
State Water Resources Control Board

September 29, 2017

VIA ELECTRONIC MAIL

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CALIFORNIA WATERFIX HEARING – RULING REGARDING REQUEST TO CHANGE THE PART 2 HEARING SCHEDULE, MOTIONS TO STRIKE PETITIONERS' LETTER REGARDING OPERATIONS, OPTIONAL PART 1 CLOSING BRIEF TOPICS, AND OTHER PROCEDURAL MATTERS

In this ruling, we deny requests for reconsideration of our August 31, 2017 ruling regarding scheduling Part 2 of the hearing on the water right change petition for the California WaterFix Project, deny motions to strike the Department of Water Resources' (DWR) and U.S. Bureau of Reclamation's (Reclamation) (collectively petitioners) September 8, 2017 Summary of Operating Criteria, provide guidance concerning the issues that we would like the parties to address in their optional Part 1 closing briefs, approve Grassland Water District's motion to file a protest and participate as a party in Part 2, and deny the City of Stockton's request for reconsideration of our August 31, 2017 ruling denying its request to move sur-rebuttal exhibits into evidence.

The Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute's Objection and Petition for Reconsideration of August 31, 2017 Ruling Regarding Part 2 Schedule

On September 6, 2017, the Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute (NRDC et al.) filed an objection to and petition for reconsideration of our August 31, 2017 ruling regarding scheduling of Part 2 of the hearing.¹ Specifically, NRDC et al. seek reconsideration of our requirement that all parties to the hearing file their written testimony and exhibits for Part 2 cases-in-chief on November 30, 2017, rather than requiring petitioners to submit their written testimony and exhibits before the other parties, as we did in Part 1. NRDC et al. assert that they and other protestants participating in Part 2 of the hearing are prejudiced by three factors: (1) the lack of a complete, project-level analysis in the Biological Opinions for the WaterFix Project; (2) alleged inconsistencies between the Biological Opinions and the Incidental Take Permit (ITP); and (3) the State Water Resources Control Board's (State Water Board) failure to complete the Phase 2 update to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). NRDC et al. argue that staggered deadlines for written testimony and exhibits is necessary to avoid prejudice to protestants because petitioners would be required to make a prima facie case, consistent with their burden of proof, and protestants would have the opportunity to respond to

¹ Our August 31 ruling concerning the hearing schedule and other procedural matters is not a final decision or order subject to reconsideration by the State Water Resources Control Board pursuant to Water Code section 1122. Accordingly, we will treat the petition as a request for reconsideration by the hearing officers of our previous ruling.

petitioners' case. In addition, NRDC et al. argue that staggered deadlines would reduce the prejudice to protestants because it would allow protestants to develop their cases-in-chief after the Scientific Basis Report for the Phase 2 update to the Bay-Delta Plan is released.

We received four joinders in NRDC et al.'s request from: (1) County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, The Mokelumne River Water and Power Authority, and Local Agencies of the North Delta (LAND); (2) Friends of Stone Lakes National Wildlife Refuge and Save Our Sandhill Cranes; (3) Friends of the River and Sierra Club California; and (4) Environmental Justice Coalition for Water and Restore the Delta. We also received a response to NRDC et al.'s request from DWR on September 12, 2017.

As we explained in our February 11, 2016 pre-hearing conference ruling, we staggered the submittal due dates in Part 1 of the hearing in order to give the petitioners the opportunity to explain their proposed project and give the other hearing parties the ability to better evaluate how their interests may be affected before they prepared and presented their cases-in-chief. During Part 1A, petitioners provided a considerable amount of information concerning project construction and operations (although some uncertainty remains, as discussed below). Since then, we have ruled that the project description is adequate to allow the parties to participate meaningfully in Parts 1 and 2 of the hearing. Accordingly, the justification for staggering Part 1 of the hearing no longer exists. In addition, we anticipate that the Scientific Basis Report for the Phase 2 update to the Bay-Delta Plan will be available in advance of the November 30, 2017 deadline for written testimony and exhibits. While we disagree with NRDC et al.'s assertion that they are prejudiced by the timing of the Phase 2 update, we recognize the value of the Scientific Basis Report to inform Part 2 hearing issues.

We disagree with the argument that protestants would be prejudiced unless deadlines for written testimony and exhibits are staggered. Both petitioners and protestants will have an opportunity to present evidence on the key hearing issues during their cases-in-chief. But, as we have stated repeatedly, petitioners bear the burden of proof, and protestants will have the opportunity during rebuttal to respond directly to petitioners' case-in-chief. In the meantime, protestants should present testimony and other evidence relevant to the key hearing issues during their cases-in-chief based on available information, including the Biological Opinions, the ITP, and the Scientific Basis Report, rather than waiting for rebuttal. Protestants are strongly encouraged to address in their cases-in-chief the potential impacts of the project that have already been identified in available documentation. In addition, protestants should to the extent possible present evidence in support of proposed terms and conditions that protestants believe are necessary and appropriate to avoid unreasonable impacts to fish and wildlife, recreational uses, and other public trust resources, including appropriate Delta flow criteria, and to advance the public interest.

For the foregoing reasons, NRDC et al.'s request for reconsideration of our August 31, 2017 ruling concerning the Schedule for Part 2 is denied.

Motions to Strike Petitioners' September 8, 2017 Summary of Operating Criteria

In response to a request from Save the California Delta Alliance, we directed petitioners to provide by September 8, 2017, an updated summary of proposed operating criteria that makes explicit whether particular criteria are proposed conditions of operation or are modeling assumptions. In a letter dated September 8, 2017, petitioners submitted a summary table of operating criteria for the project and explained that they propose the WaterFix Project be conditioned on the terms contained in State Water Board Decision 1641 (D-1641). With the

exception of an adaptive management process, petitioners explained that they are not proposing as conditions the operational criteria contained in the Biological Opinions and ITP for the project. Petitioners also stated that they do not propose the modeling assumptions as conditions, but present them in order to demonstrate it is possible to meet regulatory requirements.

Both NRDC et al. and the San Joaquin Tributaries Authority (SJTA) submitted motions to strike the petitioners' September 8, 2017 letter. The parties argue that the letter is nonresponsive because it includes incompatible and misleading information and creates greater confusion concerning proposed operating conditions. Specifically, NRDC et al. argue that petitioners' letter provides incompatible, contradictory, and misleading operating criteria for the South Delta, and creates greater confusion over operating criteria by describing legally binding operational requirements as only modeling assumptions. SJTA argues that petitioners' proposal to operate in accordance with D-1641 requirements is unclear in light of actual and modeled compliance problems with Vernalis flow objectives. Deirdre Des Jardins with California Water Research also submitted a letter that raises her concerns with some of the petitioners' proposed operating criteria.²

The motions to strike are denied. Petitioners' September 8, 2017 letter is not evidence and striking it would serve no purpose. We required petitioners to provide an updated summary of operating criteria in order to clarify whether some of the proposed operating criteria have changed to assist the parties in their preparation for Part 2 of the hearing. We did not intend to elicit motions from other parties regarding the adequacy of petitioners' response or the merits of their proposed operating criteria. That is the purpose of the hearing. We will not resolve these arguments through motions and rulings before Part 2 of the hearing begins. To the extent relevant to Part 2 issues, participants in Part 2 will have the opportunity to address the adequacy of petitioners' proposed operating criteria and to advocate for their own proposed operating criteria through the hearing process, including cross-examination of petitioners' witnesses, rebuttal, and the presentation of their own cases-in-chief.

Guidance Concerning Topics for Part 1 Closing Briefs

As set forth in our August 10, 2017 ruling, closing briefs that address the key hearing issues for Part 1 of the hearing are due by noon on November 8, 2017. Submitting a closing brief at this stage of the hearing is optional. The parties will have an opportunity after Part 2 of the hearing to submit closing briefs that address both Part 1 and Part 2 issues.

The parties should refer to the August 10, 2017 ruling for page limits and other procedural requirements applicable to closing briefs. The purpose here is to provide guidance concerning the issues that we would like the parties to address in their closing briefs. In preparing this guidance, we have taken into consideration the briefing topics suggested earlier by the parties, as well as the issues raised and evidence presented to date. Parties may address other topics relevant to the key hearing issues, and the parties are not required to brief any or all of the

² In the letter, Ms. Des Jardins also requests that we reconsider our August 31, 2017 ruling and allow testimony on the adequacy of the FEIR/EIS for the WaterFix Project, and allow discussion of this issue at the pre-hearing conference. In addition, Ms. Des Jardins advanced arguments concerning the adequacy of the hearing notice and the State Water Board's responsibility under CEQA. We will take these comments under advisement. We will consider Ms. Des Jardins' proposed pre-hearing conference topics along with the topics suggested by other parties.

following issues, but briefing of the following issues, to the extent relevant to a party's case, is of particular interest to the State Water Board:

1. Will the changes proposed in the water right change petition for the WaterFix Project in effect initiate a new water right?
 - A. The State Water Board may approve changes to a water right permit or license, including changes to the authorized point of diversion, place of use, or purpose of use, provided that the changes will not result in injury to other legal users of water, and the change will not in effect initiate a new right. (Cal. Code Regs., tit. 23, § 791, subd. (a).) State Water Board Order WR 2009-0061 includes a discussion of what constitutes a permissible change to an existing right versus the initiation of a new right. In that order, the State Water Board observed that changes are not permissible, and amount to the initiation of a new right, if they would result in an increase in the rate or volume of water appropriated from a given source during a given period of time. (Order WR 2009-0061, pp. 5-6.)
 - B. How does this legal standard apply in this case? The parameters of the water right permits for the State Water Project (SWP) and Central Valley Project (CVP) that are the subject of the change petition include the authorized source or sources of water, the maximum amount of water that may be appropriated (measured by rate and volume), and the authorized season of diversion. These permit parameters are specified in the permits themselves and summarized in Tables 1 and 2 on pages 9-10 of the Notice of Petition and Notice of Public Hearing. Collectively, the permits authorize the diversion to storage in upstream SWP and CVP reservoirs, and the export of both natural flow and storage releases from the southern Sacramento-San Joaquin Delta Estuary (Delta). The authorized sources for the SWP vary by permit, and include the Feather River, Delta Channels, and San Luis Creek. The authorized sources for the CVP also vary by permit, and include the Sacramento River, Delta channels, the American River, the Trinity River, and Clear Creek. In this case, would the proposed changes in point of diversion lead to an increase in the rate or volume of water appropriated from any of the sources authorized in the subject permits during any given period of time?
 - C. What is the proper baseline for determining whether the proposed changes could result in an increase in the rate or volume of water appropriated from the authorized sources? In Order WR 2009-0061, the State Water Board stated that approval of a change should be conditioned to ensure that the change does not result in an increase in diversions relative to both the amount to which the diverter was legally entitled and the amount that the diverter could have diverted in the absence of the change, taking into consideration practical limitations such as hydrology and the diverter's physical facilities. (Order WR 2009-0061, pp. 6-7.) Should the proper baseline be the amount of water that could be diverted in the absence of the change, or the amount of water authorized to be diverted consistent with the terms and conditions of the permit or license? For a permit that may not have been fully developed, should the permittee be allowed to make a change that will allow the permittee to divert up to the maximum amount authorized under the permit? To the extent that existing limitations on diversions under a permit should apply to any change, should hydrologic limitations be treated differently than other practical limitations, such as limitations to the diverter's facilities? (See, e.g., *City of Thornton v. Clear Creek Water Users Alliance* (Colo. 1993) 859 P.2d 1348, 1356-1357

- [holding addition of alternative storage sites to a conditional water right (akin to a water right permit under California's water right permitting system) for undeveloped water supply project would not result in injury to downstream water right holders, notwithstanding evidence that capacity of original storage site was inadequate to store maximum amount under right, provided that total amount of water stored would not exceed maximum storage right, or the amount of water physically available at original reservoir site].)
- D. What conditions, if any, are necessary to ensure that the proposed changes, if approved, would not result in an increase in the rate or volume of water appropriated from the sources authorized in the subject permits?
2. Will the proposed changes alter water flows or water quality in a manner that causes injury to any legal users of water?
- A. Water Code section 1702 provides that, before the State Water Board may approve a change petition, the petitioner must establish to the State Water Board's satisfaction, and the State Water Board must find, that the proposed changes will not operate to the injury of any legal user of the water involved. The term "injury" within the meaning of Water Code section 1702 is a legal term of art, and does not necessarily protect legal users of water from any type of impact. Rather, the term "injury" means invasion of a legally protected interest. (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 647, 738-743.)
- B. To what extent are third-party water right holders protected from any changes to stream flows or reservoir storage levels that may occur as a result of the proposed changes? To what extent are parties who have entered into contracts with petitioners protected under the terms of their contracts from any changes to stream flows or reservoir storage levels that may occur as a result of the proposed changes? What conditions, if any, should be included in any approval of the change petition to protect legal users from injury due to changes in stream flows or reservoir storage levels?
- C. With respect to changes to water rights that may affect water quality, the State Water Board has held that third-party water right holders are only entitled to the natural flows necessary to provide adequate water quality for their purposes of use; they are not entitled to better water quality than would exist under natural conditions, or better water quality than necessary to allow them to use the water to which they are entitled. (See Order WR 2015-0043, p. 33.) Are the water quality objectives set forth in the Bay-Delta Plan adequate to protect water right holders in the Delta from injury? If not, what is the level of water quality that is necessary to protect water right holders from injury, and what is the basis for any higher level of protection that may be warranted? To what extent are parties who have entered into contracts with petitioners protected under the terms of their contracts from changes to water quality that may occur as a result of the proposed changes? What conditions, if any, should be included in any approval of the change petition to protect legal users from injury due to changes in water quality?
- D. What burden of proof do protestants carry to demonstrate possession of legal entitlements under water rights or contracts, and to demonstrate potential injury that may occur due to the proposed changes?

3. Do potential impacts to legal users of water that may occur as a result of constructing WaterFix Project facilities constitute injury within the meaning of Water Code section 1702? If so, how could legal users be impacted, and what conditions, if any, are appropriate to protect legal users from injury due to construction?

Some parties have suggested briefing the issue of whether the hearing should move forward while other regulatory and planning processes are proceeding. The parties should not brief these issues, however, because we have already addressed them in the Hearing Notice and subsequent rulings. Specifically, the parties should not brief the following topics:

1. Whether the hearing should proceed despite the fact that the National Environmental Policy Act and federal Endangered Species Act processes for the WaterFix Project are not complete;
2. Whether the hearing should proceed concurrent with the ongoing proceeding to update the Bay-Delta Plan; and
3. Whether the hearing should proceed while other entities, such as the Delta Stewardship Council, complete their Delta planning processes.

Grassland Water District's Motion to File a Protest and NOI in Part 2

On July 31, 2017, we received a motion from Grassland Water District (Grassland) to file a protest and Notice of Intent to Appear (NOI) in Part 2 of the hearing, seeking for the first time to participate as a party. Grassland explained that it did not submit a protest and NOI by the original deadline or seek to participate earlier because Grassland was reassured in written and oral descriptions of the WaterFix project that CVP water deliveries to wildlife in Grassland's service area in Merced County and 13 other south-of-Delta wildlife refuges would not be adversely affected by the project. Grassland argues that there is good cause for filing an NOI and protest after the deadline because Reclamation now proposes changes to the WaterFix project in a manner that will adversely affect wildlife uses of CVP water. Specifically, Grassland claims that Reclamation presented a "California WaterFix Participation Approach" to CVP contractors at a public meeting in Los Banos on July 26, 2017, which would allow water contractors who fund construction of the WaterFix project to receive a corollary CVP water supply benefit. Grassland alleges that this "additional" allocation of CVP water for paying contractors would have a significant impact on wildlife within Grassland and other refuges. In its protest, Grassland alleges that the State Water Board's approval of the petition will not best serve the public interest, be contrary to law, and have an adverse environmental impact.

None of the other parties, including petitioners, opposed Grassland's motion.

In accordance with California Code Regulations, title 23, section 648.1 and the October 30, 2015 Notice of Public Hearing, only parties and other participants authorized by the hearing officers are allowed to participate in the evidentiary portion of the hearing. Under the Administrative Procedure Act, a motion to intervene and participate in an administrative hearing shall be granted if the following conditions are met: (1) the motion is submitted in writing and served on the other parties; (2) the motion is made as early as practicable in advance of the hearing; (3) the motion states facts demonstrating the applicant's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding; and (4) the hearing officer

determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by the intervention. (Gov. Code, § 11440.50, subd. (b).)

Grasslands submitted its NOI to participate in the hearing approximately 18 months after the deadline imposed by the October 30, 2015 Hearing Notice. Typically, we would deny such a late request outright to prevent disruption of the hearing process and prejudice to other parties. In this case, however, we find that Grassland has pled reasonable cause to intervene. Grassland alleges that new information about potential impacts to Grassland has become available that was not available at the time NOIs were due. Once Grassland became aware of this new information, it promptly submitted a motion to intervene and limited its request to participation in Part 2 of the hearing. We question whether Grassland's reliance on previous assurances concerning deliveries to wildlife refuges was reasonable, given that issues concerning financing for the project were not resolved at the time. If Grassland were seeking to reopen Part 1 of the hearing, we would be inclined to deny Grassland's motion. But Grassland has at least provided some justification for its failure to file a timely NOI, and Grassland has requested to participate in Part 2 of the hearing only, and does not seek to address Part 1 hearing issues. Accordingly, Grassland's intervention, which is well in advance of the evidentiary deadline for Part 2, will not cause undue delay or disruption in the conduct of the hearing. Based on these circumstances, and taking into consideration Grassland's interest in this proceeding, Grassland's motion to intervene and request to file a protest and NOI and participate in Part 2 of the hearing is granted.

City of Stockton's Request for Reconsideration of August 31, 2017 Ruling Denying Request to Move Sur-Rebuttal Exhibits into Evidence

In a letter dated September 6, 2017, City of Stockton (Stockton) requests reconsideration of our August 31, 2017 ruling, in which we denied Stockton's motion to move into evidence exhibits STKN-51, STKN-52, and STKN-53, which were introduced during cross-examination of a sur-rebuttal witness, because the motion was untimely. In an oral ruling during the hearing on July 11, 2017, we stated that parties who wished to move cross-examination exhibits into the evidentiary record must submit a written motion no later than noon on July 17, 2017. (R.T. (July 11, 2017)4:1-8.) Stockton confirmed in its September 6, 2017 request for reconsideration that it did not move STKN-51, STKN-52, and STKN-53 into the record by the July 17, 2017 deadline.

Stockton argues that its failure to move the exhibits into evidence by the deadline was excusable because Stockton's lead attorney was on vacation and not present at the hearing on July 11, 2017, when we set the deadline. As a result of the attorney not being present, Stockton assumed incorrectly based on incomplete information that it did not need to formally move the exhibits into the record until the hearing officers had ruled on an outstanding objection to those exhibits. Parties are not required to attend every day of the hearing. When absent from the hearing, however, it is the party's responsibility to either review the transcripts or video recordings or make arrangements with another representative to provide them with any oral rulings, pertinent deadlines, and other important information that they may have missed. Moreover, no basis exists for Stockton's assumption that an objection to its exhibits obviated the need to formally offer them into evidence. To the contrary, it has been our practice in this hearing to direct the parties to offer their exhibits into evidence at the appropriate time, notwithstanding any outstanding objections. (See R.T. (June 15, 2017) 4:3-9 [directing parties to move sur-rebuttal testimony and exhibits into record after cross-examination, redirect, and re-cross]; see, e.g., R.T. (May 19, 2017) 73:2-15 [directing LAND to move exhibits into record,

subject to ruling on outstanding objections].) Stockton's request for reconsideration of our August 31, 2017 ruling is denied.

Hearing Team

The October 30, 2015 Notice of Petition and Notice of Public Hearing listed the hearing officers and hearing team staff. The hearing team roster was updated on April 25, 2016, and again on April 13, 2017. We are now adding Nicole Kuenzi, Staff Attorney III, and Greg Brown, Senior Environmental Scientist, to the hearing team.

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