



September 19, 2017

via email

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

Re: Regulatory and adjudicatory actions and associated environmental documents

Dear Hearing Officers,

The September 8, 2017 filing by the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (USBR) ¹ proposes changes to the State Water Project (SWP) and Central Valley Project (CVP) permits that would reinterpret objectives of the Bay-Delta Water Quality Control Plan (WQCP) and fundamentally change implementation of the plan. The Petitioners' proposed changes to the Bay-Delta WQCP are beyond the scope of the Petition for Change in Point of Diversion. Petitioners' "Supplemental Information for Petition for Change in Point of Diversion" states,

This Petition is limited in scope. It proposes only to add points of diversion and rediversion within the Sacramento/San Joaquin Delta Estuary (Delta) of the permits listed above. This Petition does not propose to change any other aspect of the existing SWP/CVP permits.

(Exhibit SWRCB-1, p. 10 of 39.)²

Thus the Petitioners' September 8, 2017 filing represents a substantial change from the noticed Petition, which requires recirculation of the Hearing Notice. There is also a fundamental contradiction between the Petitioners' September 8, 2017 proposal that approval of the petition be "conditioned upon the terms contained in Water Rights Decision 1641" (p. 1) and the legislature's mandate that the order approving the change petition include "appropriate Delta

¹ Department of Water Resources and U.S. Bureau of Reclamation, Re: August 31, 2017 Ruling Regarding Scheduling of Part 2 and Other Procedural Matters, September 8, 2017.

² DWR's attorney, James Mizell, also indicated in the opening statement for Part 1, "I just would like that to be noted that our testimony does not attempt to modify anything in the existing Water Quality Control Plan. In fact, it's premised upon a continuation of the existing Water Quality Control Plan until the appropriate time when you've completed your update." (R.T. 26:11-16.)

flow criteria.” (Wat. Code 85086(c)(2.) Approval of the Petition will require substantial discretionary actions by the Board in evaluating “appropriate Delta flow criteria” for inclusion in the SWP and CVP permits. These discretionary actions are subject to CEQA.

The Board’s regulations provide that, in the absence of special circumstances, the Board’s issuance of permits is ministerial and exempt from CEQA (Tit. 23 Cal. Code Regs. § 3770 (c).) However, the BDCP/WaterFix change petition is such a special circumstance. This was acknowledged by the Board early in the BDCP/WaterFix process. Exhibit SWRCB-28, the 2009 Staff Report on the Periodic Review of the 2006 Water Quality Control Plan (2009 staff report), documents that the Board knew in 2009 that the BDCP/WaterFix project would “likely require changes to the Bay-Delta Plan and water rights implementing that plan” (p. 8.) The 2009 staff report documents the following potential changes to flow objectives in the Bay-Delta Water Quality Control Plan:

1. Re-evaluation of the export to inflow objectives (p. 19);
2. Adding reverse flow (OMR) objectives (p. 25);
3. Increasing Delta outflow objectives (p. 17);
4. Modification of Delta Cross Channel gate closure objectives (p. 22);
5. Changes to Rio Vista flow objectives (p. 5-6.)

The 2009 staff report also documents that the Board deferred analyses of these flow objectives to the Department of Water Resources in the BDCP/WaterFix process, to avoid duplication of effort. The 2009 staff report is discussed in more detail later in this letter.

The Petitioners are requesting that the Board exempt the inflows to Clifton Court Forebay from the North Delta diversions from the export to inflow calculations (p. 6.) However, the WaterFix Final EIR/EIS provides little analysis to support this exemption. The Petitioners are also proposing that the Board adopt a permit term delegating determination of flow objectives #2-5 to the adaptive management process by NMFS, USFWS, and DFW to protect listed endangered species. The September 8, 2017 filing states:

“...Petitioners are requesting that the Hearing Officers incorporate the adaptive management process into the water rights permits, and Petitioners are not proposing as conditions the operational criteria contained within the Biological Opinions and 2081(b) Incidental Take Permit.” (p. 2.)

The proposal that the Board delegate determination of flow objectives #1-5 entirely to NMFS, USFWS, and DFW conflicts with statutory and decisional law, as well as with the constitution. While NMFS, USFWS, and DFW are trustee agencies, and the Board must ensure consistency of the Board’s regulations with the ESA and CESA determinations by these agencies, this is not the same as delegation of the Board’s determinations with respect to the protection of fish and wildlife in the Bay-Delta Water Quality Control Plan to the ESA and CESA processes. The Board’s public trust responsibilities, as interpreted in *National Audubon Society v. Superior Court*, (1983) 33 Cal.3d 419, extend well beyond avoiding jeopardy of

extinction to listed species. The legislature has also given the State Water Resources Control Board *sole* statutory authority to exercise “the adjudicatory and regulatory functions of the state in the field of water resources” (Wat. Code § 174), and the legislature mandated that the Board include “appropriate Delta flow criteria” in the order approving the change petition (Wat. Code § 85086 (c)(2.))

Regardless of whether DWR proposes “appropriate Delta flow criteria” in this hearing, the Board must make its own evaluations and its own findings. The Department of Water Resources (DWR) has designated the Board as a responsible agency for the WaterFix Environmental Impact Report (EIR.) However, the designation as a responsible agency simply requires the Board to consult on potential operating scenarios for the project. It does *not* override the Board’s regulatory and adjudicatory role – which does not allow delegation of findings to DWR. In the 2009 WQCP update, Board staff were clear about the relation of Board environmental review processes to analyses in the BDCP/Waterfix EIR:

To avoid duplication of effort, to the extent feasible, the State Water Board will consider relevant analyses conducted for BDCP and other sources in its planning and environmental review efforts. When considering any other such analyses, however, the State Water Board will independently evaluate the information in the analyses. (p. 13.)

The 2009 staff report also indicated that supplemental analyses by the Board may be required:

The State Water Board, however, may determine that information developed by other agencies in these concurrent Bay-Delta processes does not sufficiently inform the board’s own water quality planning or environmental review processes, including its review of environmental impacts of proposed amendments and alternatives. It may then prepare additional analyses. Any final environmental document will reflect the independent judgment of the State Water Board. (p. 8)

The Bay-Delta WQCP update is not relying on analyses by DWR. The Hearing Officers’ February 11, 2017 Change Petition hearing ruling also recognized that the Board may need to prepare supplemental environmental documentation for consideration in the hearing:

If during the course of this proceeding, the State Water Board determines that the range of alternatives evaluated by DWR is not adequate to support the Board’s decision, then either DWR or the Board will need to prepare subsequent or supplemental documentation. (See *id.*, §§ 15096, subd. (e), 15162, 15163.) At this point, however, it is uncertain whether any subsequent or supplemental documentation will be required. (p. 9.)

However, the February 11, 2016 ruling did not recognize that the Board’s regulatory and adjudicatory powers and the constitutional requirements under Article III, section 3, of the California Constitution require the Board to conduct environmental review processes for Board’s

regulatory and adjudicatory actions.³ This constitutional requirement, and its relation to the the Board's CEQA processes, is discussed in more detail below. The Board's regulations also require the Board to be the CEQA lead agency for any revisions to the Water Quality Control Plans and for the Board's instream flow protection programs. (Govt Code §§ 15251(g), 15251(k), Tit 23 Cal Code Regs § 3776(a).)

Based on these considerations, California Water Research requests that the Hearing Officers reconsider the statement in the August 31, 2017 ruling that "consistent with the State Water Board's more limited role as a responsible agency under CEQA, the issue of whether the FEIR/EIS for the WaterFix Project satisfies CEQA or NEPA requirements is not a key hearing issue, and testimony on that issue will not be admitted." The August 31, 2017 ruling also purports to determine that no further environmental review documents are "legally required for the State Water Board to process the water right change petition for the WaterFix Project" (p. 4.) This determination is inconsistent with due process and the February 11, 2016 hearing ruling. California Water Research requests that the Hearing Officers allow discussion and argument on the adequacy of the WaterFix Final EIR/EIS CEQA analyses for the Board's determination of key hearing issues in the Pre-Hearing conference, and that the Board reconsider whether further environmental review documents may be legally required, based on the discussion in this letter and the discussion in the Pre-Hearing conference.

CEQA requirements for regulatory and adjudicatory findings by the Board

With respect to the Bay-Delta WQCP update and the WaterFix hearing, the October 30, 2015 Hearing Notice stated,

While Delta and Sacramento River flow issues and other operational constraints are involved in both the California WaterFix and the Phase 2 and 3 proceedings, the WaterFix process is much more narrowly focused on the Projects' request to add points of diversion, the findings that are required to approve those changes, and the Delta Reform Act requirement to establish appropriate Delta flow criteria for the California WaterFix project alone.

The following sections discuss CEQA requirements for regulatory and adjudicatory findings by the Board in the WaterFix Change Petition hearing.

³ Article III, section 3, of the California Constitution provides: "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (*Estate of Cirone* (1987) 189 Cal.App.3d 1280, 1286.)

1. Revised export/inflow calculation in Bay-Delta WQCP

The Board has known since 2009 that modifications to operating criteria in the WQCP would likely be required for the proposed BDCP/WaterFix project. The 2009 staff report stated,

Conservation measures currently under consideration in the BDCP process will likely require additional modifications to operating criteria for a number of existing and planned facilities. These changes may require re-evaluation of the export limit objectives as well as other Delta flow objectives in the Bay-Delta Plan (BDCP 2008). (p. 21.)

Petitioners are requesting that the Board exclude inflows to Clifton Court Forebay from the proposed North Delta diversions from the 2006 Bay-Delta WQCP export to inflow calculation and resulting export limits. This is a *substantial* revision to the 2006 Bay-Delta WQCP, with potentially major environmental impacts. With respect to the export limits, the 2009 staff report stated,

In addition to reducing entrainment, the existing export limits are intended to provide general protection of the Delta ecosystem and a variety of fish and wildlife beneficial uses by limiting the portion of freshwater that may be diverted by the SWP and CVP export facilities. Additional ecosystem benefits beyond reducing entrainment may include reduction in losses of nutrients and other materials important for the base of the food web, food organisms, habitat suitability, fishery management, and more natural flow and salinity patterns. (p. 21.)

Under section 15162(a)(1) of the CEQA Guidelines, revision of the export limits in Decision 1641 and the Bay-Delta WQCP requires a subsequent environmental document to the 2006 Bay-Delta WQCP Substitute Environmental Document (SED.) The Board's approval of the proposed North Delta diversions would also constitute a substantial change in the "project" considered in the 2006 Bay-Delta WQCP SED, triggering the requirement for a subsequent SED under section 15162(a)(1.) Under statute, the constitution and regulation, the Board must be lead agency (Wat. Code § 174, Cal. Const, art. III, § 3, Tit 23 Cal. Code Regs. § 3776(a).)

2. Reverse flow objectives and increased Delta outflows

The fact that the effects of the Board's approval of the Joint Point of Diversion are much more severe than were predicted in the CALFED and Decision 1641 EIR raises a significant CEQA issue. When there is a discretionary action by the Board with respect to the 2006 Bay-Delta WQCP and Decision 1641, this triggers a subsequent EIR (CEQA Guidelines § 15162(a)(3)(b).)⁴ There were two mitigations for the Pelagic Organism Decline discussed in the

⁴ The Board prepared two EIRs for Decision 1641. One of the EIRs addressed the following: (1) alternatives for assigning responsibility to water right holders in the watershed of the Bay-Delta Estuary to meet the flow, operational, and water quality requirements in the 1995 Bay-Delta Plan and (2) the

2009 staff report on the Bay-Delta WQCP. The 2009 staff report addressed the need for consideration of reverse flow objectives:

In light of the continued fishery declines in the Bay-Delta, however, the State Water Board should consider adopting flow objectives for Old and Middle Rivers to protect estuarine dependent fish species. [...]

Staff recommends that the State Water Board consider and evaluate the merits of adding Old and Middle River flow objectives to the Bay-Delta Plan. Some of this review could be provided by DWR to the State Water Board, in coordination with State Water Board planning efforts, as part of the environmental analyses conducted for the BDCP. (p. 25-26.)

The 2009 staff report also recommended consideration of increased Delta outflows:

The available information indicates that further review and change of Delta outflow objectives may be required. Changes to Delta outflow patterns have likely contributed to the POD and are likely having an impact on the abundance of other species of concern. [...] Additional Delta outflow recommendations are likely to come from the BDCP and other planning efforts currently under way. [...] Some of this review could be provided by DWR to the State Water Board, in coordination with State Water Board planning efforts, as part of the environmental analyses conducted for the BDCP. (p. 19.)

The March 4, 2016 Hearing ruling also indicated that more protective flow criteria were needed, and referred to their inclusion in the proposed project in the RDEIR/SDEIS:

Petitioners themselves appear to have recognized that existing flow requirements may be inadequate, and have included as part of their proposed project additional criteria for spring Delta outflow, to protect longfin smelt, and new minimum flow criteria at Rio Vista on the Sacramento River. (p. 5.)

The new minimum flow criteria at Rio Vista is no longer part of the proposed project, and the additional spring Delta outflow to protect longfin smelt is now subject to adaptive management (Petitioners' September 8, 2017 filing, p. 6, footnote 10.) The Hearing Officers originally expected that the Petitioners would propose appropriate Delta flow criteria in Part 1 of the hearing on the change petition.⁵ However, by the end of Part 1, the Hearing Officers were not necessarily expecting Petitioners to provide any information in the hearing on "appropriate

combined use of the CVP and the SWP points of diversion in the Delta. (Decision 1641, Exhibit SWRCB-21, p. 133.)

⁵ The April 25, 2016 Hearing ruling stated, "Although ultimately the State Water Board will decide what Delta flow criteria are appropriate in any approval of the petition, we expect the petitioners to describe, as part of their case in chief, what Delta flow criteria they believe would be appropriate." (p. 3.)

Delta flow criteria.”⁶ It appears, in hindsight, that the Board’s reliance on DWR to include more protective flow criteria in the proposed BDCP/WaterFix project was misplaced.

3. Relation to update of the 2006 Bay-Delta WQCP

The Board is currently updating the 2006 Bay-Delta Water Quality Control Plan, and is proposing to re-evaluate implementation of the plan during Phase 3 of the WQCP update. The Phase 3 implementation will include the WaterFix project, if it is approved. However, under CEQA, the Board cannot delay evaluation of the changes required in the Bay-Delta WQCP as a result of the North Delta diversions. The California Supreme Court held that

Section 21100 [...] requires an EIR be prepared whenever lead agencies “propose to approve or carry out” a project with potential significant effects; it is not, contrary to the trial court’s holding, “to be delayed until a ‘final’ decision has been made.

(Save Tara v. City of West Hollywood (2008) 45 Cal.4th 116, 126.)

The Board has proposed to only adopt interim Delta flow criteria in the WaterFix hearing, as discussed in the October 30, 2015 hearing notice (p. 7), and in Hearing Officer’s February 11, 2016 hearing ruling (p. 4.) However, the Board’s determination of interim Delta flow objectives is still subject to CEQA, and the Board’s CEQA analysis of alternatives must occur before the flow objectives are approved. “The policy of environmental review of feasible alternatives and mitigation measures makes practical sense only if that review occurs before an agency approves a project. [citation omitted.]” *(Poet, LLC v. Cal. Air Res. Bd. (2013), 218 Cal.App.4th 681, 717.)*

4. Appropriate Delta flow criteria

The Board’s determination of “appropriate Delta flow criteria” under Water Code section 85086(c)(2) is also not subject to a ministerial CEQA exemption. It is a project under CEQA, since it is a discretionary activity by a public agency that “may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment” (CEQA Guidelines § 21065(a).) As a CEQA “project,” the Board’s determination of “appropriate Delta flow criteria” is clearly related to revision of the flow objectives in the Bay-Delta Water Quality Control Plan.⁷ The Board is properly the lead agency for the

⁶ The July 27, 2017 Hearing ruling only stated, “we anticipate that other information concerning appropriate Delta flow criteria or other measures to protect fish and wildlife will be submitted in Part 2.” (p. 2.)

⁷ In *Poet LLC v California Air Resources Board, F073340* (May 30, 2017), the court held “there are different ways actions can be related to (i.e., connected with) each other. [citations omitted.] For instance, the two actions could be related in (1) time, (2) physical location and (3) the entity undertaking the action.” In this case, the flow objectives in the Bay-Delta WQCP, and “appropriate Delta flow criteria” address the same physical locations, and both are being evaluated and approved by the same agency.

determination of Delta flow criteria under CEQA Guidelines section 21067, because the Board has the sole responsibility for determining and approving the flow criteria.

As a responsible agency for the WaterFix EIR, the Board did designate staff to consult with DWR about “the range of actions, potential alternatives, mitigation measures, and any potential and significant effects on the environment” of the WaterFix project (CEQA Guidelines § 21080.1.) However, the Board cannot delegate findings pursuant to the Board’s public trust responsibilities to DWR.

5. The Mono Lake precedent

In Water Right Decision 1631, the Board determined public trust flow criteria for four streams feeding Mono Lake, pursuant to the decisions in *National Audubon Society v. Superior Court*, (1983) 33 Cal.3d 419 and *California Trout Inc. v. Superior Court* (1990) 218 Cal. App 187. The Board’s evaluation of alternative flow criteria for Decision 1631 was documented in an EIR, with the Board as lead agency (Decision 1631, p. 13-14.) The EIR was paid for by the Los Angeles Department of Water and Power.

The legislature specified a similar process to that in Decision 1631 for the Board’s evaluation of “appropriate Delta flow criteria.” Water Code section 85086, subdivision (d) specified that the Board “shall enter into an agreement with the State Water Project contractors and the federal Central Valley Project contractors, who rely on water exported from the Sacramento River watershed, or a joint powers authority comprised of those contractors, for reimbursement of the costs of the analysis conducted pursuant to this section.” (underlining added.) “The analysis conducted pursuant to this section” clearly includes the analysis used by the Board to determine “appropriate Delta flow criteria,” pursuant to Water Code 85086, subdivision (c)(2.)

The Board must ensure that the Board’s reliance on the Department of Water Resources for analyses needed for the Board’s public trust findings is not prejudicial to the Board’s ultimate determinations. California Water Research supports the September 6, 2017 request by NRDC et. al. to delay the deadline for submissions of protestants’ cases in chief for Part 2 so that the Board’s final Scientific Basis Report and draft environmental analysis for the Phase 2 Bay-Delta Water Quality Plan update are available. However, as discussed above, more environmental documentation, prepared by the Board, will be needed to support the Board’s ultimate decision.

Sincerely,



Deirdre Des Jardins
Principal, California Water Research