

SOUTH DELTA WATER AGENCY

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February 23, 2016

Via E-Mail

CWFhearing@waterboards.ca.gov

Re: South Delta Water Agency, et. al.'s Response to
State Water Contractors Request For Reconsideration

Dear Sir/Madam :

The South Delta Water Agency et. al. opposes the State Water Contractors' ("SWC") Objections to Pre-Hearing Conference Ruling and its request for reconsideration of that Ruling. SWC raise two issues in support of their opposition and request.

The first is that they allege that the SWRCB's statement of "*The appropriate Delta flow criteria will be more stringent than petitioners' current obligations and may well be more stringent than the petitioners' preferred project.*" (emphasis added) is somehow a determination by the Board without having taken any evidence or making any ruling. SWC however ignore a number of things in making this argument. The SWRCB has already determined what flows are needed (absent other consideration) to protect fisheries pursuant to the 2009 Water Laws. Water Code Section 85086 required the SWRCB to develop new flow criteria to protect public trust resources in the Sacramento-San Joaquin Delta. The SWRCB did so via Resolution 2010-0039 which included the Final Report on such flows.

The flows in this Resolution and Final Report are significantly higher than those in D-1641. As has been stated in writing by many agencies and interests, including the Independent Science Board, flows higher than are currently mandated are necessary to protect fisheries and other beneficial uses. In addition, it is clear to all parties and interests that current Bay-Delta criteria are insufficient to protect Delta beneficial uses. Thus, when the SWRCB in its Ruling states that "... Delta flow criteria *"will be"* more stringent ..." it only stating the obvious,

something that has already been appropriately and legally determined by Resolution 2010-0039 and which is in fact obvious on its face.

SWC make the mistake of assuming that the above quoted statement in the Ruling that these new flows will be “more stringent than petitioners’ current obligations ...” means the obligations on DWR and USBR (the petitioners) will also be more stringent. That however is not what the SWRCB stated, nor has that been pre-determined.

The SWRCB opined on the stringency of the to-be-developed flows; it did *not* make any statement that DWR and USBR *will* be burdened with any greater obligations. The final Bay-Delta flows will be somewhere between the currently (insufficient) mandated flows and the flows suggested in Resolution 2010-0039. However, the obligations on DWR and USBR to meet those newer flows have not and will not be determined until a water right hearing (including apparently this one) which will include DWR and USBR as parties is conducted. Thus, the SWRCB has not pre-determined without evidence what the obligations of the projects will be under the new flows, and those parties are therefore not harmed. The flows “*will*” be more stringent and “*may well be more stringent*” than the preferred alternative in the WaterFix. Neither of those statements is incorrect, unsupported or prejudicial to DWR and USBR.

SWC’s second argument is that staggering the hearing is somehow unfair and disadvantageous to DWR and USBR as it will give the other parties two bites at the apple; one on cross-examination and one via rebuttal testimony. This argument is more of an appeal to emotion and does not stand up under scrutiny. We have seen that DWR and USBR used one set of modeling for the WaterFix DEIR/S and another for the biological assessment process, the latter which was only “released” to the public *after* the Pre-Hearing Conference (and still remains unusable to the public at large). Clearly no parties to this Petition process were provided with the information necessary to evaluate or prepare testimony until the last minute; assuming the currently released materials do in fact provide the missing information.

The notion that DWR and USBR’s failure to provide operational information for the twin tunnels is somehow “normal” should be dismissed outright. It is true as SWC argue that some operational constraints are typically developed during such hearings as the SWRCB often orders such measures to mitigate adverse impacts. However, the fact that DWR and USBR have not fully described upfront how they would operate the tunnels means that the public does not yet know what or the extent to which the project would adversely impact any interest or harm any legal user. SWC confuse these unrelated issues in order to argue that the insufficient Petition is somehow normal. It is not. Until the public and the parties to the Hearing are told just how the twin tunnels are to be operated there is simply no basis on which to evaluate the project or the Petition. The staggering of the hearing is the only option other than dismissing the insufficient Petition outright.

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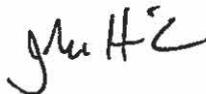
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Although SDWA et. al. believe the Petition is insufficient and should be dismissed, if the Petition goes forward the SWRCB should not rescind its decision to stagger the proceeding as per its earlier Ruling.

Please call me if you have any questions or comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "John H. Herrick". The signature is written in a cursive style with a large initial "J" and "H".

JOHN HERRICK

cc: Revised Service List (Dated February 10, 2016)