
State Water Resources Control Board

July 27, 2017

VIA ELECTRONIC MAIL

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CALIFORNIA WATERFIX HEARING – RULING DENYING SACRAMENTO VALLEY WATER USERS' REQUEST TO HOLD OPEN PART 1 OF THE HEARING

On July 10, 2017, the Sacramento Valley Water Users (SVWU) requested that the State Water Resources Control Board (State Water Board) hold open Part 1 of the hearing on the water right change petition for the WaterFix Project. SVWU seek more time to evaluate new information referenced in the Biological Opinions that the U.S. Fish and Wildlife Service and the National Marine Fisheries Service recently issued for the project, and potentially to present additional evidence on the issue of whether the Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Reclamation) have changed the project description in a manner that could injure legal users of water. In particular, SVWU argue that the Biological Opinions contain new spring Delta outflow criteria defined by a “lookup table,” which could result in injury if the criteria were to be met through State Water Project (SWP) and Central Valley Project (CVP) operations. In their July 10, 2017 letter, the SVWU also noted that the Biological Opinions require the preparation of a detailed operations plan for the WaterFix Project, and requested the State Water Board to direct DWR and Reclamation to provide more information concerning the development of the plan, including when it would be introduced in this proceeding.

We heard oral argument for and against SVWU's requests during the hearing on July 11, 2017. We took the matter under consideration after directing DWR to file a written response by noon on July 17, 2017. SVWU and other parties who supported their request were given until noon on July 19, 2017, to submit a reply to DWR's response. DWR submitted a timely written opposition to both of SVWU's requests, and SVWU submitted a timely written reply to DWR's opposition. In their reply, SVWU revised their request, and now seek to have Part 1 held open until Reclamation issues a Record of Decision (ROD) pursuant to the National Environmental Policy Act (NEPA) and DWR approves the project and issues a Notice of Determination (NOD) pursuant to the California Environmental Quality Act (CEQA).¹ In support of this request, SVWU argued that Reclamation and DWR have discretion to determine how to proceed in light of the Biological Opinions, and a stable project description will not be available for purposes of evaluating potential injury to legal users until the ROD and NOD are issued. Local Agencies of the North Delta et al. and Deirdre Des Jardins also submitted replies to DWR's opposition.

Consistent with our prior rulings on similar requests to delay Part 1 of the hearing, SVWU's request to hold open Part 1 is denied. In our prior rulings, we recognized the need for sufficient specificity concerning the manner in which the WaterFix Project will be constructed and operated to allow protestants to evaluate the potential impacts of the project and participate

¹ We take official notice of the fact that DWR filed a NOD with the Office of Planning and Research on July 21, 2017.

meaningfully in the hearing. At the same time, we recognized that not all uncertainties need to be resolved for an adequate project description, and one of the purposes of this proceeding is to hear evidence and argument concerning proposed operating conditions. Similarly, we recognized that the project description may be refined, and additional mitigation measures may be imposed, as a result of other regulatory processes, including the consultation process under the Endangered Species Act (ESA), the California Endangered Species Act (CESA) process, and the environmental review processes under NEPA and CEQA. To address this possibility, we stated that if there are any significant changes to the final CEQA document or issues that arise out of the ESA and CESA processes that have a material bearing on the issues addressed in the first part of the hearing, those issues may be revisited in the second part of the hearing. (October 15, 2015 notice, p. 11.)

DWR has indicated that the final Environmental Impact Report/Environmental Impact Statement for the project and the Biological Opinions will be submitted in Part 2 of the hearing. In addition, we anticipate that other information concerning appropriate Delta flow criteria or other measures to protect fish and wildlife will be submitted in Part 2. For this reason, we disagree with SVWU that it would be more efficient to hold open Part 1 to evaluate whether to revisit Part 1 issues at this time. Rather than addressing this issue piecemeal as new information becomes available, it would be more efficient to address this issue based on all of the information that is presented in Part 2. Accordingly, SVWU's request to hold open Part 1 is denied, but this does not mean that the evidentiary record for Part 1 is closed. Only one evidentiary record will be prepared for this proceeding, and the record will not be closed until Part 2 has been completed, and we have considered whether to revisit Part 1 issues based on the evidence presented in Part 2. Our decision not to hold Part 1 open also does not mean, as SVWU have suggested, that Part 2 will become a "free-for-all." For the time being, the scope of Part 2 remains unchanged. After evidence is presented that is relevant to Part 2 issues, we will determine whether to allow additional evidence to be presented that is relevant to Part 1 issues.

We disagree with protestants' characterization of the operations plan as necessary to inform the key hearing issues, and decline to order DWR and Reclamation to set a timeline to develop and submit a plan for purposes of this proceeding. Any approval of the petitions by the Board will include terms and conditions of operation that may be necessary to avoid injury to legal users and unreasonable impacts to fish and wildlife, among other considerations, and those terms will have to be incorporated into any "final" operations plan that petitioners may develop.

The August 3-4 and 8-10 hearing dates are cancelled. We will address the schedule for Part 2 of the hearing, outstanding objections to sur-rebuttal evidence, and requirements for Part 1 closing briefs in a forthcoming ruling to be issued in the near future.

If you have any non-controversial, procedural questions about this ruling or other matters related to the California WaterFix Hearing, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.

Sincerely,

ORIGINAL SIGNED BY

Felicia Marcus, State Water Board Chair
WaterFix Project Co-Hearing Officer

ORIGINAL SIGNED BY

Tam M. Doduc, State Water Board Member
WaterFix Project Co-Hearing Officer