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February 13, 2018

Via Electronic Mail (CWFHearing@waterboards.ca.gov)Tam M. Doduc, Co-Hearing Officer
Felicia Marcus, Co-Hearing Officer
State Water Resources Control Board
1001 I Street, 2nd Floor
Sacramento, CA 95814Re: EAST BAY MUNICIPAL UTILITY DISTRICT'S RESPONSE TO HEARING
OFFICERS' QUESTIONS FOLLOWING FEBRUARY 8, 2018 HEARING

Dear Hearing Officers Doduc and Marcus:

East Bay Municipal Utility District ("EBMUD") writes to address two questions presented by the Hearing Officers following the February 8, 2018 hearing:

4. If the WaterFix Project is constructed and operated in stages, are there potential impacts to legal users of water, fish and wildlife, the public interest, or consideration of appropriate Delta flow criteria that would warrant revisiting any Part 1 or Part 2 key hearing issues? Which issues?
6. Would any conditions necessary to adequately protect the rights of legal users, fish and wildlife, or the public interest be different if the WaterFix Project were constructed in stages? Would appropriate Delta flow criteria be different? Why or why not?

EBMUD believes these questions will ultimately be answered in the affirmative, but definitive answers will require that Petitioners adequately describe the revised WaterFix Project ("Project") and submit evidence on all key hearing issues with respect to the revised project.

Petitioners have proposed a major change in their project. This is not a mere "staging" of construction. Rather, Petitioners have scaled down their project. Petitioners are no longer proposing to build the project described in the hearing petition unless additional funding becomes available, but there is no assurance such funding will ever materialize. The WaterFix project may operate in a single-tunnel configuration indefinitely. There is no evidence in the hearing record regarding the single-tunnel project. We know nothing about how it will be constructed, and nothing about how it will be operated. Rather, the evidence of record all relates to a project that is fundamentally different from what Petitioners now propose to build.

To enable EBMUD and all other parties to intelligently assess the impacts of the revised project, we believe the Hearing Officers should require the Petitioners to must provide detailed evidence of the construction and operational impacts of the project in its revised form, so the parties can intelligently assess the extent of new or increased impacts. This evidence will include, at a minimum: (1) a complete project description of the Project in its revised form, (2) final – not “preliminary” – modeling of Project operations under that final Project description, (3) evidence of no injury to legal users of water under Water Code section 1702 from the final Project and operations, and (4) evidence that the requested changes will not unreasonably affect fish and wildlife or recreational uses of water or other public trust resources. Once that evidence is in the record, the parties to this proceeding should be given adequate time to review that evidence to determine if they are injured.

Following is a discussion of how this revision to the Project may bear on the specific impacts that EBMUD has described in this hearing.

Impacts from WaterFix Facilities and Construction

In Part 1, EBMUD provided evidence of impacts the WaterFix facilities may cause to EBMUD’s Mokelumne Aqueducts and to EBMUD’s planned future Delta tunnel, both of which conflict with the proposed WaterFix alignment. EBMUD developed its evidence in reliance on specific descriptions of the physical facilities of the WaterFix project in its original form. Petitioners now appear to be proposing to construct substantially different facilities.

Petitioners have not provided, in the hearing record or elsewhere, anywhere near the level of detail needed to understand how the revisions to the Project could affect EBMUD’s crucial water supply facilities. For example, we do not know the location, dimensions, or acreage of the two new points of diversion. Nor do we have evidence of the depth, size and length of the single tunnel. We have no description of the schedule for phasing. It may well be that the Phase 1 single tunnel is in place and operation for decades before a Phase 2 second tunnel is constructed. What happens to tunnel construction facilities (construction access tunnels, construction powerlines, etc.) in those years between Phase 1 and 2? These are basic, fundamental project description questions, but they have not been answered. Before the hearing resumes, the revised, phased Project must be fully and clearly defined so that the public and parties to this proceeding can understand exactly what Petitioners now propose in this latest iteration of the Project.

Impacts from Project Operations

It is also critical to understand how the Project will be operated. Operation of the new North Delta facilities in conjunction with existing South Delta diversion facilities will determine the quantity and timing of flows down the Sacramento River and through the Delta. The extent and timing of those flows will drive Project impacts, including impacts that specifically concern EBMUD. EBMUD has submitted evidence of two impacts that depend on the details of WaterFix project operations. In Part 1, EBMUD explained that Petitioners’ modeling shows

WaterFix facilities may be operated so as to exacerbate reverse flows in the Sacramento River near EBMUD's Freeport Regional Water Project. Because the Freeport Project cannot operate during significant reverse flow events, WaterFix operations could compromise access to this vital source of water supplies for the East Bay. EBMUD also submitted testimony for Part 2 explaining how WaterFix may affect the health of Mokelumne River chinook and steelhead fisheries. That testimony explains how Petitioners' evidence shows that the WaterFix facilities may lead to operational decisions to increase opening of the Delta Cross Channel gates in the fall, and to increase South Delta exports in the spring. Both changes would adversely affect survival of migrating Mokelumne-origin fish.

We do not assume that a one-tunnel project will necessarily reduce the impacts of the original project. While the parties have not had an opportunity to review the newly released modeling in any detail, an initial glance at the summaries the modeling data released last week by DWR shows the change to a one-tunnel project will increase the impact. The new information released on DWR's WaterFix website includes a summary of Delta Cross Channel openings[1] that shows more DCC openings in November under the new "staged construction" scenario than under previous modeling – an increase of perhaps 20% compared to BiOp modeling of the full two-tunnel project – during that key month for survival of migrating adult Mokelumne-origin salmonids. This is an example of increased impacts of the revised project on an issue of great concern to EBMUD that should warrant new evidence from Petitioners, along with an opportunity for the parties to respond.

The impacts of WaterFix operations to the Freeport Regional Water Project and to juvenile outmigrating Mokelumne-origin salmonids were identified from a detailed analysis of Petitioners' earlier modeling. EBMUD has had to keep up with a moving target, because Petitioners have continually shifted what they propose as they continually release new and different modeling:

1. Just a few months ago, Petitioners staked their Part 1 case-in-chief on the Boundary 1 and Boundary 2 modeling, attempting to show no injury to legal users of water. (See, e.g., Petitioner's September 8, 2017 letter to Chair Felicia Marcus, sent in direct response to a State Water Board question, stating that "In Part 1 of this hearing Petitioners presented the boundary analysis of B1 to B2 in order to demonstrate no impact to legal users of water within the range of foreseeable outcomes of the adaptive management process.")
2. Then, a few weeks later, in their November 30, 2017 submittal of their Part 2 case-in-chief, Petitioners changed course, alleging that the "project" was instead now CWF H3+, which was new modeling with different assumptions. As DWR's Part 2 witness Gwendolyn Buchholz states, "CWF H3+ is the Project adopted by DWR that is the subject for Change in Point of Diversion requested by DWR and Reclamation." (DWR 1010, p.2:15-16.) So it appeared DWR was attempting to

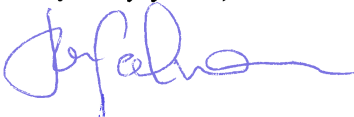
Tam M. Doduc, Co-Hearing Officer
Felicia Marcus, Co-Hearing Officer
State Water Resources Control Board
February 13, 2018
Page 4 of 4

distance itself from its Part 1 Boundary 1 and 2 modeling and replace it with new CWF H3+ modeling.

3. On the morning of February 8, 2018, less than 30 minutes before the start of Part 2 of the hearing, DWR sent an email announcing extensive new hydrologic and biological modeling. The link provided by DWR led to dozens of new modeling runs. It is not even clear what these modeling runs are. Are they evidence? If so they are late, as they were due November 30, 2017. If not evidence, then what are they? DWR appears to call these brand new modeling runs only “preliminary” in its February 9, 2018 Opposition to NRDC’s Motion to Stay. (See DWR Opposition, p. 4:8-9.)

Petitioners have submitted no evidence based on the latest modeling of the revised project, nor described the assumptions made in that new modeling. And EBMUD has not had sufficient time to review the modeling for itself to determine whether the revisions to project may affect the impacts EBMUD has identified. Petitioners should be required to submit additional evidence, based on the new modeling, to meet its burden of proof in this proceeding.

Very truly yours,



Jon Salmon
Attorney

JDS:amh

cc: Service List – January 24, 2018 *(via email)*