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November 29, 2016

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

Hearing Chair: Tam Doduc
Hearing Officer: Felicia Marcus
State Water Resources Control Board
Sacramento, CA 95814

Re: Requests for Rebuttal Phase

With respect to the procedures for the remainder of Part 1 of the Hearing, Deirdre Des Jardins, principal at California Water Research, (“California Water Research”), makes the following requests.

California Water Research also joins and incorporates the concerns on due process and requests expressed in “Comments on Sacramento Valley Water Users’ Proposal” submitted on behalf of protestants Pacific Coast Federation of Fishermen’s Associations and Institute for Fisheries Resources on November 23, 2016. California Water Research also joins in and incorporates the proposals set forth in “San Joaquin County Protestants’ and Local Agencies of the North Delta, et al.’s Proposal Re: Part 1 Rebuttal Evidence and Closing Briefs,” submitted on behalf of protestants San Joaquin County and Local Agencies of the North Delta, et. al, on November 23, 2016, with the following additional requests.

1. Clarify whether the CEQA/NEPA documents are providing information required under Water Code § 1701.2 (d) and (e), prior to rebuttal

Petitioners submitted both the 2013 BDCP Draft EIR/EIS and 2015 WaterFix Revised Draft EIR/EIS with the application for the WaterFix Change Petition. However, whether the

CEQA/NEPA analyses are provided in support of the change petition has since become extremely muddled.

Petitioners have stated that CEQA/NEPA is a separate process from the change petition process. Petitioners have also objected to testimony about the adequacy of the CEQA/NEPA documents and analyses as not being relevant to the hearing, and such testimony was stricken. During cross-examination of Russel Van Loben Sels in presentation of LAND's case in chief, DWR's attorney also stated that the mitigation in the CEQA/NEPA documents was not the same as the proposed mitigation to meet requirements of the Water Code. Petitioners also withdrew the 2010 hydrologic models used in the CEQA/NEPA documents as the foundation of the evidence presented in the hearing, stating that the more recent modeling used for the Draft Biological Assessment ("BA") would be the basis for their case in chief in the Hearing.¹

The Hearing Officers should request that the petitioners clarify whether any parts of the analysis in the CEQA/NEPA documents have been submitted for the purposes of meeting Water Code §§ 1701.2 (d) and (e), and if so, which parts. In that case, it would be both necessary and appropriate to postpone rebuttal until the Final EIR/EIS is published. Protestants must also be given enough time to review the information in the Final EIR/EIS.

2. Allow full cross-examination on all scientific evidence and expert testimony, including rebuttal evidence and testimony

Parties are presenting complex scientific evidence and testimony in the hearing, from a broad range of experts. Cross-examination on relevant scientific and technical reference texts has been important in eliciting relevant testimony on the foundation of expert opinions. Petitioners' attorneys have also objected to cross-examination that "assumes facts not in evidence," so introduction of some documentation has been necessary at times to support a line of questioning. The Hearing Officers have allowed this use of documents in cross-examination during presentation of cases in chief, and it is also allowed under Evidence Code 721(b)(1) and (3) in civil trials.² Due process requires that similar procedures be allowed during rebuttal.³

¹ In their March 11, 2016 letter, petitioners stated: "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.)

² Evidence Code 721(b) limits cross-examination texts to the following situations:

- (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion.
- (2) The publication has been admitted in evidence.
- (3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

³ Govt Code 11513(b) provides that parties have the right to cross-examine and impeach witnesses. In *Manufactured Home Communities v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 712, the fourth appellate court also clarified that in adjudicatory hearings: "Where it makes a decision based on a party's testimony, the adversary is entitled to question his or her opponent. [citations]"

Introduction of published scientific or technical reference documents should not require cross-examination of the party introducing the documents. To the extent that formal declarations that documents are “true and correct copies” are required for authentication, the Hearing Officers should provide reasonable opportunity for parties to submit such declarations.

Finally, some documents introduced in cross-examination of experts may not need to be submitted into evidence. If the expert did not recognize a document and it did not elicit any substantive testimony, the document may not need to be submitted.

3. Clarify whether the CEQA/NEPA documents are providing information required under Water Code § 1701.2 (c) and § 85086 (c), and set a time to receive comments on procedures for Part 2

The Hearing Officers provided an extension for Petitioners to provide some of the information required by Water Code § 1701.2 (c), which is prior to the beginning of Part 2:

“Part 2 of the hearing will commence following completion of the CEQA/NEPA and ESA/CESA processes.”

The Hearing Officers should require that the petitioners clarify whether any parts of the analysis in the CEQA/NEPA documents have been submitted for the purposes of meeting Water Code § 1701.2 (c) and Water Code § 85086 (c), and if so, which parts.

Experience with Part 1 in the Hearing should also inform Part 2 of the Hearing. California Water Research therefore requests that the Hearing Officers set a time after the end of Phase 1 of the Hearing to receive comments on procedures for Part 2. Appropriate comments would include requests by parties in Part 1 to submit briefs at the end of Part 2, and other requests to ensure due process in Part 2.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Des Jardins', with a stylized flourish at the end.

Deirdre Des Jardins
Principal, California Water Research

**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):

Letter Re: Requests for Rebuttal Phase

to be served by Electronic Mail (email) upon the parties listed in the Current Service List for the California Water Fix Petition Hearing, dated November 15, 2016, posted by the State Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/111516revsrvlist.pdf

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 November 29, 2016.



Deirdre Des Jardins

California Water Research

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