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## State Water Resources Control Board

November 20, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

### **CALIFORNIA WATERFIX HEARING –RULINGS ON PENDING PROCEDURAL REQUESTS**

The ruling contained herein addresses a request to modify our direction regarding objections, an emergency extension request by the Natural Resources Defense Council (NRDC), et al., the Department of the Interior's (DOI) objection to NRDC's Supplemental Notice of Intent to Appear (Supplemental NOI), an addition to the hearing team, and an amendment to the list of staff exhibits.

#### **1. Ruling on Friends of the River, et al., Request to Modify November 8, 2017 Ruling**

We have reviewed and considered the request received from Friends of the River, et al. In short, those parties request that we modify our November 8, 2017 ruling to allow written objections to the admissibility of written testimony due November 30, 2017, in order to avoid the need to be present at the hearing to object at or before the time when particular evidence is offered into the record. That request is hereby denied.

It is not overly burdensome for the parties to review written testimony and see that someone is present to object on or before the hearing days when the testimony or exhibits that they find objectionable are likely to be offered into the record. So long as a party raises its objection orally sometime before the subject testimony or exhibits are offered into evidence, it will be in compliance with the November 8, 2017 ruling. The procedure described in that ruling reflects the State Water Resources Control Board's (State Water Board) normal practice for water right hearings, and we find no adequate justification for departing from that procedure during Part 2.

#### **2. Ruling on Natural Resources Defense Council, et al., Emergency Extension Request**

Due to an unforeseen health emergency rendering Dr. Jon Rosenfield, Ph.D., unavailable until at least December 15, 2017, NRDC, Defenders of Wildlife, and The Bay Institute have requested an extension of time for filing Dr. Rosenfield's written testimony and associated exhibits. We hereby grant this request. NRDC, et al. have until 12:00 pm (noon) on December 29, 2017, to submit Dr. Rosenfield's testimony and associated exhibits. For all other written testimony and exhibits, the original deadline in the August 31, 2017 ruling remains in effect. As a reminder, NRDC, et al.'s case in chief is not an appropriate vehicle for offering rebuttal of other parties' cases-in-chief.

### 3. U.S. Department of the Interior's Objection to NRDC, et al. Supplemental NOI

DOI submitted an objection to the Supplemental NOI filed by NRDC, et al. The objection alleges that the Supplemental NOI was improper to the extent it suggested that the State Water Board could issue a subpoena compelling any DOI employee to appear as a witness. DOI advanced two main arguments in support of its objection. First, NRDC, et al. have circumvented the DOI's *Touhy* regulations – which govern when DOI employees may or may not comply with subpoenas, among other demands or orders. Second, a state tribunal such as the State Water Board lacks authority to compel a DOI employee to appear as a witness because of the United States' sovereign immunity. NRDC, et al. subsequently filed a letter of opposition to DOI's objection on the grounds that the objection was procedurally improper and DOI has waived its sovereign immunity.

DOI's objection is hereby overruled as premature. NRDC, et al.'s Supplemental NOI did not circumvent the procedure for requesting testimony under DOI's *Touhy* regulations; it merely complied with the State Water Board's procedures for the parties to define the scope of their participation in Part 2. Because it has not yet served any subpoenas on DOI, NRDC, et al. still have an opportunity to comply with DOI's procedures, and its Supplemental NOI does not offer any indication that it will not do so. Therefore, the issue of whether and under what circumstances DOI's employees may be required to appear in Part 2 pursuant to a subpoena is not yet ripe for our consideration. DOI may renew its objection by a motion to quash if and when subpoenas are issued for one or more of its employees.

### 4. Addition to State Water Board California WaterFix Hearing Team

Andrew Deeringer, a water rights attorney in the State Water Board's Office of Chief Counsel (OCC), has joined the State Water Board's WaterFix hearing team. Prior to joining OCC in July 2014, Mr. Deeringer was a junior associate at Downey Brand LLP for approximately two and a half years, during which time he performed work for some current parties to the WaterFix water right hearing in water rights-related matters. However, none of those client-matters pertained to WaterFix or the conveyance-related components of the Bay-Delta Conservation Plan.

### 5. New Staff Exhibits Marked for Identification

To avoid confusion and duplicate citations, the hearing team is amending its staff exhibits list to include:

Exhibit Number	Exhibit Description
SWRCB-105	U.S. Fish and Wildlife Service's June 23, 2017 Biological Opinion for the California WaterFix Project
SWRCB-106	National Marine Fisheries Service's June 16, 2017 Biological Opinion for the California WaterFix Project
SWRCB-107	California Department of Fish and Wildlife Incidental Take Permit (No. 2081-2016-055-03) for Construction and Operation of Dual Conveyance Facilities of the State Water Project (California WaterFix)

<b>Exhibit Number</b>	<b>Exhibit Description</b>
SWRCB-108	Developments after Publication of the Proposed Final Environmental Impact Report, July 2017
SWRCB-109	DWR's CEQA Decision Document
	CEQA Decision Document Attachment A - Final EIR/EIS (See SWRCB-102)
SWRCB-110	CEQA Decision Document Attachment B - Findings of Fact and Statement of Overriding Considerations
SWRCB-111	CEQA Decision Document Attachment C - Mitigation, Monitoring and Reporting Program
SWRCB-112	CEQA Decision Document Attachment D – Notice of Determination

Staff exhibits are public documents that contain information relevant to hearing issues. The hearing team staff will not be serving as project advocates, and do not plan to present testimony to authenticate or otherwise support any of the staff exhibits, including SWRCB-105, -106, -107, -108, -109, -110, -111 and -112. Hearing team staff will not offer the staff exhibits into evidence at the hearing (although staff may introduce other exhibits if strictly necessary).

The staff exhibits are marked for reference and will remain on the State Water Board's webpage for the convenience of the parties at [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/california\\_waterfix\\_hearing.shtml](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/california_waterfix_hearing.shtml)

Parties should carefully review the list of staff exhibits when compiling their own lists of exhibits to avoid submitting duplicative exhibits, which will not be accepted. It is incumbent on the parties to provide their own testimony to authenticate or otherwise support any of the staff exhibits they wish to rely on and offer into evidence at the hearing. Staff exhibits may be offered into evidence as exhibits by reference. Parties should review our original hearing notice, especially Enclosure D on how to reference and properly use staff exhibits in the hearing. As set forth in the Hearing Notice, staff exhibits and other public records also may be offered into evidence as exhibits by reference in accordance with California Code of Regulations, title 23, section 648.3.

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](mailto:CWFhearing@waterboards.ca.gov) or (916) 319-0960.

Sincerely,

*ORIGINAL SIGNED BY*

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

*ORIGINAL SIGNED BY*

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