

February 22, 2016

***Via Email and U.S. Mail***

The Honorable Felicia Marcus, Chair  
Co-hearing Officer  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

The Honorable Tam Doduc  
Co-Hearing Officer  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Hearing Team  
CalWaterFix  
[CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov)

RE: California WaterFix Program: Objections to Pre-Hearing Conference Ruling

Dear Chair Marcus and Member Doduc:

The State Water Contractors (“SWC”) submit these objections and request for reconsideration to the pre-hearing conference ruling (“Ruling”). The basis for the SWC objections are: (1) without taking evidence, the State Water Resources Control Board (Water Board) has made legal and factual conclusions that are an abuse of its discretion; and 2) the approach to submittal of evidence on a staggered basis is without foundation and violates the due process rights of the project proponents. Each of the objections are explained below.

1. It Is an Abuse of the Water Board’s Discretion to Have Made a Determination Regarding the Appropriate Flows to Meet the Delta Criteria for the WaterFix.

At the pre-hearing conference a significant amount of time was spent on substantive issues relating to whether the Water Quality Control Plan Update Phase 2 had to precede this hearing and the standard under the 2009 Delta Reform Act relating to the interpretation of “appropriate flow.” There was much discussion about the appropriate legal standards and the conversation waded into issue far beyond the procedural issues noticed. This deviation is highlighted by the Board’s subsequent ruling discussed below.



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On page 4 of the Ruling, the Water Board makes the following statement:

*"The appropriate Delta flow criteria will be more stringent than petitioners' current obligations and may well be more stringent than the petitioners' preferred project."*

This conclusion was made without considering any evidence, making any findings, or basing the decision on evidence and findings. As such, the Water Board's conclusion is pre-decisional, appears to be biased, and constitutes an abuse of discretion. The inappropriateness of this conclusion is essentially acknowledged by the Water Board on page 5 of the Ruling wherein the Water Board acknowledges that appropriate flow criteria "will not be established until the completion of Phase 3 of the ... Bay-Delta planning process." Whether the obligations of the CVP and SWP would be greater or lesser than current obligations must be determined based on facts, the best available science, and law. To decide in a procedural ruling that the CVP and SWP obligations would change is inappropriate. The Water Board should issue a revised ruling to correct this error.

2. The Approach to Submittal of Evidence on a Staggered Basis is Without Precedent and Prejudices the Petitioners.

Several parties to the proceeding requested they be afforded additional time to review petitioners' evidence in support of their water rights change petition before submitting their own direct testimony. These parties contend there is insufficient information contained in the record submitted to the Water Board to support the petition. The Water Board also directs the petitioners to provide the information required by 23 CCR Sec. 794(a), but doesn't identify any specific deficiencies. Yet, in its Ruling, the Water Board points out the considerable information already submitted for consideration by the parties. (Ruling, pp. 5-6) The level of information put forth by petitioners is unprecedented.

The deficiencies Parties contend exist concern operational matters that will be addressed during Parts 1 and 2 of the proceeding and are not traditionally contained within permit conditions. Whenever a new major project is developed, how it will operate remains discretionary, provided permit terms are complied with. How the California WaterFix will operate will be informed by the permit conditions adopted by the Water Board due to the fact that Petitioners operate the state and federal water projects to meet permit conditions. The complaining parties are attempting to put this project in a box that would eliminate discretionary actions afforded to the project operators. The Water Board's job is not to operate the SWP or CVP projects, rather it is to evaluate and place necessary permit conditions that must be met. Stated another way, the Water Board sets the standards, it doesn't tell the operators how they must meet the standards.

The Water Board states it is fair to give the parties extra time to prepare their direct testimony. (Ruling, p. 7) This represents a significant deviation from standard Water Board practice. (23 CCR Secs. 648.4, 648.5) The concerns here are that the parties would use the staggered process to engage in the type of surprise testimony specifically discouraged by the regulations (Sec. 648.4(a)) and that the proceedings would be extensively lengthened rather than made more efficient as the parties focus on the minutiae of project operations rather than legitimate concerns about alleged unlawful interference with their rights. (23 CCR Sec. 648.5(a), setting forth the policy of securing relevant information expeditiously.)

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We recognize the Water Board has the discretion to organize this proceeding as it sees fit. (*Id.*) However, this unprecedented action of allowing months for the protestants to prepare their cases in chief, rather than relying on the traditional methods of cross-examination and rebuttal, will afford protestants an unfair advantage. In fact, the process as described in the order will allow protestants to have two opportunities for rebuttal, first in the direct testimony and again in rebuttal. If the petitioners fail to make their case as required by Sec. 794, the petition would be dismissed. This has been the standard used by the Water Board for major and minor projects. Yet, here the petitioners must not only make their case, they would have to fend off the second guessing that would occur as the parties use the extra time to model and re-model how they would like the project operated, rather than simply determining whether their rights have been interfered with.

The SWC request the co-chairs reconsider their decision.

Sincerely,



Stefanie Morris  
General Counsel

cc: Electronic service list as provided by the State Water Resources Control Board on February 10, 2016 (electronic service)

Clifton Court L.P. (US Mail)