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VIA electronic mail to CWFhearing@waterboards.ca.gov and service list of hearing participants.

Felicia Marcus, Chair and Co-Hearing Officer

Tam Doduc, Member and Co-Hearing Officer

State Water Resources Control Board

1001 I Street

Sacramento, California 95814

Dear SWRCB hearing officers,

This letter pertains to the request by the Petitioners to delay the hearing for 60 days, and by Protestants to dismiss the petition, or hold a second Pre-Hearing Conference. My own observation is that these developments stem from significant unresolved issues with respect to the Hearing process and the adequacy of the information submitted in support of the Change Petition. These issues need to be addressed before the hearing proceeds further.

1. Petition Adequacy

The prior Board decision that the information submitted for the Change Petition was sufficient for acceptance and to proceed with the hearing was based on the extensive CEQA/NEPA documents submitted by the Petitioners. The Feb. 11, 2016 Pre- Hearing Conference Ruling states:

California Code of Regulations, title 23, section 794 contains a detailed list of information that must be provided in a change petition, including effects on other known users of water, and any quantified changes in water quality, quantity, timing of diversion and use, reduction in return flows and other pertinent information. The petitioners' change petition specifies that this information is contained in the CEQA/NEPA documents. (See Environmental Information form attached to Petition at 1 [Specific discussions of the components of Alternative 4A most relevant to petition found within the Partially Recirculated Draft Environmental Impact Report /Supplemental Draft Environmental Impact Statement at sections 1.1, 1.1.4, 4.1, 4.1.2.2-4, 4.3.7-8, 11.1.2, Appendix A and 3B.) [p. 5]

Yet one month after this decision, Petitioners announced that they would not use the information from the CEQA/NEPA modeling in support of their Case in Chief. In their March 11, 2016 letter entitled "Written Response to March 4 Requirement to Address Information Requests from California Water Research and Sacramento Valley Water Users," Petitioners stated that they would only use the information developed from the Biological Assessment modeling:

As noted in Table 1 above, the modeling conducted for the BA is the basis of the information that will be used in the case-in-chief in the Hearing process. [p. 7]

In light of this significant change to the Petition, the Board should reconsider whether the information submitted in support of the Petition meets the requirements of section 794 of the Water Code.

2. Board's assumption of relying on the WaterFix CEQA/NEPA information

The Board had clearly planned to rely on the information developed during the CEQA/NEPA process for analysis of the issues pertaining to the Change Petition. The Board stated in 2013 comments on the DEIR/DEIS:

while BDCP parties may determine that CEQA does not require an analysis of all of the issues pertaining to water right change petition approval (including impacts to other legal users of water and public trust resources), it would assist the State Water Board in its consideration of the BDCP if the EIR/EIS discussed these issues. Given the similarity of the scope of analyses, it would be efficient to address these issues in one document. [Comment 3, Water Rights, p. 4]

Given that the Petitioners have announced that they will not use the modeling that is the basis of the CEQA/NEPA review documents for their Case in Chief, this assumption by the Board should be revisited.

The basic question of whether the RDEIR/SDEIS will be introduced into evidence is also unclear and must be resolved. The Pre-Hearing Conference Ruling states,

In response to concerns raised by parties, hearing team staff do not currently propose to offer the staff exhibits into evidence at the hearing (although staff may introduce exhibits if strictly necessary). [p. 11]

The Board did not oversee the development of the information in the RDEIR/SDEIS, nor can the staff attest to its accuracy, completeness or fitness for the Hearing. There were also many issues

raised with respect to the adequacy and fitness of the computer modelling for the CEQA/NEPA analysis. These issues need to be resolved before the CEQA/NEPA documents are introduced into evidence for the hearing.

3. Question of CEQA/NEPA analysis for Change Petition

The Petitioners currently propose to use information from the modelling for the Biological Assessment in support of their Case in Chief. The project itself is also changing as settlements are reached.

This creates fundamental issues for the Board in completing the CEQA/NEPA analysis required for the Change Petition. Presumably the Board had planned to rely on the Final WaterFix EIR/EIS for this analysis, but at this point it appears that the project description, proposed operations, and underlying modelling may all be different.

There is also a question of the adequacy of the alternatives in the FEIR/FEIS. It is currently not clear if the Board's requested alternative will even be included in the FEIR/FEIS. The Board's comments on the RDEIR/SDEIS stated in part,

To illustrate that there is additional potential for providing environmental benefits without impacting cold water pool resources and compliance with water quality requirements, the State Water Board requested that a scenario that increases Delta outflows without impacting cold water pools be evaluated. This scenario illustrates that more outflow can be provided without impacting cold water pools. However, given the limited time for this scenario analysis, it was also not optimized or developed into an alternative. [p. 2]

The Board did state in its February 11, 2016 Pre-hearing Conference Ruling,

If during the course of this proceeding, the State Water Board determines that the range of alternatives evaluated by DWR is not adequate to support the Board's decision, then either DWR or the Board will need to prepare subsequent or supplemental documentation. (See *id.*, §§ 15096, subd. (e), 15162, 15163.) At this point, however, it is uncertain whether any subsequent or supplemental documentation will be required. [p. 9]

Given new developments, the decision that supplemental documentation may not be required should be revisited.

4. Information supporting anti-degradation analysis

Both the Biological Assessment and FEIR/FEIS modelling released by the Petitioners compare the proposed change to a No Action Alternatives with future conditions which show a degraded baseline. Petitioners attribute this degradation to climate change.

It is unclear that the NAA baseline meets the requirements for an anti-degradation analysis. To show “no harm” to legal users of water or beneficial uses, the baseline hydrologic model version used in the hearing must be adequately validated and calibrated, and have a suitable range of sensitivity and uncertainty analyses. This information is not provided in the CEQA/NEPA documents. The State Water Board’s comments on the RDEIR/SDEIS state in part,

The level of uncertainty associated with the modeling should be clearly articulated in the impacts analysis. There is a large degree of uncertainty regarding the exact effects of the project due to a number of factors. However, this is not always clear in the RDEIR/EIS. The effects analysis frequently does not follow the guidelines for use of output from physical and biological models. [p. 2]

Development and disclosure of this fundamental information could have been mandated in the protest resolution process. As the SWRCB described in the February 11, 2016 Pre-hearing Conference Ruling:

The petition process under Water Code sections 1701 et seq. includes various procedures designed to supply supporting information and narrow issues prior to any Board hearing or decision. A petition for change must include detailed information and the State Water Board may request additional information reasonably necessary to clarify, amplify, correct, or otherwise supplement the information submitted by a petitioner. Similarly, any protests to the petition must include specific information and the State Water Board may request additional information reasonably necessary to supplement the information submitted by protestants. The State Board may request additional information from petitioners or protestants to attempt to resolve a protest. The State Board may cancel a petition or a protest if requested information is not provided. (Wat. Code, §§ 1701.4; 1703.6.) [p. 6]

However, the SWRCB skipped this process at the request of the Petitioners.

California Water Research and the Sacramento Valley Water Users did request more complete information on the modelling from the Petitioners, including a version history, and information on model calibration, validation, and the full set of sensitivity analyses performed. The Board’s March 4, 2016, ruling stated that

Within 7 days from the date of this letter, the petitioners should respond in writing to the above letters, copying both the hearing team at CFWHearing@waterboards.ca.gov and the parties on the current service list, identifying how the concerns identified in the letters will be addressed.

[p. 11, emphasis in original.]

In spite of this directive, much of the requested information was not disclosed in the Petitioners' response. It is currently unclear when or if it will be provided. The Board needs to examine whether the Petitioner's response was sufficient.

5. Funding for the public trust analysis

In the February 11, 2016 Pre-Hearing Conference Ruling, the Board referenced the delay in the update of the Bay Delta Water Quality Control Plan, and mentioned other staff obligations:

We acknowledge that the WaterFix, if approved, would be a significant component of Delta operations, and it would be preferable to have Phase 2 completed prior to acting on the change petition. Unfortunately, emergency actions in response to the ongoing drought have delayed the Bay-Delta planning process. At this point, waiting until completion of Phase 2 would significantly delay processing of the change petition. [p. 5]

It is clear that the SWRCB staff has been overwhelmed with work since the beginning of 2014. However, §85086 (3)(d) of the Delta Reform Act did direct that the Board enter into an agreement with the CVP & SWP export contractors to reimburse the Board for conducting the analysis mandated in that section:

§ 85086 (3) (d) The board shall enter into an agreement with the State Water Project contractors and the federal Central Valley Project contractors, who rely on water exported from the Sacramento River watershed, or a joint powers authority comprised of those contractors, for reimbursement of the costs of the analysis conducted pursuant to this section.

This legislative mandate was intended to ensure adequate staff resources for the public trust analysis mandated by §85086. The Board should disclose if it was ever executed.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Des Jardins". The signature is written in a cursive style with a large initial "D" and a distinct "A" at the end.

Deirdre Des Jardins