Due process requires that protestors be fully apprised of all evidence supporting the Petition before submitting their cases in chief. For this reason, I respectfully request that the Hearing Officers reconsider the denial of the request for an extension of 30 days for protestors to submit their cases in chief to allow Petitioners to finish presentation of their Case in Chief.
Assessment of whether the information provided by the Petitioners meets the following statutory, and regulatory requirements has been deferred by the Hearing Officers to allow Petitioners to complete their Petition: Water Code § 1701.2, Title 23 CCR § 794.

I respectfully bring these issues to the attention of the Hearing Officers, to request that they ensure that all information required by statute or regulation has been provided by Petitioners, prior to deadlines for submittal of the cases in chief. Due process requires that all information required by statute or regulation be available to protestants to fully examine, prior to submittal of their cases in chief.

ISSUES OF ADEQUACY OF INFORMATION

The issue of incompleteness of information submitted in support of the Petition was raised at the Pre-Hearing Conference. The February 11, 2016, Pre-conference Hearing Ruling stated that the Hearing Officers believed that requiring Petitioners to submit and present their Case in Chief before protestants submitted their response would fill in the information gaps:

This approach will give petitioners the opportunity to fully explain their proposed project and should give the other hearing parties the ability to better evaluate how their interests may be affected before they begin their cases. *If petitioners fail to adequately describe their project, it also gives the State Water Board the opportunity to make course corrections.* (p. 2, emphasis added)

Given the lack of detailed information on the project impacts on reservoir levels, Sacramento River and Delta flows, and Delta water quality in the Petitioners’ exhibits, it is
important to ensure that the project has been adequately described. Specifically, the Petitioners need to meet requirements of Water Code § 1701.2 and Title 23 CCR § 794.

Water Code § 1701.2 (c) and (d) provide that

A petition for change in a permit or license shall meet all of the following requirements:

(c) *Include all information reasonably available to the petitioner,* or that can be obtained from the Department of Fish and Wildlife, concerning the extent, if any, to which fish and wildlife would be affected by the change, *and a statement of any measures proposed to be taken for the protection of fish and wildlife in connection with the change.*

(d) *Include sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water.*

(emphasis added)

The February 11, 2016 Pre-Hearing Conference Ruling noted that the procedures under Water Code §§ 1701 et. seq were skipped at the request of the Petitioners:

The lack of information concerning project operations and potential effects is due in part to the fact that, at the petitioners’ request, the State Water Board skipped the protest resolution process that would normally precede a hearing on a water right change petition. The petition process under Water Code sections 1701 et seq. includes various procedures designed to supply supporting information and narrow issues prior to any Board hearing or decision. A petition for change must include detailed information and the State Water Board may request additional information reasonably necessary to clarify, amplify, correct, or otherwise supplement the information submitted by a petitioner. Similarly, any protests to the petition must include specific information and the State Water Board may request additional information reasonably necessary to supplement the information submitted by protestants. The State Board may request additional information from petitioners or protestants to attempt to resolve a protest. The State Board may cancel a petition or a protest if requested information is not provided. (Wat. Code, §§ 1701.4; 1703.6.) This type of information exchange would have served to fill information gaps, narrow the focus of hearing issues, and increase the efficiency of the hearing. (p. 6)
The February 11, 2016 Pre-Hearing Conference ruling also responded to concerns expressed at the Pre-Hearing Conference that Petitioners had failed to provide evidence mandated under Title 23 CCR § 794. The Feb 11, 2016 Pre-Hearing Conference ruling stated:

Suspending the due date for other parties to submit written testimony and exhibits until after petitioners present their cases in chief will address the need for an adequate project description. The petitioners’ cases in chief must, to the extent possible, contain the information required by section 794 of our regulations in a succinct and easily identifiable format. The other parties will then be able to more accurately assess whether the proposed changes would cause injury. (p. 7, emphasis added)

A request for dismissal was filed on March 29, 2016 by Planning and Conservation League et. al. The request stated in part:

Water Code sections 1701.1 and 1701.2 and Title 23 of the California Code of Regulations section 794 (among other provisions) describe the contents of a complete change petition. The Hearing Officers previously acknowledged that the Petition was incomplete, but continued with the hearing process with the expectation that the Petition would be subsequently completed, first by March 1st, and then by March 30th. Now Petitioners are unable to meet the current deadline and are again asking for more time. (p. 2)

And continued:

Among other deficiencies, the Change Petition: (1) does not adequately describe the changes sought; (2) fails to attempt to demonstrate a reasonable likelihood that the change will not injure any other legal user of water; and (3) fails to describe the extent of impacts to fish and wildlife. As a result of these and other deficiencies, the full nature and extent of injuries to legal users of water and significant adverse impacts to fish and wildlife uses have not been identified and analyzed. (p. 2)

In the April 25, 2016 Ruling, the Hearing Officers responded:

The request to dismiss the petition is denied. Parties raised similar concerns about petition completeness during the pre-hearing conference, and this issue was addressed in our February 11, 2016 ruling. Rather than supplement the petition, the petitioners are expected to provide more information concerning project operations and potential effects on legal users of water during the petitioners’ case in chief. (p. 3, emphasis added)
Petitioners have not yet finished presentation of their Case in Chief, so requiring
Protestants to file their own Cases in Chief before that presentation is concluded, means that
Protestants may not have adequate information available concerning project operations and
effects on legal users of water. Many protestants submitted objections to the adequacy of the
information in the exhibits on July 12, 2016. The Hearing Officers stated in the July 22, 2016
ruling on Evidentiary Objections and Other Procedural Matters, that it was not necessary to
address these issues prior to the start of the Hearing, and that those concerns should be raised in
the hearing process.

While the other parties still have specific and various criticisms of petitioners’ evidence
and testimony, we disagree with those parties who contend that petitioners’ case-in-chief
is insufficient to allow parties to meaningfully participate in Part 1 of the hearing.

We recognize that petitioners bear the burden of establishing that the proposed changes
will not injure other legal users of water. As we stated in our February ruling, however,
not all uncertainties can or need to be resolved before beginning the hearing. In fact, the
purpose of this hearing is to resolve some of the issues concerning how the proposed
project would be operated. At this point, any remaining uncertainty concerning the
proposed project and its effects should be raised in the hearing process, including but not
limited to cross-examination, and the protestants’ cases in chief. (p. 2, emphasis added)

To the extent that testimony and cross-examination is not finished, and particularly that of the
Water Rights panel, it is clear that “any remaining uncertainty about the project” may not have
been resolved. I respectfully raise these concerns, and request that the Hearing Officers
reconsider the decision to deny the requests for a 30 day extension of the deadline for Protestants
to submit their cases in chief. Approval of this request will allow the Water Rights panel to
testify and cross-examination to finish, so that information from the cross-examination will be available prior to filing of cases in chief.
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(s):

Motion for Reconsideration

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 25, 2016, posted by the State Water Resources Control Board at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

I certify that the foregoing is true and correct and that this document was executed on August 29, 2016.

Signature:

Name: Deirdre Des Jardins
Title: Principal, California Water Research

Party/Affiliation:
Deirdre Des Jardins

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