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VIA electronic mail.

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

Request for clarification of hearing rulings on CEQA for the Board’s adjudicatory findings

Deirdre Des Jardins, Principal at California Water Research, (“California Water Research”) thanks the Hearing Officers for their ruling of February 21, 2018. However, the February 21, 2018 hearing ruling does not address the issue of whether or not the State Water Resources Control Board (“Board”) will require a Subsequent EIR/EIS. California Water Research previously argued in California Water Research’s January 18, 2018 Motion for Partial Conversion of Proceeding that the Board must be lead agency and prepare its own environmental documentation of the Board’s consideration of alternatives for “appropriate Delta flow criteria.”¹ The Hearing Officers February 6, 2018 hearing ruling has a footnote recognizing California Water Research’s motion, but there is no substantive discussion in the ruling of the issues raised in the motion.

¹ California Water Research’s January 18, 2018 Motion for Partial Conversion of Proceeding is incorporated as if set forth in full herein. Available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/2018/20180119_ddj_partialjoinder.pdf

Furthermore, as explained below, the declaration of Dana Heinrich, Hearing Counsel contains a long and substantive discussion about the State Water Resources Control Board's ("Board's") proposed compliance with CEQA for the Board's determining appropriate Delta flow criteria in this proceeding. The Board's proposed procedure for compliance with CEQA for the Board's adjudicatory findings should be in a hearing ruling, not buried in the declaration by the Hearing Counsel. For these reasons, California Water Research moves that the Hearing Officers clarify their ruling on California Water Research's Motion for Conversion of Proceedings, and also clarify whether the Board has decided not to require a Subsequent EIR for the WaterFix project.

BACKGROUND

Parties have long sought clarification of the Board's process for determining "appropriate Delta flow criteria." The San Joaquin Tributaries authority moved on April 20, 2016, for the Board to hold a hearing to "determine the procedure and process through which appropriate Delta flow criteria will be developed before or during Part I of the WaterFix hearing," citing inadequate information on operational criteria in the change petition.² The motion was denied, at the same time that the Hearing Team was meeting with the Department of Water Resources on developing the Board's alternative for "appropriate Delta flow criteria."

The Hearing Counsel's declaration contains information about the Board's proposed compliance with CEQA for the Board's discretionary actions in determining permit terms for the State Water Project and Central Valley Project in this proceeding. The Hearing Counsel's declaration states,

12. As an attorney assigned to the WaterFix Project, one of my duties is to ensure that the State Water Board complies with CEQA when exercising its discretionary approval authority over the project. DWR was the lead agency for BDCP and is the lead agency for the WaterFix Project. The State Water Board is a responsible agency. As the lead agency, DWR was responsible for preparing environmental documentation for the project. [...] (February 6, 2018 Hearing ruling, p. 18.)

13. As a responsible agency, the State Water Board will comply with CEQA by considering the Final EIR/EIS and reaching its own decision whether and under what conditions to approve the project. (Cal. Code Regs., tit. 14, § 15096, subd. (a).) (*Id* at p. 19.)

16. In my opinion, evaluation of the operational scenario requested by staff was necessary to ensure that the EIR would be adequate to support the State Water Board's discretionary decision whether and under what conditions to approve the water right change petition for the WaterFix Project[...] In order for the State Water Board to

² The San Joaquin Tributaries Authority's April 20, 2016 motion is incorporated as if set forth in full herein. Available at https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20160420_sjta_app.pdf

consider flow criteria that are more protective than Decision 1641, however, the potential environmental impacts of those criteria should be evaluated and disclosed under CEQA. (*Id* at p. 20.)

The Hearing Counsel's interpretation of the Board's compliance with CEQA would limit the Board's consideration of flow criteria to those criteria considered and evaluated in the Final EIR/EIS. The November 8, 2017 Hearing Ruling indicated differently:

The Board has the authority, however, to impose flow criteria that are outside of the range of alternatives evaluated in the Final EIR if the Board finds those criteria to be appropriate based on the hearing record. As protestants point out, in that case, the Board may need to conduct additional environmental analyses to satisfy CEQA requirements. (*Id* at p. 2.)

But the Hearing Counsel's declaration states,

14. A responsible agency's options are limited if the agency determines that the final environmental document prepared by the lead agency is inadequate for use by the responsible agency. In that situation, the responsible agency must either (1) take the lead agency to court within 30 days after the lead agency files a notice of determination, (2) be deemed to have waived any objection to the adequacy of the document, (3) prepare a subsequent EIR if permissible under section 15162 of the CEQA Guidelines, or (4) assume the lead agency role as provided in section 15052, subdivision (a)(3) of the CEQA Guidelines. (Cal. Code Regs., tit. 14, § 15096, subd. (e).) (*Id* at p. 19.)

Under the Hearing Counsel's interpretation, if the Board does not elect to prepare a Subsequent EIR, then as a responsible agency, the Board's discretionary determination of appropriate Delta flow criteria in this proceeding would be limited to those analyzed in the WaterFix Final EIR/EIS.

The Hearing Counsel's declaration also states, with respect to the Ex Parte discussion of the Board's high outflow scenario:

I do not recall any debates between State Water Board staff and DWR or its consultants over whether to designate an environmental impact under the State Water Board staff scenario as significant. State Water Board staff deferred to DWR as CEQA lead agency to make that determination (*Id* at p. 21, underlining added.)

This interpretation would indicate that the State Water Board staff are proposing to delegate findings on significant and unavoidable impacts of alternatives for appropriate Delta flow criteria to the Department of Water Resources as lead agency.

The Board's deference to DWR as lead agency in determining environmental effects within the Board's jurisdiction is different than the interpretation in the October 30, 2015 Hearing Notice which states,

To the extent feasible, the State Water Board is responsible for mitigating or avoiding the significant environmental impacts identified in the resource areas within the State Water Board's jurisdiction, specifically for the water right petition components of the California WaterFix Project. (Cal. Code Regs., tit. 14, §15096.) When considering the Petition, the State Water Board must make independent findings concerning significant environmental effects within the State Water Board's jurisdiction, and may require additional or different mitigation measures for impacts in those resource areas. (*Id* at p. 10.)

But the October 30, 2015 Hearing Notice did not address how the Board would comply with CEQA for the Board's independent findings concerning significant environmental effects within the Board's jurisdiction, or for additional or different mitigation measures. But if the Board does not prepare a Subsequent EIR, under the above interpretations, it would appear that the Board's findings on significant environmental effects have been predetermined by the Department of Water Resources as lead agency for the Final EIR/EIS.

In conclusion, the Hearing Counsel's declaration states that the Board will rely on the WaterFix Final EIR/EIS for the Board's CEQA compliance for determination of appropriate Delta flow criteria. Also, the Hearing Counsel's declaration indicates that this constrains what the Board can consider as appropriate Delta flow criteria to that in the Final EIR/EIS. The Hearing Counsel's declaration also indicates delegation of findings on environmental impacts to the Department of Water Resources as lead agency.

California Water Research's Motion for Conversion of Proceedings raised the issue that delegation by the Board of adjudicatory findings to the Department of Water Resources would be unconstitutional. California Water Research argued that, for this reason, the Board must prepare its own environmental documentation of the Board's independent consideration of appropriate Delta flow criteria. The October 30, 2015 Hearing Notice also indicated that the Hearing Counsel intended that the Board make independent adjudicatory findings on appropriate Delta flow criteria in this hearing. The hearing ruling on California Water Research's Motion for Partial Conversion of Proceeding should clarify the statements in the Hearing Counsel's declaration, and clearly indicate how the WaterFix Final EIR/EIS will fully support the Board's independent findings.

Finally, if the WaterFix Final EIR/EIS does not adequately support the Board's independent adjudicatory findings, the Board must take this into account in the Board's decision on whether a Subsequent EIR/EIS is required.³

³ California Water Research hereby incorporates California Water Research's February 20, 2018 letter to Michael Lauffer, Chief Counsel, and Nicole Kuenzi, Senior Staff Counsel as if set forth in full herein.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Des Jardins', with a small mark above the final 's'.

Deirdre Des Jardins
Principal, California Water Research

cc: Michael Lauffer, Chief Counsel
Nicole Kuenzi, Senior Staff Counsel
WaterFix Hearing service list

**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):

Request for clarification of hearing rulings on CEQA for the Board's adjudicatory findings

to be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated January 24, 2018, 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 February 21, 2018.



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California Water Research

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