
State Water Resources Control Board

August 5, 2016

[Via email]

Deirdre Des Jardins
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CALIFORNIA WATERFIX HEARING – DEIRDRE DES JARDINS’ MOTION TO INTRODUCE FOUNDATIONAL EVIDENCE INTO THE HEARING RECORD

Dear Ms. Des Jardins:

In a motion dated July 19, 2016, and in letters submitted prior to that date, Ms. Deirdre Des Jardins has requested that the following documents concerning computer modeling be admitted into evidence at this stage of the hearing:

1. Close et al., Strategic Review of CALSIM II and its Use for Water Planning, Management, and Operations in Central California (Dec. 4, 2003);
2. California Department of Water Resources & U.S. Bureau of Reclamation, CalSim Peer Review Response: A Report by DWR/Reclamation in Reply to the Peer Review of the CalSim-II Model Sponsored by the CALFED Science Program in December 2003 (Aug. 2004);
3. Ford et al., Review Panel Report, San Joaquin River Valley CalSim II Model Review (Jan. 12, 2006);
4. Lund et al., Analytical Tools for Evaluating the Water Supply, Hydrodynamic, and Hydropower Effects of the Bay-Delta Plan (Oct. 26, 2012);
5. Department of Water Resources, California Natural Resources Agency, Methodology for Flow and Salinity Estimates in the Sacramento-San Joaquin Delta and Suisun Marsh, 35th Annual Progress Report to the State Water Resources Control Board in Accordance with Water Right Decisions 1484 and 1641 (June 2014); and
6. Department of Defense, Instruction Number 5000.61, DoD Modeling and Simulation (M&S) Verification, Validation, and Accreditation (VV&A) (May 13, 2003).

In her motion, Ms. Des Jardins argued that these documents, which she characterizes as foundational, should be admitted into evidence for purposes of objections to petitioners’ testimony and exhibits that are based on computer modeling. In addition, Ms. Des Jardins stated that timely consideration of her request would allow these documents to be used during

cross-examination of petitioners' witnesses under Evidence Code section 721, subdivision (b)(2). Ms. Des Jardins argued further that the hearing schedule does not afford protestants an adequate opportunity to address foundational issues concerning the modeling. Specifically, Ms. Des Jardins requested that a preliminary part of the hearing be designated to hear testimony and argument on the choice of model runs and the reliability of the models used by the petitioners before making any findings based on the testimony of petitioners' witnesses concerning the modeling.

In addition to the six documents listed above, on July 12, 2016, Ms. Des Jardins submitted a document that she prepared entitled "Evaluation of testimony on the reliability of the methods used to produce CalSim and DSM2 model results." In a letter dated July 29, 2016, Ms. Des Jardins clarified that this submittal, which she characterizes as a brief on technical issues, is not intended to be testimony, but she seeks to have the brief accepted into the hearing record before objections to petitioners' modeling evidence are considered.

The Department of Water Resources has objected to all of Ms. Des Jardins' submittals on the grounds that they are not valid objections, requests for official notice, or submissions of evidence.

Ms. Des Jardins' motion to introduce evidence is premature. Under the rules governing adjudicative proceedings before the State Water Resources Control Board (State Water Board), evidence does not need to be formally accepted into evidence in order to be cited in an objection or used on cross-examination.¹ Ms. Des Jardins may mark the documents and technical evaluation that she has submitted for identification and use them during her cross-examination of petitioners' witnesses. After she completes her cross-examination, she may offer them into evidence. If any of the documents are not admitted into evidence at that time, Ms. Des Jardins may offer them into evidence as part of her own case in chief or during rebuttal during part 1B of the hearing.

The issues raised by Ms. Des Jardins concerning the modeling can be addressed through the usual hearing process, and do not necessitate designating a preliminary part of the hearing to hear testimony and argument on the choice of model runs and the reliability of the models used by the petitioners. The State Water Board's ultimate decision on the water right change petition for the WaterFix Project will be based on the entire administrative record, and the State Water Board will not make any findings based on petitioners' modeling evidence until all of the other parties have had an opportunity to test the reliability of that evidence through cross-examination of petitioners' witnesses, presentation of their own cases in chief, presentation of rebuttal, and submittal of closing briefs.

¹ Ms. Des Jardins cited to Evidence Code section 721, subdivision (b)(2), which allows cross-examination of an expert witness regarding a scientific, technical, or professional text, treatise, journal, or similar publication if the publication has been admitted in evidence. Note that Evidence Code section 721, subdivision (b) specifies other circumstances under which an expert may be cross-examined regarding a scientific or technical document that has not been admitted into evidence, such as when the witness referred to, considered, or relied on the document in forming his or her opinion. Moreover, Evidence Code section 721 does not apply to adjudicative proceedings before the State Water Board.

Ms. Des Jardins also requested that we take official notice of the fourth document listed above. This document is not the proper subject of official notice because it is a fairly lengthy report that contains expert opinions on various topics and numerous recommendations. We may take official notice of facts that may be judicially noticed, as well as any generally accepted technical or scientific matter within the State Water Board's field of expertise. (Cal. Code Regs., tit. 23, § 648.2.) The contents of the report in question are not limited to generally accepted technical or scientific matters. Ms. Des Jardins should offer this document into evidence as an exhibit at the appropriate time.

Sincerely,

Original Signed By

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

Original Signed By

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

[Via Email Only]

cc: CWFhearing @waterboards.ca.gov
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