



November 6, 2017

via email

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

**Re: Statutory and regulatory requirements for Change Petition still not met**

Dear Hearing Officers Doduc and Marcus,

On October 27, 2017, the Department of Water Resources sent an email to the Hearing list stating in part,

Based upon questions raised at the pre-hearing conference and the recently submitted email by Ms. Des Jardins, the California Department of Water Resources is reminding the Parties of the publicly available final Biological Opinions from the National Marine Fisheries Service and the U.S. Fish and Wildlife Service, the final 2081(b) Incidental Take Permit from the California Department of Fish and Wildlife and clarification memo, and the certified Final Environmental Impact Report/Environmental Impact Statement and Notice of Determination. These documents can be found at the websites listed below.

NMFS BiOp: [http://www.westcoast.fisheries.noaa.gov/central\\_valley/CAWaterFix.html](http://www.westcoast.fisheries.noaa.gov/central_valley/CAWaterFix.html)

USFWS

BiOp: [https://www.fws.gov/sfbaydelta/HabitatConservation/CalWaterFix/documents/Final\\_California\\_WaterFix\\_USFWS\\_Biological\\_Opinion\\_06-23-2017.pdf](https://www.fws.gov/sfbaydelta/HabitatConservation/CalWaterFix/documents/Final_California_WaterFix_USFWS_Biological_Opinion_06-23-2017.pdf)

CDFW 2081:

[https://www.californiawaterfix.com/docs/CWF\\_ITP\\_FinalSigned\\_with\\_Attachments.pdf](https://www.californiawaterfix.com/docs/CWF_ITP_FinalSigned_with_Attachments.pdf)

CDFW 2081 Clarification Memorandum:

[http://cms.capitoltechsolutions.com/ClientData/CaliforniaWaterFix/uploads/ClarificationMemoCAWaterFixCESAITPPermitNo2081\\_2016\\_055\\_03.pdf](http://cms.capitoltechsolutions.com/ClientData/CaliforniaWaterFix/uploads/ClarificationMemoCAWaterFixCESAITPPermitNo2081_2016_055_03.pdf)

DWR's Certified FEIR/EIS:

<http://baydeltaconservationplan.com/NoticeofDetermination.aspx>

A second email with updated links was sent to the Hearing list by the Department of Water Resources on November 3, 2017.

The Department of Water Resources and the U.S. Bureau of Reclamation also submitted a letter on September 8, 2017 containing proposed operating criteria for the WaterFix project, which

relied on the NMFS and USFWS Biological Opinions (BIOPs.) The Petitioners appear to be attempting to amend the obsolete information submitted in Part 1A of the WaterFix Hearing to meet the requirements of Title 23 California Code of Regulations section 794 (Exhibit DWR-324) by these filings.

Deirdre Des Jardins, principal at California Water Research (California Water Research), objects to any reliance by Petitioners on the information in the NMFS or USFWS Biological Opinions to meet the requirements of Title 23 California Code of Regulations section 794, based on these documents relying on Reclamation's Preferred Alternative (PA), which has yet to be finalized or adopted in a Record of Decision. The Biological Opinions also indicate that all operational criteria in the Preferred Alternative are subject to change.

The Biological Assessment states in part:

Presentation of the PA in this biological assessment does not amount to a project approval by DWR or Reclamation. DWR must complete CEQA review, as well as compliance with several other federal and state environmental laws and regulations, before it can construct, operate or use any new facilities associated with the PA. Reclamation must complete NEPA review prior to implementing any federal actions associated with the PA. In conducting its CEQA review, and completing other environmental compliance processes, DWR may be required to modify, add, or remove elements of the PA consistent with the requirement to adopt mitigation measures and/or alternative in order to address specific environmental impacts. Consistent with the directives of CEQA, DWR may determine, at the completion of the CEQA process, to deny approval of the PA or specific elements of the PA based on any significant environmental impact that cannot be mitigated. Prior to the conclusion of formal consultation, the BA will be supplemented if substantive changes are made to the PA relevant to the analysis of listed species or designated critical habitat. (Exhibit SWRCB-104, p. 3-8, underlining added.)

The NMFS Biological Opinion also states in part:

[...] Some of the criteria identified in the PA may have substantial water supply effects while providing limited ability to minimize effects to species. As a result, operational criteria identified in the CWF PA may be modified, relaxed or removed and may no longer apply to an operation with CWF, while other operational criteria, not currently identified in this CWF consultation or those already identified may be included or modified. Therefore, the operational criteria that are described in the CWF BA and in this Opinion are likely to change between now and when CWF becomes operational. (p. 16, underlining added)

The USFWS Biological Opinion also states in part:

Agency decisions related to identifying the final CWF operational criteria will be made in a subsequent consultation, and Reclamation and DWR have committed to analyze and further address species effects from CWF operations at that time. (p. 12-13.)

While the Incidental Take Permit issued by the Department of Fish and Wildlife pursuant to Fish and Game Code Section 2081 appears to constrain future operations, by mandating that the “most restrictive” of either the ITP or the federal Incidental Take Statement will apply, in reality it is the criteria in the federal biological opinions, which have yet to be finally determined, which will govern Endangered Species Act operational criteria. California Water Research’s August 14, 2017 filing quoted Fish and Game Code section 2081.1(a), and concluded:

According to FGC [section] 2081.1(a), the federal Incidental Take Statement would override the more restrictive conditions in the DFW Incidental Take Permit if the DWR Director notified the DFW Director of the Federal ITP and requested a consistency determination. For this reason, operations of the State Water Project and Central Valley Project are not fully defined until the final operating criteria in the federal biological opinions are determined.

California Water Research’s August 14, 2017 filing is hereby incorporated as if fully set forth herein.

The information submitted by Petitioners in Part 1A to meet Title 23 California Code of Regulations section 794 is obsolete. The information relied on modeling results from operating scenarios H3, H4, Boundary 1, and Boundary 2. Most of the operational criteria in those scenarios relied on speculation about determinations of operating criteria by NMFS and USFWS and are either obsolete or speculative.

Basic operations of the new diversion facilities are also not clear. Petitioners’ internal preliminary engineering document indicates that the North Delta and South Delta diversion facilities could be used simultaneously. California Water Research incorporates California Water Research’s September 27, 2017 letter, *Re: Objection to Petitioner’s September 8, 2017 response to the August 31, 2017 Hearing ruling and request for additional information* fully as if set forth herein.

It also appears, from the proposal that the North Delta Diversions be approved under the terms of Decision 1641, that Petitioners may be seeking a permit to divert their entire export capacity at the North Delta Diversions, constrained only by the physical size of the North Delta diversion facility. Both the potential initial and future size of the proposed physical facility are also still unclear. Statements by the Board of Directors of Westlands Water District and Santa Clara Water District also indicate that the CVP contractors cannot afford to pay for Reclamation’s share of the proposed 9,000 cfs facility.

Finally, Petitioners stated in the September 8, 2017 Hearing Notice that they were proposing that the Change Petition be authorized under the existing Decision 1641 permit terms, the NMFS Biological Opinion referenced by the Petitioners clearly states that the Preferred Alternative does not include existing Decision 1641 requirements. Many other existing requirements assumed in the Board’s EIR for Decision 1641 and the SED for the 1995 and 2006 Bay-Delta Water Quality Control Plan are changed in the Preferred Alternative. This is from the table on page 6 of the NMFS Biological Opinion:

Facilities and Activities Not Included in the PA				
Existing Requirements	D-1641	Implement D-1641, as described	SWRCB D-1641	Incorporated into the environmental baseline. PA may include discretionary operations as allowed under the existing regulatory criteria and proposed operations criteria.
Existing Requirements	COA	Implement existing COA	P.L. 99-546	Incorporated into the environmental baseline. PA may include discretionary operations as allowed under the existing regulatory criteria and proposed operations criteria.
Existing Requirements	CVPIA	Implement CVPIA, as authorized	P.L. 102-575	Incorporated into the environmental baseline. PA may include discretionary operations as allowed under the existing regulatory criteria and proposed operations criteria.
Existing Requirements	SWRCB WRO 90-05	Implement WRO 90-05	SWRCB WRO 90-05	Incorporated into the environmental baseline.
Flow	VAMP	Vernalis Adaptive Management Plan (VAMP)	D-1641 Reclamation (2008)	VAMP has expired, per agreement.

The proposal by Petitioners is thus internally inconsistent. As previously argued by California Water Research, the Board needs to prepare a supplemental SED for any proposed changes to the 2006 Bay-Delta Water Quality Control Plan and a supplemental EIR for Decision 1641 if the “project” considered in that EIR is changed and there is another discretionary action by the Board. California Water Research hereby incorporates California Water Research’s September 17, 2017 filing, *Re: Regulatory and adjudicatory actions and associated environmental documents*, fully as if set forth herein.

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.” Title 23 of the California Code of Regulations, section 794, subdivision (a) 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 explained above, Petitioners have still not provided substantial information on proposed operations that is not speculative. Petitioners also have yet to define any constraints on either the physical size or future operations of their project that are not speculative or subject to change.

California Water Research objects to hearing proceeding with consideration of whether the proposed project will have an unreasonable effect on fish and wildlife, without the information required under Title 23 California Code of Regulations section 794. Requiring protestants to

provide evidence and testimony in their Cases in Chief on unreasonable effects on fish and wildlife without the information required by statute and regulation is against due process under Article I, section 7 of the California Constitution and the Fourteenth Amendment to the United States Constitution.

Protestants are also being required to respond to an enormous amount of evidence provided by the Petitioners in Part 1 that is neither relevant nor reliable, being based on operational criteria that are either speculative or obsolete. Protestants have also been barred by the February 21, 2017 ruling from filing Kelly-Frye objections that the testimony and evidence submitted by the Petitioners based on the speculative modeling are neither relevant nor reliable. The cumulative effect of these rulings is an unreasonable burden on protestants to respond to testimony and evidence based on “operating scenarios,” which can never rise to the level of substantial evidence. In (*Pacific Gas*, 189 Cal. App. 3d at 1135), the court held:

The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. [citations omitted] Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [citations omitted] In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence. [citations omitted.]  
(underlining added.)

Because this situation is of irremediable prejudice to protestants, California Water Research respectfully moves that the Hearing Officers require Petitioners to provide current, non-speculative information required to meet the requirements of Title 23 California Code of Regulations section 794.

If the Board needs to determine “appropriate Delta flow criteria” to constrain the proposed operations of the project and provide the information required under Title 23 Cal Code Regs section 794, subdivision(a), then the “appropriate Delta flow criteria” should be determined by the Board before protestants are required to provide testimony on whether the proposed change in point of diversion would harm fish or wildlife, or rebuttal testimony on whether the proposed change would harm other legal users of water. In no other way can the requirements of due process under the state and federal constitutions be satisfied.

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