Project will do what it is supposed to do, as DWR indicates it has already "determined that there is a reasonable probability that adaptive management of the Project will be required within a reasonable period of time after Project operations commence." So, it is already planning for what it will do when the Big Notch Project

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doesn't work.

In fact, it appears that DWR has developed, planned, and proposed the Project in a manner that, while more palatable to certain stakeholders, is likely not to be effective in meeting its stated objectives, and that DWR's real plan is to expand the scope of the Big Notch Project, or implement subsequent projects, that are decidedly less palatable, in hopes of ultimately meeting the objectives the Big Notch Project will fail to achieve, while evading environmental review requirements (including those imposed under the National Environmental Policy Act ("NEPA")), general public scrutiny, and informed right to take challenges by the Owner.

To be blunt, this appears to be a bait-and-switch strategy. And the Commission cannot credibly make a finding that public interest and necessity require the Big Notch Project given the set-up.

Moreover, even if there were solid evidence the Big Notch Project, as defined in the EIR/EIS, will serve the public interest and necessity, both the incomplete and misleading characterization of the Big Notch Project and its true scope and the complete absence of any identification of future projects preclude the Commission from making the finding required by CCP section 1240.030(a). "It is both a physical and legal impossibility for legislators to make a determination that public interest and necessity require 'the project,' . . . if the resolution contains no intelligible description of what the project is." (*Marina Towers, supra*, 171 Cal. App. 4th at 108.)

3. **The Proposed Project Is Not Planned or Located in the Manner That Will Be Most Compatible with the Greatest Public Good and Least Private Injury.**

As with the finding of public interest and necessity, the Commission should be very concerned about the issues raised in the pending CEQA action, with respect to environmental impacts, impacts to terrestrial resources, impacts to existing land uses, impacts to recreational uses, and consideration of environmental justice issues.

Further, neither the Big Notch Project, nor any future projects, are planned in the manner that will be most compatible with the greatest public good and the least

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private injury. (CCP §1240.030(b).) The Big Notch Project's true scope and the potential scope of any project modifications or new projects are unknown. DWR has supplied the Commission with grossly insufficient evidence to allow the Commission to assess either the likelihood that the Big Notch Project will be effective as presently planned and proposed, or what the scope of ultimate private injury will be if DWR modifies the Big Notch Project or undertakes new projects that intensify the annual periods and/or intensity of inundation of the Property. Of particular concern is the fact that if DWR were to lengthen periods of flow beyond March 15, it would threaten the utility of the Property for otherwise compatible agricultural and/or recreational uses. The NE indicates DWR presently believes it may do this. But it has supplied the Commission with no information about when or under what circumstances this would occur, or what the effects of doing so would be.

As with the finding of public interest and necessity, it would be impossible for the Commission to determine that "the project" is located or planned in a manner consistent with the greatest public good and least private injury when the resolution contains no intelligible description of what "the project" actually is that necessitates DWR taking the Proposed Easement. (*Marina Towers*, *supra*, 171 Cal. App. 4th at 108.)

Finally, DWR has only looked at impacts to affected properties using its inundation model TUFLOW that analyzes water years 1997 to 2012 with the Big Notch opened between November 1 and March 15, with a maximum flow of 6,000 cfs and concluded a projected number of additional wetted days, based on averages. This method is inaccurate and does not adequately assess the private harm for at least two reasons. First, it does not follow the law of California when assessing damages cause by a taking of easement rights. DWR is required to evaluate the most injurious use of the easement in assessing damages. The rights taken are controlling, not averages. (See *East Bay Municipal Utility Dist. v. City of Lodi* (1932) 120 Cal.App. 740, 762; *Ellena v. State of California* (1977) 69 Cal.App.3d 245, 254; and *People By & Through Dep't of Pub. Works v. Silveira* (1965) 236 Cal. App. 2d 604, 622.) Second, DWR's TUFLOW model did not include the effects of its' eleventh-hour attempt to take more rights than previously disclosed by the "adaptive management flowage easement." Therefore, private harm has not been assessed with respect to the adaptive management flowage easement.

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4. **The Subject Property is Not Necessary for the Project.**

Neither DWR, nor the Commission, has advised that the RON is for a taking for any project other than the Big Notch Project. But DWR asks the Commission to authorize the taking of an easement that has ***no*** duration or flow limitations. The excess scope of rights is clearly not necessary for the Big Notch Project and would violate the landowners' constitutional rights. Therefore, the Commission cannot make the requisite statutory finding pursuant to CCP §1240.030(c).

If DWR's speculation that it may need the additional property rights in excess of those necessary for the Big Notch Project sometime in the future proves to be true, the Eminent Domain law requires DWR return to the Commission with facts that show the necessity for modification or expansion of operations beyond those currently planned as part of the Big Notch Project. (It would likewise be required to demonstrate the imposition of an increased burden on private property rights and an increase in private harm would be warranted.)

As it stands, DWR has not, and cannot, make such a showing to the Commission, and the Commission cannot make a determination that the property interests sought to be acquired are necessary for "the project," because it has no evidence before it of any details as to potential modifications to the Big Notch Project or future projects, which are undefined and unstudied. (*Marina Towers*, *supra*, 171 Cal. App. 4th at 108.)

5. **Proposed Acquisition Is for Future Use Beyond the Normal Statutorily-Authorized Period, and Without a Specified Estimated Date of Use.**

"[P]roperty may be taken for future use only if there is a reasonable probability that its date of use will be within seven years from the date the complaint is filed or within such longer period as is reasonable." (CCP §1240.220(a).) If a date of use is planned to occur at some point further in the future, a resolution of necessity "shall refer specifically to [CCP section 1240.220] and shall state the estimated date of use." (CCP §1240.220(b).)

While there may be a reasonable probability that the Big Notch Project, as defined in the EIR/EIS will be implemented within the next seven years, the Proposed

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Easement also provides for "the right for the flowage of water over and upon the Property as may be required for the present ***and future*** permitted construction and operation of fish passage and floodplain restoration projects," without specification as to what such future projects are or when they might occur. (Emphasis added.) The late-released RON provides "for future use pursuant to Code of Civil Procedure Section 1240.220(b)," and states "there is a reasonable probability that use will be within 15 years, by April 20, 2037."

Baldly stating that there is a "reasonable probability" that some unspecified future use will occur at some point in time within a 15-year period of time is not compliant with the requirement of section 1240.220(b). It is not a statement of an estimated date of use, but an exceedingly broad range. Moreover, the 15-year range is entirely arbitrary. There is not an iota of evidence before the Commission to support a finding that DWR's unspecified future uses will occur, if at all, within 15 years. And it is the condemnor's burden to show that use beyond 7 years is reasonable. (See Miller and Starr California Real Estate (4th ed. 2021), §24:12 and Matteoni and Veit, Condemnation Practice in California (3rd ed. 2019), §6.14.) Therefore, adoption of the RON would purport to authorize a taking in violation of the Code of Civil Procedure section 1240.220, resulting in a fatally deficient RON that cannot support condemnation.

6. **Authorization of a Taking for Indefinite Future Projects Is Improper and Would Expose the RON to an Independent Basis of Attack.**

As already discussed, the indefiniteness of the potential future projects forming the basis for DWR's attempt to secure the unduly broad flowage rights proposed via the Proposed Easement precludes the Commission from making the requisite findings pursuant to CCP section 1240.030(a)-(c). But it does more. Among other things, it invites the Commission to aid DWR in attempting to evade compliance with environmental review requirements of CEQA and NEPA, as well as judicial review of valid statutory defenses to DWR's right to take, by furthering a project definition so vague "that no one could definitively determine what use the legislative body had in mind for the property." (*Marina Towers, supra,* 171 Cal. App. 4th at 108.) Therefore, the indefiniteness exposes the RON to independent attack and judicial review on grounds not susceptible to any argument that a valid resolution conclusively establishes the matters addressed in CCP section 1240.030. (See Legislative Committee Comments—Senate, 1975 Addition, to CCP §1245.250.)

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7. **DWR Has Presented Insufficient Evidence of Compatibility of Its Intended Use With Current Public Use Pursuant to Conservation Easements.**

"Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated." (CCP §1240.610.) In such event, the RON must specifically refer to section 1245.610. Likewise, "Any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire for that use property appropriated to public use if the proposed use will not unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future." (CCP §1240.510.) And, in that event, the RON must specifically refer to section 1245.510.

Here, the Property is already appropriated to public use by conservation easements. (CCP §1240.055(a)(3).) DWR has made no assertion that its proposed use is a more necessary public use. It asserts the Big Notch Project is a compatible use and will not unreasonably interfere with or impair continuance of the conservation easements' public use as it exists or may reasonably be expected to exist in the future. But it does not appear DWR has supplied any detail to the Commission in its staff report or elsewhere as to the nature of the conservation easements or their specific terms and objectives. Therefore, the Commission lacks sufficient evidence to evaluate DWR's claims. Moreover, given that DWR has not confined the Proposed Easement to such rights as might be necessary to serve the Big Notch Project, but is instead seeking expanded rights that would allow longer periods of inundation of the Property, its assertions of compatibility lack of interference or impairment are insufficient because it has supplied no representation or assessment with respect to compatibility of future potential projects that would utilize the Proposed Easement. Further, the RON does not appear to make any reference to the conservation easements, include any finding as to whether DWR's use is either more necessary or compatible, or include the applicable requisite statutory reference.

Absent the Commission's receipt of sufficient evidence, its determination that DWR's use is more necessary than or is compatible with and will not interfere with or impair use of the Property pursuant to the conservation easements, and its

inclusion of the requisite findings and statutory reference in the RON, the RON will be fatally deficient and ineffective to support condemnation.

8. **The Requirements of Government Code Section 7267.2 Have Not Been Complied With.**

Although amount of compensation will not be considered at the hearing, the issue of compensation is distinct from the question of whether a condemnor has complied with Government Code section 7267.2. (*People ex rel. Dept. of Transportation v. Cole* (1992) 7 Cal.App.4th 1281, 1286.) A condemnor must consider the property owner's objections that the mandatory requirements of section 7267.2 have not been complied with, including objections concerning the adequacy of the appraisal upon which an offer is based. (*Id.* at 1285-86 (*City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005, 1011–1013).)

Section 7267.2, subdivision (a)(1), requires: "Prior to adopting a resolution of necessity pursuant to Section 1245.230 of the Code of Civil Procedure and initiating negotiations for the acquisition of real property, the public entity shall establish an amount that it believes to be just compensation therefor, and shall make an offer to the owner or owners of record to acquire the property for the full amount so established." (*Id.*) "The amount shall not be less than the public entity's approved appraisal of the fair market value of the property." (Cal. Gov. Code § 7267.2.) Further: "The public entity shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation." (Gov. Code § 7267.2(b).) The written statement must "contain detail sufficient to indicate clearly the basis for the offer" and must separately state "damages to real property," with included "calculations and narrative explanation supporting the compensation." (Gov. Code § 7267.2(b), (b)(3).)

In this case, the appraisal and offer to purchase based thereon clearly did not reflect the full measure of just compensation mandated by Article I, section 19 of the California Constitution and the Eminent Domain Law. And although an Appraisal Summary Statement ("Statement") was supplied to the Owner, it did not contain anywhere close to statutorily adequate detail required by the section 7267.2. The skeletal Statement indicates that the Proposed Easement was valued at "20% rights," suggesting, but with no explanation to confirm, that the interests to be acquired have been valued at twenty (20) percent of the fee value of the Property.

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How this figure was determined is a mystery. There is no narrative explanation to support its application.

Moreover, it appears based on information presented by DWR to the Commission that the appraisal was improperly influenced and based upon consideration of historical inundation data in the Project area to generate an anticipated scope of impact based on a limited number of "wetted" days, resulting in the failure of DWR to establish a valid appraisal of probable just compensation.

In order for the government to comply with the mandate of Article I, Section 19 of the California Constitution that a property owner be paid just compensation for the taking of their property, "all the damages that might be inflicted by the condemning party," must be assessed "based upon the ***most injurious use to which the condemnor may lawfully put the property***" based on the scope of rights being acquired. (*East Bay Municipal Utility Dist. v. City of Lodi, supra*, 120 Cal.App. at 762 (emphasis added); accord *Ellena v. State of California, supra*, 69 Cal.App.3d at 254 and *People By & Through Dep't of Pub. Works v. Silveira, supra,*236 Cal. App. 2d at 622).) Upon final condemnation "it must be assumed that the owner has been compensated for all reasonably foreseeable damage to his property resulting from the acquisition." (*Id.*) A condemning agency cannot purport to take "less of an interest than is provided in the resolution." (*People by Dept. of Public Works v. Schultz Co.* (1954) 123 Cal.App.2d 925, 931 disapproved of on other grounds by *People ex rel. Department of Public Works v. Chevalier* (1959) 52 Cal.2d 299.) "Mere promises by the condemner" that it does not intend to exercise all rights taken "are ineffective and cannot operate to reduce damages." (*Id.*)

Therefore, DWR cannot be said to have complied with section 7267.2 when its appraisal does not value the Proposed Easement based on the most injurious way the State will be permitted to lawfully use the easement – i.e. to flow unlimited water for 365 days of the year. This does not represent a valuation concern outside the scope of the Commission's charge with respect to consideration of the RON, but rather a question of a failure by DWR to meet the statutory requirements of section 7267.2 that are prerequisites to the adoption of a RON that ensure that if a condemnation action were instituted the amount deposited as probable just compensation to secure an early authorization of rights pending a final order of condemnation could credibly be deemed compliant with the constitutional mandate that just compensation be paid prior to taking. Therefore, in addition to the many

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other reasons the Commission should decline to adopt the RON, it should reject the sufficiency of DWR's compliance with section 7267.2 and require a new appraisal be made of the full scope of rights DWR seeks authorization to take.

9. **The Scope of Rights to Be Taken Is Impermissibly Uncertain Due to the "Draft" Status of the Proposed Easement.**

The Proposed Easement is watermarked "DRAFT" and "For discussion purposes only." Without certainty as to a final recitation of the rights to be acquired, the Owner has been deprived their right to fairly analyze and respond to the merits of the proposed adoption of the RON pursuant to CCP section 1240.030. Further, the uncertainty renders insufficient the evidence before the Commission to support the Commission's findings pursuant to CCP section 1245.230, such that upon adoption of the RON, the Commission shall have failed to conduct a fair hearing and determination on the basis of evidence presented in a judicious and nonarbitrary fashion, which will nullify and/or deprive the RON of any conclusive effect as to the required findings. Finally, the uncertainty provides an additional reason why DWR has failed to comply with Government Code section 7267.2, as it further calls into question what scope of rights the appraiser valued.

Conclusion

At minimum, the Commission should require DWR to modify the overly broad scope of rights proposed to be taken to conform its Proposed Easement to the rights actually required for the Big Notch Project, as presently planned. Should the RON be adopted without modification of the rights proposed to be authorized, and a condemnation suit initiated, the Owner will be compelled to judicially challenge the right to take, and will assert all of the objections stated herein, as well as any additional objections raised at the hearing, or which exceed the parameters set forth in the Notice or are based on facts later learned which are currently unknown to the Owner. The bases for objection stated herein are informed by the Notice's stated parameters, and the objections are limited to those the Owner is reasonably capable of making prior to being afforded an opportunity to review the text of the proposed RON and final plans for the project. The Owner reserves the right to raise additional arguments objecting to the right to take both at the hearing and in any future proceedings. And we, again, request that the Commission provide a copy of the RON and any other materials relating to consideration of the resolution ahead

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of the hearing, as we have still not been provided same.

We would appreciate confirmation of your timely receipt and filing of this correspondence, and we expect its inclusion in the official record of the proceeding.

Sincerely,

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Gary Livaich

Kristen Ditlevsen Renfro

GL/KDR/mj

cc: Client

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