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September 14, 2016

Hearing Officer Tam Doduc
Hearing Officer Felicia Marcus
State Water Resources Control Board
Sacramento, CA 95812-0100

Via email

Subject: Request to clarify Board procedures for serving multiple large documents in Part 1A

Dear Hearing Officers,

As you know, there are many significant technical issues in this proceeding, which have been a major focus of Part 1A of the WaterFix hearing. My cross-examination has required reference to multiple large documents. I am requesting clarification on the accepted Board procedures for serving multiple large documents that I introduced during the hearing for cross-examination in Part 1A.

For the WaterFix hearing, the Hearing Team set up an ftp site for use in submitting documents by parties. However, for Part 1A, use of the ftp site for submission and service was only set up for the Petitioners. The Board web page with the list of exhibits states:

For Part 1A of the hearing, only the petitioners will be given a username and password to upload their exhibits to the FTP site.

For the other hearing parties, it is still unclear if there is an acceptable procedure for serving multiple large documents that are introduced in cross-examination in Part 1A, other than directly serving all the documents on the parties. Enclosure D of the October 30, 2016 Hearing Notice does state:

The following requirements apply to exhibits:

6. (...) c. A party seeking to enter in evidence as an exhibit a voluminous document or database may so advise the other parties prior to the filing date for exhibits, and may ask them to respond if they wish to have a copy of the exhibit. If a party waives the opportunity to obtain a copy of the exhibit, the party sponsoring the exhibit will not be required to provide a copy to the waiving party. Additionally, with the permission of the hearing officers, such exhibits may be submitted to the State Water Board solely in electronic form, using a file format readable by Microsoft Office 2003 software. (p. 33)

I did submit five large (> 2 MB) technical and scientific documents for reference in motions on June 10, 2016, June 20, 2016, and July 12, 2016, prior to the hearing commencing on July 26, 2016. Since the total size of the documents was almost 20 Megabytes, I numbered them 1-5 and served the letters of submission on the parties, using the procedure specified above in section 6(c) of the October 30, 2016 Hearing Notice. The Hearing Team posted the pdf files on the Hearing website, but not on the page of submitted exhibits. No party objected to this method of service at the time, or asked for a copy. I have yet to receive a request for a copy of the documents. A sixth document was served directly on the parties on July 12, 2016.

Since the documents were not posted under submitted exhibits, I made a motion on July 19, 2016, resubmitting all the documents into evidence and for use in cross-examination, with the numbering (1-6.) The motion referred to Evidence Code 721(b)(2) in requesting that the documents be accepted into evidence. On August 1, 2016, DWR objected to all of my submissions.

The Hearing Officers ruled on my July 19, 2016 motion on August 5, 2016. The ruling stated that Evidence Code 721 does not apply to adjudicative proceedings before the State Water Board (p. 2), and also stated:

Ms. Des Jardins' motion to introduce evidence is premature. Under the rules governing adjudicative proceedings before the State Water Resources Control Board (State Water Board), evidence does not need to be formally accepted into evidence in order to be cited in an objection or used in cross-examination. (p. 2)

The ruling did not clarify the appropriate procedure for serving multiple large documents for use in cross-examination, but did refer to DWR's objection to my submissions:

The Department of Water Resources has objected to all of Ms. Des Jardins' submittals on the grounds that they are not valid objections, requests for official notice, or submission of evidence in accordance with the Board's rulings." (p. 7)

I did introduce some of the submitted documents and other documents for cross-examination during the hearing.

After the ruling, John Herrick, the attorney for South Delta Water Agency, introduced a number of documents in cross-examination of the Operations panel. The Hearing Officer requested that Herrick serve the documents he had introduced directly on the parties, and Herrick did so on August 17, 2016. However, Herrick's documents were small, less than 1 MB each, and there were only four of them.

It is still unclear if all documents used in cross examination need to be directly served on the hearing parties, or if the parties can use the procedure specified in Enclosure D, section 6(c) of the October 30, 2016 Hearing Notice. Please clarify this. For multiple large documents in Part 1A, I would much prefer to serve an exhibit list with hyperlinks instead if the method of service in Enclosure D, section 6(c) of the Hearing Notice is acceptable. I believe that most of the parties would also prefer this method of service.

Thank you for your assistance in clarifying the acceptable procedures for parties to submit documents for Part 1A.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Des Jardins', with a stylized flourish at the end.

Deirdre Des Jardins

Principal, California Water Research

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):

REQUEST TO CLARIFY BOARD PROCEDURES FOR SERVING MULTIPLE LARGE DOCUMENTS FOR PART 1A

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 September 2, 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 September 14, 2016.

Signature: 

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

Party/Affiliation:
Deirdre Des Jardins

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