

~~Governor~~**DEPARTMENT OF WATER RESOURCES**

1416 NINTH STREET, P.O. BOX 942836  
SACRAMENTO, CA  
94236-0001 (916) 653-  
5791



September 12, 2017

[CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov) via Email

Tam Doduc, Hearing Officer  
Felicia Marcus, Hearing Officer  
State Water Resources Control Board  
1001 I Street  
Sacramento, California 94596

Re: Response to NRDC Petition for Reconsideration and Corresponding Joinders

Dear Chair Marcus and Board Member Doduc:

The Department of Water Resources ("DWR") hereby responds to the Natural Resources Defense Council's and The Bay Institute's (collectively "protestants")<sup>1,2</sup> request for reconsideration of the Hearing Officers' August 31, 2017 Ruling Regarding Scheduling of Part 2 and Other Procedural Matters Ruling ("Ruling"). Specifically, protestants request reconsideration of the Hearing Officers' decision to require all parties to file cases-in-chief on November 30, 2017. Instead, protestants request that the submission of the cases-in-chief be staggered, as in Part 1 of the proceeding, to require Petitioners, DWR and Bureau of Reclamation, to submit their case-in-chief "several months" in advance of all protestants.

The Board should deny protestants' request because the rationale for staggering submission of the cases-in-chief in Part 1 does not apply in Part 2; the proposed staggering would create inefficiencies in the hearing process to the prejudice of Petitioners, and would further delay the schedule for the completion of Part 2.

In their February 11, 2016 and March 4, 2016 Prehearing Conference Ruling, responding to concerns regarding the project description, the Hearing Officers' explained their rationale for staggered submission of the cases-in-chief in Part 1, stating:

[t]his approach will give petitioners the opportunity to fully explain their proposed project and should give the other hearing parties the ability to

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<sup>1</sup> In their request for reconsideration, protestants Natural Resources Defense Council and The Bay Institute confusingly refer to themselves as "Petitioners," a term that in this proceeding to date has referred to the Department of Water Resources and the Bureau of Reclamation as the joint petitioners for approval of new points of diversion and/or points of rediversion to their specified water rights. DWR refers to these parties as either parties or protestants, consistent with their role in the water rights hearing.

<sup>2</sup> At the time of this response, protestants' request for reconsideration was joined by San Joaquin County, et al., Friends of Stone Lakes National Wildlife Refuge and Save Our Sandhill Cranes, Friends of the River and Sierra Club California.

better evaluate how their interests may be affected before they begin their cases.

This staggered approach allows the hearing to move forward while focusing the hearing issues and capturing efficiencies from the protest resolution process that normally precede a Board hearing.

(Feb. 11, 2016 Prehearing Conference Ruling pp. 2, 7.)

In addition, the staggered approach should allow the other parties to present more focused cases in chief, and to rely less heavily on the rebuttal phase of the hearing to respond to new information presented during the Petitioners' case in chief.

(Mar. 4, 2016 ruling p.2.)

For Part 2, in contrast to the reasoning in these ruling, the Hearing Officers have concluded that the project description is adequate to allow the parties to participate meaningfully in Part 2.<sup>3</sup> (Ruling, pp. 1, 7.) Further, noting that completion of ESA section 7 consultation and issuance of an incidental take permit is not legally required for Board approval of a water right petition, the Hearing Officers also determined that substantial information regarding potential environmental impacts is already available to allow the parties to proceed meaningfully with Part 2. (Ruling, pp. 5-7.)

Furthermore, as shown in Part 1 of the proceeding, staggering of the submission of the cases-in-chief for Part 1 allowed protestants additional opportunity to evaluate the proposed project, but also led to inefficiencies during the rebuttal portion of Part 1. By staggering the submissions, protestants were afforded two successive opportunities to rebut Petitioners' cases-in-chief making the scope of true rebuttal repetitive and difficult to define. As a result of the staggered structure, the Hearing Officers had to contend with duplicative presentation of arguments and evidence during rebuttal. Here, in Part 2, with sufficient information available for parties to develop their cases-in-chief, the proceeding should proceed more efficiently with simultaneous exchange of cases-in-chief followed by a more narrowly-constrained presentation of rebuttal testimony and evidence consistent with the process set forth by the Hearing Officers in the August 31, 2017 ruling.

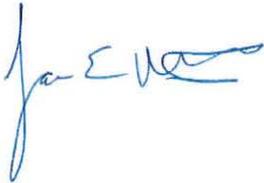
Finally, protestants argue that the submission of its cases-in-chief be staggered, and stayed, until the Board rectifies its failure to complete Phase 2 of the Bay Delta Water Quality Control Plan ("WQCP") update, more specifically the issuance of the final Scientific Basis Report and draft environmental analysis for Phase 2. Because the Board previously stated that it intends to rely on the best available science, including the 2010 Delta flow criteria and the Scientific Basis Report, protestants claim that they (but apparently not

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<sup>3</sup> In order to eliminate any confusion, the Hearing Officers directed the Petitioners to provide an updated summary of operating criteria, which Petitioners timely submitted on September 8, 2017. (Ruling, p. 7.)

Petitioners) will be prejudiced if required to submit their case-in-chief prior to the issuance of these documents. First, the Board has repeatedly ruled, as early as the February 11, 2016 Prehearing Conference Ruling (pp. 3-5), that this proceeding may proceed prior to the completion of various parallel regulatory proceedings such as the updating of the Bay-Delta Plan, expressly explaining the narrower focus of this proceeding, which does not require the promulgation of any new water quality objectives. More importantly, the Board has made clear in its August 31, 2017 Ruling (pp. 6-7) that substantial environmental information currently exists to justify the commencement of Part 2 without delay. Here, protestants' request that the deadline for submission of protestants' cases-in-chief be delayed until the issuance of documents in Phase 2 of the Bay Delta WQCP update, at an unknown date in the future, is an unnecessary delay in the commencement of this independent proceeding. Yet, if the Hearing Officers do find merit in protestants' argument, the prejudice would certainly extend to all parties in the hearing including the Petitioners.

Sincerely,



Tripp Mizell  
Attorney

cc: *Electronic service*

Felicia Marcus, Chair & hearing officer, State Water Resources Control Board  
Tam Doduc, Board Member & hearing officer, State Water Resources Control Board  
Eileen Sobeck, Executive Director, State Water Resources Control Board  
Michael Lauffer, Chief Counsel, State Water Resources Control Board  
Electronic service list as provided by the SWRCB on September 12, 2017.

*Personal service via U.S. Postal Service*

Suzanne Womack and Sheldon Moore,  
Clifton Court, L.P.,  
3619 Land Park Drive,  
Sacramento, CA 95818