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May 3, 2016

Via email

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

**Request for clarification – Water Code § 85086 process**

Deirdre Des Jardins, Principal at California Water Research (“California Water Research”), hereby requests more information on the Board’s planned process for considering testimony and evidence for determining the “appropriate Delta flow criteria” pursuant to CWC § 85086(c)(2). The reservoir operations modeling is a significant part of this analysis, but the Petitioners are only proposing that their modeling and operations witnesses appear in Part 1. It is unclear how cross-examination on this evidence will be handled.

In the Change Petition, (Exhibit SWRCB-1), under Supplemental Information for Petition for Change in Point of Diversion, the Petitioners stated:

Petitioners will file a final Environmental Impact Report/Environmental Impact Statement with the State Water Board during the course of the public hearing for this Petition. Subsequent filings

and appearances before the State Water Board will fully support approval of the request contained in this Petition and demonstrate satisfaction of California Water Code section 85086. (p. 11 of pdf.)

The final EIR/EIS has not been filed with the State Water Resources Control Board for the Hearing, and it is currently unclear what information submitted for the hearing is proposed to demonstrate satisfaction of CWC § 85086.

The 2013 Bay-Delta Conservation Plan Draft EIR/EIS (Exhibit SWRCB-4), states in Appendix 3A, with respect to the 2010 flow criteria set by the Board pursuant to CWC § 85086(c)(1):

Results of model runs indicated reductions in SWP and CVP water supplies and end-of-September reservoir storage in Trinity Lake, Shasta Lake, Oroville Reservoir and Folsom Lake in more years with the 2010 flow recommendations than under the baseline conditions (State Water Board 2011a: 178–191). The reduction in reservoir storage also resulted in an increased frequency of non-compliance with coldwater storage in accordance with NMFS biological opinion requirements. It should be noted that these reductions would have become more severe if the model assumptions had not reduced agricultural water demands in the Sacramento Valley, including water demands of pre-1914 water rights holders, to reduce surface water diversions. Since these water rights holders are not applicants for the BDCP, these modeling assumptions do not represent a reasonable component of a BDCP action alternative. Reduced water diversions from these water rights holders cannot be feasibly accomplished through approval of the BDCP. (p.3A-67 at 48.)

Clearly the assertions in this passage are not without controversy in the WaterFix Change Petition hearing. Appendix 3I of the 2013 Bay-Delta Conservation Plan Draft EIR/EIS (Exhibit SWRCB-3) also states,

The low-end bookend alternative encompassing criteria as defined by the State Water Board's 2010 flow report for the Delta was eliminated from further analysis through the Second Screening process, as explained in Appendix 3A, Section 3A.10.3. The decision was based on preliminary modeling results presented in a draft report by the State Water Board. Those results indicated the possibility of reductions in cold water pool storage in Trinity Lake, Shasta Lake, Oroville Reservoir, and Folsom Lake that would lead to increased levels of non-compliance with the NMFS Biological Opinion and adverse impacts to salmonids in the Sacramento and Feather rivers as compared to Existing Conditions or No Action Alternative. The preliminary model runs, as discussed in Section 3A.9.4.2, resulted in the possibility of these adverse impacts following the reduction of water available to pre-1914 water rights holders in the Sacramento River basin. (p. 3I-9 at 7.)

The 2013 Draft EIR/EIS clearly proposes to use these analyses and the associated modeling for CWC § 85086, but there appears to be no final filing. The Department of Water Resources also has not produced detailed information from these early analyses for the WaterFix hearing, although it was requested by California Water Research and subpoenaed by PCFFA/IFR.

The February 21, 2017 Hearing Ruling stated:

In adjudicative proceedings before the State Water Board, by contrast, the State Water Board Members who serve as hearing officers have technical expertise that enables them to evaluate the reliability of scientific evidence and ensures that they will not afford undue weight to evidence derived from unproven scientific techniques. (See Wat. Code, § 175 [providing that the five members of the State Water Board shall consist of one attorney qualified in the fields of water supply and water rights, one registered civil engineer qualified in the fields of water supply and water rights, one registered professional engineer experienced in sanitary engineering and qualified in the field of water quality, and one additional member qualified in the field of water quality].) In addition, the hearing officers are assisted and advised in every adjudicative proceeding by a team comprised of professional attorneys, engineers, and scientists with the expertise necessary to evaluate whatever scientific information is presented in the proceeding.

Presumably the Board's "team comprised of professional attorneys, engineers, and scientists with the expertise necessary to evaluate whatever scientific information is presented in the proceeding" reviewed and advised the Board on the analyses described in Appendix 3I (Exhibit SWRCB-3, 3I-7 at 22) during the BDCP/WaterFix CEQA process. However, California Water Research notes that the process of DWR providing the Board with scientific information and modeling outside of any hearing could violate *English v. City of Long Beach (1950) 35 Cal.2d 157*, if it was used to make a decision:

Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present. [citations omitted.] The fact that there may be substantial and properly introduced evidence which supports the board's ruling is immaterial. [citations omitted.]

Pursuant to *English v. City of Long Beach*, the Board will need to fully consider any final CWC § 85086(c)(2) "screening alternatives" analysis in the formal hearing process, including providing

information used for the analysis to the hearing parties, and allowing adequate cross-examination on the analysis and associated modeling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Des Jardins', with a small apostrophe at the end of the last name.

Deirdre Des Jardins

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 for clarification – Water Code § 85086 process**

to be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated March 30, 2017, posted by the State Water Resources Control Board at

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/docs/111516revsrlist.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/111516revsrlist.pdf)

*Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.*

I certify that the foregoing is true and correct and that this document was executed on May 3, 2017.



Deirdre Des Jardins

California Water Research

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