

MOTION TO STRIKE THE SEPTEMBER 8, 2017 LETTER FROM THE CALIFORNIA DEPARTMENT OF WATER RESOURCES AND U.S. BUREAU OF RECLAMATION REGARDING THE AUGUST 31, 2017 RULING REGARDING SCHEDULING OF PART 2 AND OTHER PROCEDURAL MATTERS

The Natural Resources Defense Council, The Bay Institute, and Defenders of Wildlife (“Petitioners”) hereby submit this motion to strike the September 8, 2017 letter from the California Department of Water Resources and U.S. Bureau of Reclamation regarding the August 31, 2017 Ruling Regarding Scheduling of Part 2 and Other Procedural Matters (“Operations Letter”). The Board should strike the Operations Letter because it: (1) includes incompatible and contradictory statements regarding operational requirements for South of Delta pumping; and, (2) fails to describe with specificity which operational requirements are controlling. The Board should strike the response as improper and nonresponsive. *See* Cal. Code of Civ. Proc. § 436(a).

The Board’s August 31, 2017 Ruling Regarding Scheduling of Part 2 and other Procedural Matters (“Ruling”) required DWR and USBR:

To eliminate any confusion concerning petitioners’ current proposal, we direct the petitioners to provide an updated summary of operating criteria that makes explicit whether particular criteria are proposed conditions of operation or are set forth solely as modeling assumptions.

Ruling at 7. The Board should strike the Operations Letter because it fails to meet these requirements, provides incompatible and misleading information, and creates greater confusion concerning operations. The Board should also require DWR and USBR to submit an adequate description of operations.

1. The Operations Letter Includes Contradictory and Incompatible Operations Criteria for the South Delta

The Operations Letter should be stricken because it improperly identifies two separate, contradictory and incompatible operations criteria for Old and Middle River (“OMR”) flow requirements in the South Delta. This is clearly misleading.

The Operations Letter provides that December through September South Delta operations under the biological opinions and ITP are identical to the criteria in the EIS/EIR. Operations Letter at 4. The table below summarizes those OMR requirements for January to March (OMR must be equal or less negative to the results in this table):

Month	Wet	Above Normal	Below Normal	Dry	Critically Dry
January	0 cfs	-3,500 cfs	-4,000 cfs	-5,000 cfs	-5,000 cfs
February	0 cfs	-3,500 cfs	-4,000 cfs	-4,000 cfs	-4,000 cfs

March	0 cfs	0 cfs	-3,500 cfs	-3,500 cfs	-3,000 cfs
--------------	-------	-------	------------	------------	------------

Id. In addition, the Operations Letter explains that OMR requirements for the month of June will depend on gaged flow at Vernalis, as follows:

June OMR	June Vernalis Flow
-3,500 cfs	Less than or equal to 3,500 cfs
0 cfs	Between 3,500 and 10,000 cfs
+1,000 cfs	Between 10,000 and 15,000 cfs
+2,000 cfs	Greater than 15,000 cfs

Id. at 4-5.

In contrast, footnote 9 of the Operations Letter provides a completely different set of OMR requirements, which are contradictory to and incompatible with the OMR requirements summarized above. It states that,

The criteria do not fully reflect the complexities of CVP/SWP operations, dynamic hydrology, or spatial and temporal variation in the distribution of aquatic species. As a result, **the criteria will be achieved by operating within an initial range of real time operational criteria from January through March and in June.** This initial range, including operational triggers, will be determined through future discussion, **including a starting point of -1250 to -5000 cfs based on a 14-day running average**, and will be informed by the Adaptive Management Program, including real time monitoring. Further, the 3-day averaging period may be modified through future discussion. Modifications to the 3-day average period and the range of operating criteria may be needed, in part, because: 1) the water year type is forecasted in February but not finalized until May and 2) 0 cfs, or positive, OMR in wet and above normal years may be attained coincident with unimpaired flows.

Id. at 5, FN 9 (emphasis added).¹ The operating criteria described in this footnote are identical to the OMR requirements in the 2008 and 2009 biological opinions for the months of January to March and June. They therefore would not require any reduction in South Delta pumping in

¹ The explanation why modifications to the range of operating criteria may be needed is also misleading. First, the incidental take permit provides rules for water year forecasting for OMR criteria before the final water year type is determined. Second, it is illogical to claim that because 0 cfs or positive OMR requirements can be met with unimpaired flows, the criteria should include -1,250 to -5,000 cfs OMR during these same months.

these months, contrary to numerous representations by DWR and USBR. To our knowledge, these criteria were not modeled or analyzed in the biological opinions or incidental take permit.²

It is impossible for the project to be operated to have OMR flows no more negative than 0 cfs in a wet year, and simultaneously be operated to OMR flows between -1,250 cfs to -1,500 cfs. The Operations Letter provides misleading and contradictory South Delta Operations for the months of January, February, March and June (except for the months of January in Dry and Critically Dry water year types).

DWR and USBR cannot have it both ways. Either OMR is more restrictive in the South Delta and there will be reduced pumping, or there will not. Because the Operations Letter fails to make explicit which of these contradictory operating criteria are conditions of operation, it should be stricken.

2. The Operations Letter Identifies Legally Binding Terms and Conditions of Biological Opinions and Incidental Take Permits as Modeling Assumptions

The Operations Letter should also be stricken because it is nonresponsive to the Ruling, creating more confusion regarding operations and appearing to identify the legally binding terms and conditions of biological opinions and incidental take permits as modeling assumptions only. The Operations Letter explicitly states that, “Petitioners are not proposing as conditions the operational criteria contained within the Biological Opinions and 2081 (b) Incidental Take Permit.” Operations Letter at 2. It also proposes that the only proposed conditions of operation are the requirements of D-1641, and describes OMR criteria as modeling assumptions only. *Id.* at 1.³ Under this logic, the 2008 and 2009 biological opinion criteria, including the criteria referenced in Footnote 9 above, are mere modeling assumptions. Likewise, the North Delta bypass flows referenced in the table are only modeling assumptions. Indeed, all of the operations criteria in the table are merely modeling assumptions according to DWR and USBR. This cannot be true. Indeed, in signing the incidental Take Permit, DWR “agrees on behalf of the Permittee to comply with all terms and conditions.” *See* ITP at 232.

DWR and USBR cannot have it both ways. Either these operational requirements of the incidental take permit and biological opinions are binding commitments and thus are part of the operational proposal for the Board’s permitting process, or they are not. To our knowledge, the

² In addition, the language describes this as a “starting point,” indicating that less protective OMR requirements may be adopted in the future. This highlights the problems for the Board in moving forward without a final biological opinion from FWS that addresses operations of the project, as well as a Record of Decision from USBR that legally commits the agencies to implement the biological opinions.

³ DWR and USBR misleadingly state that, “For purposes of this hearing, these modeling assumptions are not proposed as conditions but are presented in order to demonstrate compliance with the existing Water Quality Control Plan, which sets forth the thresholds for protecting beneficial uses.” The Board has rejected this narrow and unlawful view of its obligations under the Delta Reform Act and with respect to consideration of petitions to change a point of diversion. *See* February 11, 2016 Prehearing Conference Ruling at 4-5; March 4, 2016 Ruling at 4-5. NRDC et al addressed this issue in our September 29, 2015 letter to the SWRCB, and hereby incorporate our prior letter by reference. This statement should also be stricken as irrelevant, incorrect, and misleading.

NRDC et al Motion to Strike September 8, 2017 Operations Letter
September 13, 2017

final EIS/EIR for WaterFix failed to model and analyze the environmental effects of the WaterFix operations proposed as conditions of approval described in the Operations Letter.

The Operation Letter appears to ask the Board to consider a radically altered WaterFix project, inconsistent with the project description in the biological assessment, the biological opinions, the incidental take permit, and the final EIS/EIR. The Operations Letter is nonresponsive to the Ruling. The Board should reject this 11th hour radical transformation of the project, and it should strike the Operations Letter as misleading.

In conclusion, the Board should grant NRDC et al's motion to strike the Operations Letter because it: (1) includes contradictory and misleading operating criteria for the South Delta; and, (2) creates greater confusion over operating criteria and describes legally binding operational requirements as only modeling assumptions. The Board should also require DWR and USBR to submit an adequate description of operations that responds to the Ruling.

Dated: September 13, 2017

Natural Resources Defense Council

By:  _____

Doug Obegi

On Behalf of Protestants

Natural Resources Defense Council

Defenders of Wildlife

The Bay Institute