

State Water Resources Control Board

April 13, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING REGARDING REBUTTAL PHASE OF PART 1

This ruling addresses the following issues pertaining to the Part 1 rebuttal phase of the water right change petition hearing for the California WaterFix Project: (1) admissibility of written rebuttal testimony, (2) location changes for certain hearing dates, (3) order of presentation for rebuttal testimony, (4) time limits for rebuttal testimony and cross-examination, (5) sur-rebuttal, and (6) changes to the hearing team.

Inadmissible Rebuttal Testimony

In accordance with our March 15, 2017 ruling, we have reviewed written rebuttal testimony and determined that most of what has been submitted appears to be within the scope of Part 1 of the hearing, responsive to another party's case-in-chief, and sufficiently reliable to be admissible. As explained in greater detail below, however, part of the testimony of some witnesses is not admissible because it either addresses issues outside the scope of Part 1 or is not clearly responsive to another party's case-in-chief. The written rebuttal of those witnesses must be revised in accordance with this ruling to be admissible.

American River Water Agencies

We appreciate the American River Water Agencies' (ARWA) attempt to comply with our direction to bifurcate the presentation of evidence supporting their proposed permit terms consistent with the scopes of Parts 1 and 2 of the hearing. A few statements contained in the rebuttal testimony of James Peifer and Tom Gohring, however, are outside the scope of Part 1. Specifically, paragraph 4 of Mr. Peifer's testimony (CITYSAC-35) should be revised to eliminate the assertion concerning the effect of low flow conditions in the lower American River on fish. Similarly, parts of Mr. Gohring's testimony (ARWA-300) in paragraphs 17, 18, and 20 concerning the effects of low storage levels in Folsom Reservoir on fisheries in the lower American River should be withdrawn and resubmitted in Part 2. Other statements in Mr. Gohring's testimony that mention fishery concerns as part of his description of the development and co-equal objectives of the Modified Flow Management Standard constitute acceptable background information.

San Joaquin County et al.

The rebuttal testimony of Marc Del Piero (SJC-76), submitted on behalf of San Joaquin County and a number of other parties, including the California Sportfishing Protection Alliance (CSPA) and the Local Agencies of the North Delta (LAND), addresses several issues that are either

outside of the scope of Part 1 of the hearing, or outside the scope of the hearing altogether. These issues include: (1) failure of past efforts to protect public trust resources in the Sacramento-San Joaquin Delta (Delta), (2) effects of State Water Project (SWP) operations in general, and the California WaterFix Project in particular, on public trust resources, and (3) failure to enforce various environmental laws that “assist in the equitable distribution of water ...” To the extent that these issues are relevant to the potential effects of the California WaterFix Project on fish, wildlife, or recreational uses of water, the testimony may be presented in Part 2.

Mr. Del Piero’s testimony concerning the requirements of a water availability analysis is outside the scope of the hearing. Although one of the key hearing issues for Part 1 is whether the proposed changes would initiate a new right, that issue does not extend to what would be required to support an application for a new water right permit if a new water right permit were required for the California WaterFix Project.

Snug Harbor Resorts, LLC

Nicole S. Suard’s written rebuttal testimony (SJRrebuttal3-23-17) contains some testimony that is not relevant to the key hearing issues, including Ms. Suard’s opinion that administration of the drinking water program conflicts with consideration of the WaterFix Project and Ms. Suard’s opinions regarding water exports and transfers in general. In addition, Ms. Suard’s testimony concerning our decision not to admit one of Snug Harbor Resorts’ exhibits into evidence is not responsive to another party’s case-in-chief, and therefore is not proper rebuttal testimony.

Patrick Porgans

Patrick Porgans’ written rebuttal testimony (PORGANS EXHIBIT-300) is very difficult to follow, and significant portions of his testimony do not appear to be relevant to the key hearing issues in Part 1 of the hearing or responsive to another party’s case-in-chief. Only Mr. Porgans’ testimony concerning SWP and Central Valley Project (CVP) compliance with Delta water quality standards and a small portion of his testimony concerning the issue of whether the proposed changes would initiate a new water right appear to be admissible rebuttal testimony.

We appreciate Mr. Porgans’ good faith efforts to comply with hearing requirements, but in spite of those efforts, his testimony does not comply with procedural requirements. Accordingly, we are directing our staff to review Mr. Porgans’ written rebuttal testimony to exclude all but the testimony concerning SWP and CVP compliance with Delta water quality requirements and the testimony on page 10, lines 13-14. Staff will provide the admissible testimony to Mr. Porgans and the other parties by the deadline set forth below. We will expect Mr. Porgans to limit the oral summary of his rebuttal testimony to the admissible testimony. Staff will also advise Mr. Porgans and the other parties which rebuttal exhibits do not appear to be admissible because they are associated with excluded rebuttal testimony.

ARWA, the City of Sacramento, San Joaquin County et al., and Snug Harbor Resorts are directed to revise the testimony identified above to eliminate the subject areas that are outside the scope of Part 1 or are not responsive to another party’s case-in-chief. The parties should also review their exhibits and withdraw any exhibits associated with testimony that is deleted.

Revised, written testimony must be submitted no later than noon on April 19, 2017.

Deletions must be shown in strike-through and any non-substantive additions must be underlined. No testimony may be added.

Consistent with our March 15, 2017 ruling, any objections to the admissibility of rebuttal testimony that we have not addressed, and any objections to the admissibility of rebuttal exhibits, must be made, orally or in writing, during the hearing when the testimony and exhibits are offered into evidence, or earlier. Parties should review our March 15, 2017 ruling (pp. 2-4) for additional instructions regarding objections to rebuttal testimony and what types of objections are appropriate in State Water Resources Control Board (State Water Board) proceedings.

Changes to the Hearing Schedule and Room Locations

A revised Attachment A, with the rebuttal hearing date schedule and room locations, is attached. Changes from the schedule included with our February 21, 2017 ruling are shown in red strikeout and underline. All rebuttal hearing dates will now be held at the Joe Serna Jr. – CalEPA Building. In addition, please note that we will not conduct the hearing on April 26, May 31, and June 28 - 30, 2017.

Order of Rebuttal and Cross-Examination

Consistent with our prior rulings, we will not accept notices of unavailability from parties. Parties should be ready to present their rebuttal testimony and exhibits when they are called. If a party cannot present on a particular day, it is that party's responsibility to coordinate with another party to take their place in line and give at least three days' notice to the hearing officers and the Service List. Proposals to present out of order are subject to approval by the hearing officers.

In a letter dated April 7, 2017, the Department of Water Resources and the U.S. Department of the Interior (collectively petitioners) stated that they will present their witnesses in three or four panels. The petitioners provided a list of witnesses to be included in the first panel, but requested flexibility to re-order the remaining panels depending on the availability of the witnesses. In their letter, petitioners listed dates on which their witnesses are unavailable.

While the petitioners may be able to present rebuttal testimony and make their witnesses available for cross-examination without delays in the hearing if we allow a witness to be moved from one panel to the next due to scheduling conflicts, the order of the witness panels and the witnesses included on each panel must be established in advance for the benefit of the parties preparing for cross-examination. By petitioners' own account during Part 1B, it is difficult for parties to prepare for cross-examination of witnesses without knowing the order of testimony in advance. (See R.T. [October 26, 2016] 6:11-7:2.)

Petitioners have known that they would be called first to present rebuttal testimony since our December 19, 2016 ruling and have known the hearing dates for rebuttal since our February 21, 2017 ruling. Petitioners' witnesses are therefore expected to appear when their panel is called. If a witness is not available for cross-examination when called, the witnesses' written testimony will not be accepted into evidence. Any proposal to appear out of order must be requested in advance and is subject to our approval. Based on the subject of the rebuttal testimony submitted, petitioners will present their witnesses in the order and as described in Attachment B.

Petitioners must notify the hearing team and Service List by **noon, April 19, 2017**, if they have any changes to the panels listed in Attachment B. Otherwise, we will proceed in the above order.

We received proposed grouping assignments with requests for order of presentation for joint rebuttal testimony from the following parties. Based on the information received, parties will generally present rebuttal in the order of their previously assigned group numbers, except for the changes described below. For consistency with Parts 1A and 1B, we will not assign new group numbers for rebuttal. See Attachment B for the order of presentation of rebuttal testimony. We will assume that parties who plan to call more than one witness but did not submit a proposed grouping will present their witnesses as a panel.

We approve the following requests to present joint rebuttal testimony, witness panels, and changes in group order:

- Sacramento Valley Water Users (SVWU) group of parties (Group 7) asked to present a shared witness panel consisting of witnesses Walter Bourez (SVWU-200) and Dan Easton (SVWU-203), followed by any additional witnesses on behalf of specific members of the SVWU;
- ARWA (Group 7) asked to present a single witness panel consisting of Keith Durkin (SJWD-17), James Peifer (CITYSAC-35), Marcus Yasutake (Folsom-28), Tom Gohring (ARWA-300) and Jeff Weaver (ARWA-400) after other Group 7 panel(s) that will address issues concerning the Sacramento Valley more broadly;
- North Delta Water Agency and Member Districts (NDWA or Group 9) asked to present a witness panel consisting of witnesses Gary Kienlen (NDWA-300) and Shankar Parvathinathan (NDWA-301);
- City of Stockton (Group 22) and City of Antioch (Group 27) asked to present rebuttal on the same day because they are calling the same witness, Dr. Susan Paulsen; and
- County of San Joaquin, et al. (Group 24) asked to present a witness panel shared with CSPA et al. (Group 31) and LAND et al. (Group 19) in Group 31's spot in the order of presentation of rebuttal. The panel consists of witnesses Marc Del Piero (SJC-76) and Brandon Nakagawa (SJC-70).

On March 28, 2017 we received a letter from NDWA requesting Department of Water Resources (DWR) staff to appear as rebuttal witnesses for NDWA and bring relevant documents. On April 12, 2017, DWR sent us a motion for protective order based on NDWA's notice requesting witnesses and production of documents. This issue remains pending and we will not rule on this matter at this time.

Parties will conduct cross-examination in the same sequence as in Part 1. Prior to requesting a change in the order of cross-examination, parties must arrange with another party to take their place in line so that other parties are not affected. Proposals to cross-examine out of order are subject to approval by the hearing officers.

Time Limits

Parties are encouraged to be efficient in presenting their rebuttal and in conducting cross-examination. Each rebuttal witness will be allowed up to 15 minutes to summarize his or her written testimony, subject to extension for good cause. With the exception of Dr. Paulsen, who submitted different testimony on behalf of two different parties, witnesses representing more

than one party will not be allowed more than 15 minutes by virtue of the fact that they are representing more than one party.

Cross-examiners will be limited to **one hour** per witness or panel of witnesses. We may allow additional time for cross-examination if there is good cause demonstrated in an offer of proof.

Sur-Rebuttal

Based on the amount of new information contained in the written rebuttal testimony and exhibits that have been submitted, we anticipate that the parties will seek to present sur-rebuttal evidence. Sur-rebuttal testimony and exhibits will be permitted. Consistent with our usual practice with respect to rebuttal, sur-rebuttal will begin immediately after all parties present their rebuttal testimony and their witnesses have been cross-examined. Sur-rebuttal testimony and exhibits will not be required to be submitted in advance. Sur-rebuttal testimony must be responsive to evidence submitted during rebuttal. Sur-rebuttal does not include evidence that should have been presented during the case-in-chief or rebuttal of the party submitting sur-rebuttal evidence. It also does not include repetitive evidence. Cross-examination of sur-rebuttal witnesses will be limited to the scope of their sur-rebuttal. Unless we approve changes, the order of presentation of sur-rebuttal will be the same as for rebuttal.

Hearing Team Members

The October 30, 2015 Notice of Petition and Notice of Public Hearing and Pre-Hearing Conference to Consider the Petition listed the hearing officers and hearing team members. The hearing team staff list was later updated in the hearing officers' April 25, 2016 ruling to replace Richard Satkowski with Kyle Ochendusko. In addition, Conny Mitterhofer, Supervising Water Resource Control Engineer, is now the chief of the Hearings and Special Projects Section of the Division of Water Rights and has joined the hearing team. John Gerlach has left State Water Board employment and is no longer a member of 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:

ORIGINAL SIGNED BY:

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

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

Attachments