



August 11, 2017

via email

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

Response to DWR's request to notice Part 2 of the Hearing

Deirdre Des Jardins, Principal at California Water Research ("California Water Research") hereby joins in the request of Save the California Delta Alliance. Save the California Delta Alliance objects to noticing Part 2 of the hearing, arguing that Part 2 needs to be delayed until the Bureau of Reclamation approves the Final EIS and the Federal Interim Take Statement is issued.

California Water Research further objects that any notice of Part 2 of the hearing, would rely on the incomplete and obsolete WaterFix Change Petition noticed by the Board on October 30, 2015. The description of the project operations in the Waterfix Change Petition refers to the Partially Recirculated Draft Environmental Impact Report / Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS), which has been superseded by the Final EIR/EIS. The RDEIR/SDEIS also did not provide the information required for a change petition by statute and regulation, and the required information was not provided in Part 1 of the hearing, although mandated by the Hearing Officers. Proceeding without a legally adequate petition, noticed prior to Part 2 of the hearing would compound the resulting statutory and due process issues, as argued on points and authorities below.

The Petitioners do have the ability to provide the information required for a legally adequate change petition, once initial operations are fully determined. Furthermore, there is no compelling reason to proceed without the statutorily required information, since Petitioners have substantially more work to do on the WaterFix project geotechnical exploration and engineering. California Water Research therefore requests that the Board not notice any further quasi-judicial proceedings on the WaterFix Change Petition until operations are specified and the legally required information has been submitted to the Board by the Petitioners.

California Water Research further objects to noticing of Part 2 of the hearing as predecisional to issues raised in Part 1 of the hearing. The Board has not yet received, considered, or ruled on briefs on issues raised in Part 1 of the hearing. Some of the issues raised in Part 1 require action by the Board. For example, if the Board decides the petition is for a new water right, then a new petition would be required.

There was also substantial testimony and evidence presented on the Petitioner's modeling of WaterFix project operations during Part 1, which supported two requests for the Board to do further modeling. PCFFA / IFR requested that the Board model operations at 18 inches of sea level rise and for drier climate change scenarios so that the Board could adequately assess potential impacts of the change on beneficial uses of water, for at least the first half of the project lifetime. The Sacramento Valley Water Users requested that the Board model more appropriate operations during droughts. There was further testimony by CSPA and California Water Research that the modeled operations have insufficient carryover storage to meet water quality standards during droughts. There was also testimony by California Water Research on issues with validation of the CALSIM modelling of reservoir operations.

Part 2 will consider "appropriate Delta flow criteria," which will presumably be analyzed using CALSIM operations modeling by the Department of Water Resources for the Board. To do so without receiving briefs and fully considering and reaching a decision on the testimony and requests for Board modeling presented in Part 1 of the Hearing, is predecisional and in contravention of the assertion in the July 22, 2016 hearing ruling that one of the purposes of the hearing was to "resolve some of the issues concerning how the proposed project would be operated."

Change Petition Notice and Hearing Rulings

The courts have ruled that reasonable notice is fundamental to due process under the state and federal constitutions. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612 [156 Cal.Rptr. 718, 596 P.2d 1134]; see also *Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 428-430 & fn. 5 [71 L.Ed.2d 265, 272-273, 102 S.Ct. 1148].)

The October 30, 2015, Hearing Notice stated:

The California WaterFix Project, as described in the Petition and RDEIR/SDEIS, is identified as Alternative 4A, the CEQA preferred alternative. (p. 4.)

The Petitioners attached the Partially Recirculated Draft Environmental Impact Report / Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) to the Change Petition application and referred to it for information on proposed operations. However, there were the RDEIR/SDEIS did not have the information required by statute and regulation.

The February 11, 2016 Hearing ruling recognized the issues with the RDEIR/SDEIS and the need to provide the information required by statute and regulation:

The available information lacks clarity in several ways, including whether operational

criteria are intended to constrain project operations or are identified for modeling purposes only, areas where a specific operational component or mitigation measure is not yet chosen or identified, operational parameters that are not defined and deferred to an adaptive management process, and lack of clarity concerning some mitigation measures.

We recognize that not all of these uncertainties need to be resolved for a satisfactory project description. Indeed, precisely what mitigation measures should be required and what flow criteria are appropriate, should the State Water Board approve the petition, are issues that will comprise a significant portion of the issues to be decided on the hearing record. At a minimum, however, petitioners should provide the information required by section 794, subdivision (a) of our regulations. (p. 6.)

A motion to dismiss the petition was filed by PCL et. al. on March 29, 2016. The April 25, 2016 hearing ruling stated.

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.)

This ruling was a waiver of the statutory requirements for the change petition. At the time, it was unclear that there would be significant prejudice to the protestants because of the direction by the Hearing Officers that the petitioners would provide more information in their case in chief.

When Petitioners' case in chief was filed, it became clear that there were issues with sufficiency of the information. The July 22, 2016 hearing ruling contradicted the February 11, 2016 ruling:

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. [...]

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.)

This was effectively a waiver of statutory requirements for the change petition. There were further issues raised when the Final Biological Opinion was issued. The issue of the inaccuracy of information provided in Part 1 of the hearing was raised by SVWU at the end of Part 1. California Water Research also raised the continuing issue of the insufficiency of the provided information. The Hearing Officers ruled on July 27, 2017 that:

In our prior rulings, we recognized the need for sufficient specificity concerning the manner in which the WaterFix Project will be constructed and operated to allow

protestants to evaluate the potential impacts of the project and participate meaningfully in the hearing. At the same time, we recognized that not all uncertainties need to be resolved for an adequate project description, and one of the purposes of this proceeding is to hear evidence and argument concerning proposed operating conditions. (p. 1-2.)

This was effectively a second waiver of statutory requirements for the change petition. Rulings that there is sufficient information for protestants to “participate meaningfully in the hearing,” are basically assertions that there is no prejudice to protestants by waiving statutory requirements for the change petition. However, there was substantial information, required by statute, that was not provided in Part 1 of the hearing.

Water Code section 1701.2, subdivision (e) requires that a petition for change in a permit or license shall “be in the form required by applicable regulations.” The California Code of Regulations, Title 23, section 794 provides that a Petition shall include the following information: (2) The amount(s) of water proposed for change, transfer or exchange; (6) The existing and the proposed diversion, release and return flow schedules if stored water is involved or if the streamflow regime will be changed; (9) Information identifying any effects of the proposed change(s) on other known users of water, including identification in quantitative terms of any projected change in water quantity, water quality, timing of diversion or use, consumptive use of the water, reduction in return flows, or reduction in the availability of water within the streams affected by the proposed change(s). As described in Attachment A, this information was not in the RDEIR/SDEIS, and was not provided during Part 1 of the hearing.

Due Process Issues

The Hearing Officers only have the authority to waive non-statutory requirements, not requirements mandated by statute and the state and federal constitution. Title 23 Cal Code Regs section 648, subdivision (d) provides that:

The presiding officer may waive any requirements in these regulations pertaining to the conduct of adjudicative proceedings including but not limited to the introduction of evidence, the order of proceeding, the examination or cross-examination of witnesses, and the presentation of argument, so long as those requirements are not mandated by state or federal statute or by the state or federal constitutions. (emphasis added.)

The Hearing Officers are thus proceeding outside of statute or regulation. Proceeding further without the statutorily required information risks remand of the entire decision on due process issues, which is the opposite of hearing efficiency.

These errors will be compounded by proceeding to Part 2 of the hearing with the new operating criteria in the Final EIR/EIS. Save the California Delta Alliance describes in detail on p.3-6 of the motion of August 3, 2017 the ways in which the proposed operations for the CEQA preferred alternative in the WaterFix RDEIR/SDEIS were changed in the Final EIR/EIS and are now superceded. Save the California Delta Alliance also explains how the initial operations will be undefined until the actual Federal Incidental Take Statement is issued. Thus there is currently

insufficient information to meet statutory and regulatory requirements. California Water Research hereby objects to noticing Part 2 of the hearing on the WaterFix Change Petition without the change petition containing the information required by statute. California Water Research requests that the Board direct the Petitioners to supply the missing information, and to update obsolete information in the RDEIR/SDEIS. This information should include the table of operating criteria requested by Save the California Delta Alliance.

In the meantime, it would be appropriate for the Board to hold a workshop to receive additional information needed to develop the Board's "appropriate Delta flow criteria." To the extent that sufficient information is not available to the Board to develop "appropriate Delta flow criteria," it is because the Board has not held such a workshop, although it is recommended under the Administrative Procedure Act. (California Water Research hereby incorporates California Water Research's August 4, 2017 filing on APA act requirements fully as if set forth herein.) Developing proposed mitigation measures and proposed Delta flow criteria is much more appropriate in a workshop than in a quasi-judicial and/or quasi-legislative water rights proceeding, which have strong statutory and due process requirements.

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

cc: WaterFix hearing parties

Attachment A

Failure to provide the information required by Title 23 Cal. Code Regs. § 794.

The Department of Water Resources provided Exhibit DWR-324 to meet the mandate of the hearing officers in the February 11, 2016 hearing ruling:

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.)

Subdivision (6) of California Code of Regulations, Title 23, section 794 provides that a change petition must include "[t]he existing and the proposed diversion, release and return flow schedules if stored water is involved or if the streamflow regime will be changed."

To meet the requirements is subdivision 6, Exhibit DWR-324 referred to the CALSIM modeling presented by the Petitioners:

Mr. Munevar's testimony describes the CWF with the Initial Operational Criteria and modeling analysis and results of the proposed CWF facilities of flows, diversions, and storage changes compared to the No Action Alternative. (See Exhibit DWR-71.)
(p. 6.)

The modeling did not provide the existing diversion, release and return flow schedules, and the No Action Alternative also did not reflect current operations rules for Oroville reservoir.

Petitioners' witness John Leahigh stated in cross-examination during sur-rebuttal that the rule curve for operations of Oroville reservoir had been changed, and no longer corresponded to the rule curve in the CALSIM operations modeling presented for the hearing.

MR. SHUTES: Very good. And you mentioned the last time the equation changed, and that would be 2009? Would that be correct? When the low-level outlet had some issues?

WITNESS LEAHIGH: So, the last time it would have changed is when -- We essentially have now a fix in place, so I'm trying to remember exactly which year. So either last year or the year before were -- we actually revised that first number. For this year, we're actually using 1.3 million acre-feet rather than 1.0.
(R.T. May 9, 2017, 16:17-17:1.)

These issues of the modeling not accurately representing current reservoir operations are strongly related to the failure by the Petitioners to validate the CALSIM model's representation of reservoir operations, which was discussed in testimony by Deirdre Des Jardins for California Water Research's case in chief (exhibit DDJ-108 errata 12-9.) Without reasonably accurate representation of storage releases, diversion and return flow information in the modeling is simply wrong.

Furthermore, the initial operating criteria for the project have been changed, as explained in the filing by Save the California Delta Alliance on p.3-6 of the motion of August 3, 2017. Without accurate representation of operating criteria, storage release, diversion, and return flow information in the modeling is simply wrong.

Subdivision (2) of California Code of Regulations, Title 23, section 794 provides that a change Exhibit DWR-324 states, petition must include “[t]he amount(s) of water proposed for change, transfer or exchange.”

To meet the requirements is subdivision 2, Exhibit DWR-324 states, “The requested change will not increase the rate at which water can be diverted from the Delta.” (p. 2.) This is simply incorrect. Mr. Bourez testified during rebuttal that the physical capacity of the projects to divert water would be increased by 3000 acre-feet.

Furthermore, the modeling presented by DWR for Part 1 of the hearing did not have the final criteria for use of the North Delta diversions. The differences were explained in the filing by Save the California Delta Alliance on p.3-6 of the motion of August 3, 2017. Without accurate criteria for use of the North Delta diversions, the amount of water changed is simply wrong.

Finally, Subdivision (9) of California Code of Regulations, Title 23, section 794 provides that a change petition must include “information identifying any effects of the proposed change(s) on other known users of water, including identification in quantitative terms of any projected change in water quantity, water quality, timing of diversion or use, consumptive use of the water, reduction in return flows, or reduction in the availability of water within the streams affected by the proposed change(s).”

To meet the requirements is subdivision 2, Exhibit DWR-324 states,

The modeled potential effects to other users, and how the SWP/CVP address the potential effects in real time operations, are discussed and summarized in the testimony of Mr. Leahigh, Mr. Milligan, Mr. Nader-Tehrani, and Mr. Munevar. (Exhibits DWR-61, DWR-66, DWR-71.)
(p. 8.)

But if the modeling does not have a reasonably accurate representation of storage releases, diversions and return flows, modeled changes in water quantity, water quality, and timing of diversion or use are simply wrong.

**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):

Response to DWR's request to notice Part 2 of the Hearing

to be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated July 27, 2017, 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

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 August 11, 2017.



Deirdre Des Jardins
California Water Research

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