

August 14, 2017

VIA EMAIL

Tam M. Doduc, Hearing Officer
Felicia Marcus, Hearing Officer
California State Water Resources Control Board

Re: Delta Alliance's Reply to DWR's Response to Delta Alliances August 3, 2017 Letter

Dear Hearing Officers Marcus and Doduc:

DWR has shown that it is unable to respond to Delta Alliance's August 3, 2017, letter demonstrating that it has not been able to develop a coherent project description—despite being given extraordinary leeway to do so by the Board throughout Part 1 of these hearings.

DWR's reply did not attempt to offer any reason at all why Part 2 of these hearings should be noticed contrary to the Board's very clear February 11, 2016, Pre-Hearing Conference Ruling requirements, which have not been fulfilled.

DWR did not dispute that the federal ESA process remains substantially incomplete, nor did it dispute that federal ESA process completion *is required* by the February 11, 2016, Ruling *before* Part 2 can commence. DWR did not dispute that the project description will be determined by forthcoming ESA consideration of project operations and construction of the intakes, both of which have not yet been considered in the federal ESA process. DWR gave no reason why protestants (and the Board) should bear the risk of expending resources in a potentially moot proceeding before USBR issues its NEPA ROD. As DWR admits, USBR's decisions are "not predetermined" and no one knows what the "outcome of the federal NEPA decision making process" will be "if and when Reclamation eventually issues a record of decision." (DWR, p.3; *see also 'Ilio'ulaokalani Coalition v. Rumsfeld* (Ninth Circuit, 2006) 464 F.3d 1083, 1107 [after Federal Register FEIS publication a federal agency "must accept [and consider] comments" until a ROD is issued].) DWR does not dispute that the Board required completion and submission of the NEPA ROD, which is entirely within Petitioner USBR's control, prior to the start of Part 2. Yet DWR showed no good cause why the petition should not be canceled for failure to timely provide the NEPA ROD and a succinct project description. "If, within the time period provided, the petitioner does not provide the information requested ... the board shall cancel the petition." (Water Code § 1701.4.)

Instead of explaining why the Board should reverse the February 11 Ruling, which *directly addresses* requirements for starting Part 2, DWR mischaracterizes two prior tangential Board rulings—and thereby attempts to turn the tables—as if Delta Alliance was seeking reconsideration of previously decided issues. In fact, it is DWR that asks the Board to abandon its February 11 Ruling and seeks to re-litigate already decided issues.

DWR relies on the Board's February 21, 2017, Ruling without quotation or page number citation. Delta Alliance found nothing in the fifty-four page February 21 evidentiary ruling related to starting Part 2.

DWR quotes the Board's July 22, 2016, Ruling, and makes much of the Board's comment that "not all uncertainties can or need to be resolved before beginning the hearing." (July 22, 2016, Ruling p. 2.) However, in the July 22 Ruling the Board made clear that "beginning the hearing" applied only to beginning Part 1, noting that "we disagree with those parties who contend that petitioners' case-in-chief is insufficient to allow parties to meaningfully participate in Part 1 of the hearing." (July 22 Ruling, p. 2.)

The July 22 Ruling in fact re-affirmed the key February 11, 2016, Pre-Hearing Conference Ruling's requirements for starting Part 2:

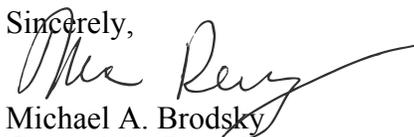
[A] number of parties raised issues that we addressed following the pre-hearing conference concerning the timing of this hearing relative to other regulatory processes, including environmental review under the California Environmental Quality Act and the National Environmental Policy Act, compliance with the federal Endangered Species Act and the California Endangered Species Act, and the pending update to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. These arguments have been reviewed and considered and addressed in our February 11 ruling, and will not be reexamined.

(July 22, 2016, Ruling, p. 3, emphasis added.) The July 22 Ruling states that the timing of these hearings relative to other regulatory processes decided in the February 11 Ruling, "will not be reexamined." Yet this is exactly what DWR seeks: reexamination of the February 11 Ruling's requirements that the NEPA and federal ESA processes be complete before beginning Part 2.

DWR argues "the degree of specificity" that would describe project operations is not required by California law at the application stage. (DWR, p.2.) However, the "Water Board's decision in issuing a permit must track the matter required to be in the application [and] prerequisite to the issuance of a permit [the] application must contain the matter and information prescribed by this division." (*Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal. App. 4th 245, 260, emphasis added [ordering "the trial court to set aside the permits and direct the Board to require that DW amend the applications to specify" the information prescribed by division 2, which includes, *inter alia*, Water Code §1701.2].)

Finally, DWR refers to the Board's recent July 27, 2017, Ruling. It was the July 27 Ruling that prompted Delta Alliance to write to the Board on August 3. The July 27 Ruling deals with a different issue—whether Part 1 should be "left open." However, ambiguous language in the July 27 Ruling alarmed Delta Alliance because it indicated that the Board might have been considering prematurely noticing Part 2. Delta Alliance therefore requested clarification that Part 2 would not be noticed until the requirements of the February 11, 2017, Pre-Hearing Conference Ruling were satisfied (in the manner detailed in Delta Alliance's August 3, 2017, Letter). And that is where the matter still stands.

Sincerely,



Michael A. Brodsky
Counsel for Petitioner
Save the California Delta Alliance

STATEMENT OF SERVICE

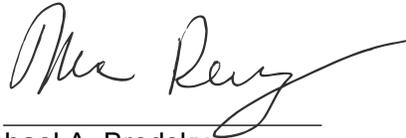
**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

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):

Delta Alliance's August 14, 2017 Letter Reply to DWR's August 11, 2017, Response to Delta Alliance's August 3, 2017 Letter concerning noticing Part 2.

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated July 27, 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

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



Signature: _____
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Title: Attorney

Party/Affiliation:
Save the California Delta Alliance, et al.

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