



August 11, 2017

via email

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

**Response to DWR's response to
Save the California Delta Alliance's opposition to noticing Part 2**

Deirdre Des Jardins, Principal at California Water Research ("California Water Research"), hereby provides this response to DWR's response to Save the California Delta Alliance's opposition to noticing Part 2. The Department of Water Resources ("DWR") states that the five points in Save the California Delta Alliance's objections are related to meeting Title 23 of the California Code of Regulations, Section 794. California Water Research agrees that this was a fundamental issue for Part 1 of the hearing, and continues to be an issue for Part 2.

As argued below, DWR has played a shell game to date in the hearing, apparently attempting to hide the impacts of a potentially massive increase in exports with the new facilities. While witnesses for the Department of Water Resources stated in testimony in Part 1 that, under initial operations, exports under the WaterFix could increase by up to 500 thousand acre-feet (TAF) per year, in reality exports could increase by up to 1.2 million acre-feet (MAF) per year under Boundary 1.

The initial operations in the submitted WaterFix Change Petition, and in the Department's supplemental information also did not clearly indicate the amounts of water proposed for change, thus failing to meet Title 23 of the California Code of Regulations, Section 794, subdivision (a)(2): [t]he amount(s) of water proposed for change, transfer or exchange."

In response to the Hearing Officer's mandate to provide the information required under Section 794 in a "succinct and easily identifiable format," the Department of Water Resources submitted Exhibit DWR-324. With respect to subdivision (a)(2), Exhibit DWR-324 states,

The most recent modeling shows that with the Initial Operational Criteria the average annual combined SWP/CVP Delta diversions through operation of both the north Delta Diversion (NDD) and south Delta diversion may increase from approximately no change to five hundred thousand acre-feet (TAF) as compared to the no action alternative.

(Exhibit DWR-71, section III.B.)

(*Id* at p. 3)

But this statement about “the most recent modeling” showing a potential increase of up to 500 TAF was misleading and inaccurate. While H3 and H4 were the proposed initial operating criteria in the Preferred alternative in the Partially Recirculated Draft EIR/ Supplemental EIS (RDEIR/SDEIS) which was attached to the change petition, Jennifer Pierre’s testimony in the WaterFix hearing indicated that the initial operations could change during project construction.

Furthermore, Armin Munevar’s testimony, Exhibit DWR-71 states that the exports under Boundary 1 could be considerably higher:

Figure 11 shows the simulated SWP and CVP delta exports for all years as an exceedance plot. (Exhibit DWR-514, p. 14.) The boundary scenarios, Boundary 1 and 2, provide a broad range of delta exports ranging from an export reduction (in Boundary 2) of about 1,100,000 acre-feet per year (24 percent decrease) to about 1,200,000 acre-feet per year (in Boundary 1) higher exports (25 percent increase) as compared to the NAA. The CWF proposed operational range scenarios, H3 and H4, reflect a more modest range of roughly equivalent to the NAA to about 500,000 acre-feet per year increase (10 percent increase) as compared to the NAA.

Jennifer Pierre’s testimony for the Department of Water Resources (“DWR”) on July 29, 2016 indicated that DWR was planning to “adjust” operations during construction of the project.

For purposes of this proceeding, we’re looking at a range call Boundary 1 to Boundary 2. And the purpose of that is because, as I mentioned in my very first slide, this project also includes the collaborative science and adaptive management program and the ability to make adjustments to the initial operating criteria based on science and monitoring and data that is -- that comes to light over the course of the construction period of this project as well as beyond. So Boundary 1 and 2 represent what we think at this time, based on those uncertainties, the range of potential adjustments that may be made.

(R.T. July 29, 2016, 40:3-15, underlining added.)

This is a substantial change from the initial operational range in the submitted Change Petition, which was noted for the Hearing. Jennifer Pierre then testified in Part 1 that the initial operations in the RDEIR/SDEIS were a range from H3 and H4:

Moving into the last column relative to operations, the EIR/EIS identified the range of H3 to H4 as the Alternative 4A. And that's what's evaluated in the recirculated draft. In the

biological assessment that was released in January, we picked a point between H3 and H4, and that we call H3-Plus.

(R.T. July 29, 2017, 39:19-24.)

Furthermore, 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 federal Incidental Take Statement, which has not been issued, which will govern operations.

Fish and Game Code section 2080.1, subdivision (a) states:

Notwithstanding any other provision of this chapter, or Chapter 10 (commencing with Section 1900) or Chapter 11 (commencing with Section 1925) of Division 2, but subject to subdivision (c), if any person obtains from the Secretary of the Interior or the Secretary of Commerce an incidental take statement pursuant to Section 1536 of Title 16 of the United States Code or an incidental take permit pursuant to Section 1539 of Title 16 of the United States Code that authorizes the taking of an endangered species or a threatened species that is listed pursuant to Section 1533 of Title 16 of the United States Code and that is an endangered species, threatened species, or a candidate species pursuant to this chapter, no further authorization or approval is necessary under this chapter for that person to take that endangered species, threatened species, or candidate species identified in, and in accordance with, the incidental take statement or incidental take permit, if that person does both of the following:

- (1) Notifies the director in writing that the person has received an incidental take statement or an incidental take permit issued pursuant to the federal Endangered Species Act of 1973 (16 U.S.C.A. Sec. 1531 et seq.).
- (2) Includes in the notice to the director a copy of the incidental take statement or incidental take permit.

So according to FGC 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 are not clearly defined until the federal Incidental Take Statement is issued. As previously argued by California Water Research, without clearly defined operations, the requirements of Title 23 of the California Code of Regulations, section 794, cannot be met.

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

cc: WaterFix hearing parties

**STATEMENT OF SERVICE
CALIFORNIA WATERFIX PETITION HEARING**

Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)

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

**Response to DWR's response to
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to be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated August 11, 2017, posted by the State Water Resources Control Board at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

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

I certify that the foregoing is true and correct and that this document was executed on August 14, 2017.



Deirdre Des Jardins
California Water Research

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