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7 Principal, California Water Research

8 **BEFORE THE**
9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10 HEARING REGARDING PETITION
11 FILED BY THE DEPARTMENT OF
12 WATER RESOURCES AND U.S. BUREAU
13 OF RECLAMATION REQUESTING
14 CHANGES IN WATER RIGHTS FOR THE
15 CALIFORNIA WATERFIX PROJECT

16 RESPONSE TO HEARING TEAM
17 QUESTIONS REGARDING PART 2

18 Deirdre Des Jardins, principal at California Water Research (“California Water Research”) hereby provides the following responses to the questions asked by the Hearing Team regarding Part 2 of the hearing.

19 I. Additional Information Submitted in Support of Change Petition

20 The Hearing Team asked,

21 3. If the WaterFix Project is intended to be constructed and operated in stages, is an amendment to the change petition or any additional supporting information under Water Code sections 1701.1, 1701.2, and 1701.3 necessary? Why or why not?

22 A formal process under Water Code section 1701.3 is necessary to provide additional supporting information for the WaterFix change petition. In addition, *all* additional supporting information provided for the hearing needs to be formally considered under Water Code sections

1 1701.3 and 1701.4, including information submitted to meet the requirements of section 794(a)
2 of the Board's regulations in Part 1. California Water Research hereby submits the attached
3 Motion to Formally Consider Additional Information Submitted in Support of Petition.
4

5 II. Potential impacts of project

6 The Hearing Team asked,

- 7
- 8 1. Does the certified final Environmental Impact Report (EIR) address all potential impacts
9 if the WaterFix Project is constructed and operated in stages? In the supplement to the
10 EIR, what additional analyses will be performed and what specific environmental issues
11 will be evaluated?

12 As explained below, the change to a staged project means that neither the long-term nor the
13 initial operations of the project are defined. The petition thus fundamentally fails to meet the
14 requirements of Water Code section 1701.2. In the interests of hearing efficiency, this must be
15 addressed before Part 2.

16 A. Long-term Operations

17 A staged implementation assumes that the Late Long Term operations of the WaterFix
18 project are defined. However, the WaterFix Final EIR/EIS does not define Late Long Term
19 operations of the project. This is a major issue with the Petitioners' application for a permit that
20 will govern operations of the project for the next 50 years.

21 Petitioners have submitted an application for three new intakes in the North Delta, with
22 associated conveyance facilities. Although Petitioners have stated that the intakes will have a
23 design capacity of 3,000 cfs, diversion rates could be increased with greater rates of pumping.
24 The Petitioners' application proposes that there will be no limit on the pumping rate for the new
25 intakes, stating the following:
26

1 While the larger California WaterFix conveyance project includes an additional SWP
2 pumping station in the south Delta as part of the reconfigured Clifton Court Forebay,
3 water from the additional points of diversion is delivered to the new station through a
4 tunnel and that water is at all times isolated from, and not comingled with, any other
5 supplies. For this reason, the new SWP pumping station is not part of this petition, except
6 to the extent construction impacts of the California WaterFix are discussed. (Exhibit
7 SWRCB-1, p. 13 of 24, pdf p. 22.)

8 The new facilities also will not be subject to the existing diversion limits into Clifton
9 Court Forebay in the Army Corps of Engineer’s permit (Public Notice 5280A, as amended,
10 Exhibit SWRCB-98.) Petitioners are also proposing to exempt the three new intakes from the
11 export limits in the 2006 Bay-Delta Water Quality Control Plan (Petitioners’ September 8, 2017
12 filing, p. 6.) There are also no bypass requirements proposed the new intakes, to be included in
13 the permit by the State Water Resources Control Board. Ultimately, the Change Petition is an
14 application for a new water right for arbitrarily large diversions from the Sacramento River.

15 Although Petitioners are currently required to provide water for salinity control in the
16 Delta, the U.S. Bureau of Reclamation has historically only recognized the obligation to provide
17 salinity control at the Central Valley Project contract intakes at the Contra Costa and Delta
18 Mendota canals. Ultimately, both of these diversions will have alternate intakes at Freeport and
19 in the North Delta. Petitioners have not indicated how they ultimately intend to operate the new
20 North Delta diversions, but have indicated that they will be used to adapt to sea level rise. The
21 WaterFix Final EIR/EIS states that “[a]lternatives 1A–2C, 3, 4, and 5 would allow the Delta to
22 be managed in a number of different ways, including maintaining salinity as it is currently
23 managed or allowing salinity to fluctuate more freely in the Delta as it did prior to the
24 development of upstream reservoirs.” (WaterFix Final EIR/EIS, Chapter 29, climate change, p.
25 29-16.) This statement was not in the Partially Recirculated Draft EIR/EIS, which was provided
26 as the project description for the Change Petition.

27 Under the Hearing Officers August 31, 2017 ruling, protestants who are legal users of
28 water will not be allowed to submit testimony about this change in project description for Part 2,

1 because Petitioners are not providing any direct testimony about the change. This is a major
2 change that could impact all beneficial uses of water in the Delta. Protestants must be allowed to
3 rebut this evidence.

4 B. Initial Operations

5 Even for initial operations, the Petitioners have not provided the information required
6 under statute and regulation in the filing for the Change Petition.

7 To the extent that the Hearing Officers directed that Petitioners provide information
8 required under statute and the constitution in Part 1 of the Hearing, and Petitioners did not make
9 a good faith attempt to do so, it was a violation of protestant’s due process rights. As
10 documented by California Water Research, petitioners played a shell game in Part 1 of this
11 hearing with speculative, ever-changing “operational scenarios.” The Department of Water
12 Resources now proposes to continue the shell game in Part 2, proceeding with an obsolete “Alt
13 4A” project description, and a clearly obsolete “CWF H3+” initial operations scenario for Early
14 Long Term operations at 2025.

15 DWR’s proposal to continue Part 2 of this hearing without providing correct, accurate,
16 and complete project information provides neither adequate notice for legal users of water, nor
17 adequate notice of impacts on fish and wildlife. It also does not provide an adequate opportunity
18 for protestants to examine and rebut evidence submitted by Petitioners for the Hearing Record.
19 To the extent that a Part 3 of the hearing would be required, it is a waste of everyone’s time.
20

21 II. Appropriate Delta flow criteria

22 The Hearing Team also asks:

23 6. Would any conditions necessary to adequately protect the rights of legal users, fish
24 and wildlife, or the public interest be different if the WaterFix Project were constructed in
25 stages? Would appropriate Delta flow criteria be different? Why or why not?
26

1 California Water Research argues that the Hearing Officers must sever the Board’s
2 hearing to determine “appropriate Delta flow criteria” from the Board’s consideration of the
3 WaterFix Water Right Change Petition application. The Board’s attempt, to date, to combine the
4 adjudicatory hearings for these two separate processes has resulted in irremediable prejudice to
5 protestants in both processes.

6 The Hearing Officers have repeatedly ruled that “[n]ot all uncertainties need to be
7 resolved for an adequate project description, and one of the purposes of this proceeding is to hear
8 evidence and argument concerning proposed operating conditions.” (July 27, 2017 hearing
9 ruling, p. 2, August 31, 2017 hearing ruling, p. 7.) As argued above, trying to simultaneously
10 determine operating conditions to protect the public trust, while holding the adjudicatory hearing
11 for protestants to evaluate the impacts of petitioners’ proposed project on fish and wildlife and
12 legal users of water, is a fundamental violation of due process.

13 There are also major statutory and constitutional issues arising from combining the
14 Board’s hearing on “appropriate Delta flow criteria” with the hearing on the petitioners’
15 proposed projects. The Board is proposing to rely entirely on the WaterFix Final EIR/EIS for
16 CEQA documentation of the Board’s consideration of alternatives for “appropriate Delta flow
17 criteria.” However, there is no preferred project identified for the Board’s determination of
18 “appropriate Delta flow criteria” in the Final EIR/EIS, except the Petitioners’ “preferred project.”
19 California Water Research has previously argued that it is against statute and the constitution for
20 the Petitioners to be lead agencies for the Board’s determination of “appropriate Delta flow
21 criteria.” California Water Research hereby incorporates California Water Research’s Motion
22 for Partial Conversion of Proceedings as if set forth in full herein.

23 III. Conclusion

24 In conclusion, the Hearing Officers must require the Petitioners to amend the Change
25 Petition, and in the meantime, must provide for a separate hearing to determine “appropriate
26 Delta flow criteria,” which conforms with statute and regulation. Because determining
27

1 “appropriate Delta flow criteria” is an interactive process, the Board should break the Hearing to
2 determine “appropriate Delta flow criteria” into two phases. The first phase should formally
3 consider the adequacy of the Board’s current analysis for “appropriate Delta flow criteria,” as
4 well as testimony on alternative operational criteria to consider. The second hearing should
5 evaluate the feasibility of the proposed flow criteria for the initial project that Petitioners are
6 actually proposing to build, when the project information becomes available.

7 The Board must also sign the contract required under Water Code 85086(d) so that the
8 Board may do its own independent analysis, pursuant to Water Code 85086(c)(2), or at least
9 have independent review of the modeling provided by the Department of Water Resources used
10 to determine reservoir impacts. This was clearly recommended in 2012 by the Board’s own
11 panel of scientific and technical experts. Using an unvalidated reservoir operations model to
12 determine reservoir impacts also creates major issues, which should be fully addressed before the
13 State Water Resources Control Board staff bases decisions about feasibility on that modeling.

14
15 IV. Discovery

16 If the Hearing Officers do decide to continue Part 2 of the Hearing without requiring
17 formal submission of the new project information, the Hearing Officers must ensure that the
18 Department of Water Resources complies fully with discovery prior to Part 2 of the Hearing. As
19 previously argued by California Water Research, protestants do have the right to discovery in
20 this proceeding. California Water Research therefore moves that, if the Hearing continues to
21 Part 2 at this time, the Hearing Officers require the Department of Water Resources to comply
22 fully with discovery, prior to the Hearing resuming, and allow protestants time to evaluate the
23 discovered evidence, prior to testimony and cross-examination of Petitioners witnesses.
24 Production for the City of Antioch subpoena is due on February 21, 2018, so this should not
25 unduly delay the proceedings.

1 In any case, if the Petition is not dismissed, California Water Research moves that the
2 Hearing Officers rule that protestants can subpoena witnesses provided by Petitioners in Part 1 of
3 the Hearing for rebuttal, to be examined on changes to the project, including Reclamation's
4 witnesses. The Board ruled for the 1998 Bay-Delta Water Quality Control Plan proceeding¹:

5
6 Generally, witnesses will be excused after their cross-examination is completed
7 during any phase in which they testify. A party may call the same witness again
8 for rebuttal in that phase or during a subsequent phase. Also, a party may
9 subpoena any witness, including a witness who has previously appeared for
10 another party and has been excused. Witnesses who are employees of the federal
11 government or its member agencies, however, will not be excused until the end of
12 the hearing unless the management of the federal government agency commits to
13 make its employees available to give testimony with respect to matters presented
14 by other parties either voluntarily or pursuant to a subpoena issued by the
15 SWRCB.

16 Finally, the Hearing Officers must rule on California Water Research's motion requiring
17 a legally adequate response by DWR to PCFFA/IFR's subpoena. If the Hearing Officers rule
18 that California Water Research must issue a subpoena duces tecum as a party, California Water
19 Research requests that the Hearing Officers stay the Hearing to allow California Water Research
20 time to issue the subpoena duces tecum and for DWR to respond to it.

21 Dated February 13, 2018

22 Respectfully submitted,

23 

24 Deirdre Des Jardins
25 Principal, California Water Research

26 ¹ Available at
27 https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/notices/1998/10julyntc.shtml
28 Requested for incorporation by reference.

1 **STATEMENT OF SERVICE**

2
3 **CALIFORNIA WATERFIX PETITION HEARING**
4 **Department of Water Resources and U.S. Bureau of Reclamation**
5 **(Petitioners)**

6 I hereby certify that I have this day submitted to the State Water Resources
7 Control Board and caused a true and correct copy of the following document(s):

8 **Response to Hearing Team Questions Regarding Part 2**

9 to be served by Electronic Mail (email) upon the parties listed in the Current Service List
10 for the California Water Fix Petition Hearing, dated January 24, 2018, posted by the
11 State Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

12 *Note: In the event that any emails to any parties on the Current Service List are*
13 *undeliverable, you must attempt to effectuate service using another method of service, if*
14 *necessary, and submit another statement of service that describes any changes to the*
15 *date and method of service for those parties.*

16 I certify that the foregoing is true and correct and that this document was executed on
17 February 13, 2018.

18
19 Signature:



20 Name: Deirdre Des Jardins

21 Title: Principal, California Water Research

22 Party/Affiliation:

23 Deirdre Des Jardins

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