



September 22, 2017

via email

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

Re: Proposed topics for consideration at Part 2 pre-hearing conference

Deirdre Des Jardins, principal at California Water Research, proposes the following topics for consideration at the pre-hearing conference:

A. Change to Noticed Petition

A key hearing issue for Part 2 is whether the Board should accept the WaterFix Final EIR/EIS into evidence. The proposed operational scenarios in the Final EIR/EIS have changed from the WaterFix RDEIR/SDEIS which was attached to the noticed petition.

1. What procedural issues are raised by the change in operational scenarios in the Final EIR/EIS?
2. What procedural issues are raised by the inconsistency between the operational scenarios in the Final EIR/EIS and Notice of Determination?
3. How should the Board deal with the issues?

B. Completion of Federal NEPA process

1. Before proceeding with the scheduled hearing, should the Board request that the Bureau of Reclamation confirm that the Bureau is still planning to issue a Record of Decision on the WaterFix Final EIR/EIS?
2. Should the Bureau's Record of Decision be required before the WaterFix Final EIR/EIS is accepted into the evidentiary record?

C. Operational scenarios and CESA/ESA processes.

Most of the operational criteria in the WaterFix Final EIR/EIS and NOD are derived from the CESA and ESA processes. The operational criteria are subject to change through adaptive management, and DFW and NOAA are not proposing to testify.

Questions:

1. Should DFW's Interim Take Permit be accepted into the evidentiary record without testimony by the agency?
2. Should NOAA's Biological Opinion be accepted into the evidentiary record without testimony by the agency?
3. How should the Board deal with inconsistencies between the CESA and ESA criteria, given that the agencies are not testifying?
4. Given the modeled operational criteria are reliant on the CESA/ESA processes, and are subject to modification, how should the Board ensure the relevance and reliability of information presented on WaterFix impacts in Part 2?

D. Potential revision of Bay-Delta Water Quality Control Plan flow objectives

The operational scenarios in the Petitioners' September 8, 2017 filing assume revision of flow objectives in the Bay-Delta Water Quality Control Plan, including the export to inflow calculation (proposed by the Petitioners.)

Changes to the Bay-Delta Water Quality Control Plan, required for implementation of the BDCP / WaterFix were not noticed for this proceeding, and were included in the 2009 scoping notice for the Phase 2 update.

Questions:

1. Can the Board consider revision of flow objectives in the Bay-Delta Water Quality Control Plan in this proceeding without the required SED (Tit 23 Cal Code Regs 3777(a))?
2. If not, how should the Board deal with the speculative nature of the operational scenarios?

E. Other flow-related operational criteria

Flow-related operational criteria in the WaterFix Final EIR/EIS and NOD, are also being considered as potential flow objectives in the Phase 2 Water Quality Control Plan Update.

Questions:

1. Should the Board consider adoption of flow-related operational criteria as permit terms in this proceeding?
2. Should the consideration be based on the analyses in the WaterFix Final EIR/EIS?

- a.) If so, how should the Board evaluate the analyses in the WaterFix Final EIR/EIS for sufficiency?
- b.) How should the Board ensure independence of the Board’s findings with respect to “appropriate Delta flow criteria”?

F. Public trust findings

1. Is the Board a lead agency or a responsible agency for public trust findings in this proceeding?
2. If the Board is a lead agency, how should the Board make its own independent public trust findings if
 - a. The California Department of Fish and Wildlife is not testifying?
 - b. NOAA Fisheries is not testifying?
3. If the Board is a lead agency, how should the Board document its independent consideration of alternatives for “appropriate Delta flow criteria” in this proceeding?

G. Climate Change

The operational scenarios described in the Petitioners’ September 8, 2017 filing only address determination of initial and near term operational criteria under 6 inches of sea level rise.

1. How will the Board consider/address possible impacts on public trust resources under long-term operations, especially if listed species go extinct?

H. Board’s procedure of weighing evidence at the end of the hearing

The Board accepted modeling, modeling results, and related testimony into the hearing in Part 1 that were based on obsolete assumptions about operational scenarios (RDEIR/SDEIS scenarios H3 and H4.) The Boundary 1 and Boundary 2 scenarios also were speculative about the outcomes of the CESA and ESA processes. Protestants objected to the admission of the modeling, modeling results, and related testimony based on the Kelly-Frye standard, i.e., that the modeling needed to be relevant and reliable.

The Hearing Officers ruled on February 21, 2017:

State Water Board staff and the Board Members have developed a solid understanding of both the utility and the limitations of models such as CalSim II and DSM2. Hearing Officer Doduc, in particular, is familiar with the models and their limitations. (See, e.g., R.T. (Aug. 24, 2016) 48:749:7 [Hearing Officer Doduc facilitated cross-examination of one of DWR’s modeling experts by explaining modeling issue]; R.T. (Dec. 14, 2016) 272:12-14.) For this reason, application of the Kelly rule in this proceeding to petitioners’ testimony based on modeling results is unnecessary to ensure that the modeling evidence is afforded the proper weight.

The ruling for Part 2 bars objections based on the Kelly-Frye standard.

Questions:

1. Given the speculative nature of the operational scenarios for the WaterFix, how will the Board ensure that information accepted for the Hearing record in Part 2 is relevant and reliable?

I. Sufficiency of information in the WaterFix CEQA/NEPA documents

The February 11, 2016 Pre-hearing conference ruling stated,

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.)

1. Is DWR a "lead agency" and the Board a "responsible agency" under CEQA for determination of "appropriate Delta flow criteria"?
 - a. If not, should the Board prepare documentation of the Board's own evaluation of "appropriate Delta flow criteria"?
2. Should the Board consider testimony on the sufficiency of the WaterFix CEQA documents for
 - a. the Board's decision on the Change Petition?
 - b. the Board's determination of "appropriate Delta flow criteria"?
 - c. the Board's determination of other permit terms?
3. If so, when and how will the Board assess the sufficiency of the information in the CEQA/NEPA documents?

J. Discovery

Petitioners' discussion of their collaboration with the Board on analyses with respect Water Code 85086 in the CEQA/NEPA documents refers to modeling and model results that have not been disclosed. There are other relevant technical memoranda that have not been disclosed.

1. How will the Board deal with discovery for Part 2 of the Hearing?

Thank you for your consideration of these topics,

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