Spencer Kenner (SBN 148930)
James E. Mizell (SBN 232698)
Robin McGinnis (SBN 276400)
CALIFORNIA DEPARTMENT OF WATER RESOURCES
Office of the Chief Counsel
1416 Ninth Street, Room 1104
Sacramento, CA 95814
Telephone: (916) 653-5966
E-mail: james.mizell@water.ca.gov

Attorneys for California Department of Water Resources

BEFORE THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

HEARING IN THE MATTER OF CALIFORNIA DEPARTMENT OF WATER RESOURCES AND UNITED STATES BUREAU OF RECLAMATION'S REQUEST FOR A CHANGE IN POINT OF DIVERSION FOR CALIFORNIA WATER FIX	**CALIFORNIA DEPARTMENT OF WATER RESOURCES' RESPONSE TO REQUESTS FOR EXTENSIONS OF THE DEADLINE FOR PART 1B CASES-IN-CHIEF**

California Department of Water Resources ("DWR") provides this response to a number of written requests for an extension of time for Part 1B[1] (collectively, "Protestants"). These requests vary in reasoning and timing. The proposed extensions are 30 days after the end of the Part 1A hearing, or until October 3, 2016 or October 16, 2016.

For the reasons explained below, DWR requests that the State Water Resources Control Board hearing officers ("Board") deny these requests and any other such motions or joinders. The Protestants' arguments include: (1) the submittal of the July 2016 Biological Assessment ("BA") by the Petitioners creates new information they must review, despite the fact that the Petitioners do not rely specifically upon the submitted BA

[1] Written requests and/or joinders were filed by Central Delta Water Agency, South Delta Water Agency, Lafayette Ranch, Heritage Lands, Mark Bachetti Farms, Rudy Mussi Investments L.P., Save the California Delta Alliance, et al. (does not describe the other parties on whose behalf it was filed), County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, Mokelumne River Water and Power Authority, Islands, Inc., Restore the Delta, North Delta Cares, and Sacramento Valley Water Users.

in the case-in-chief; (2) Protestants have limited resources and this hearing is complex, even though the nature and complexity of this hearing were presumably taken into account by the Board in setting the current deadlines and thus without a compelling change in circumstances this is not grounds to approve an extension at this time; (3) Petitioners received an extension so Protestants should as well, despite the fact that the current hearing structure was proposed by the Protestants themselves, and each extension granted included an extension of the due date for Part 1B cases-in-chief; and it is unclear what exhibits the Board will formally accept into the record such that Protestants' cannot focus their attention, although this is a common condition for all parties and therefore not a persuasive basis to show prejudice.

Requests for more time to begin Part 1B are untimely, unwarranted, and based on issues upon which the Board has already ruled.[2] Any delay in the revised schedule will pose undue burden and prejudice on Petitioners and other parties that have relied on previous rulings.

BACKGROUND

DWR and Reclamation filed their petition for a change in point of diversion for their water rights on August 25, 2015. The schedule set in the October 30, 2015 hearing notice required all parties to submit their Part 1 cases-in-chief on March 1, 2016.

The hearing officers scheduled a pre-hearing conference on January 28, 2016 to discuss the scope of the hearing and any other procedural issues. (October 30, 2015 Notice, at page 15.) After the pre-hearing conference, and based on a proposal from Protestants Sacramento Valley Water Users ("SVWU"), the Hearing Officers set a staggered submittal schedule for cases-in-chief that affirmed March 1, 2016 as the deadline for Petitioners' Part 1 case-in-chief (Part 1A) while setting May 16, 2016 (76 days later) as the deadline for all other cases-in-chief in Part 1 (Part 1B). When the

[2] As provided in the July 22, 2016 Ruling, "[w]hile the other parties still have specific and various criticisms of petitioners' evidence and testimony, we disagree with those parties who contend that petitioners' case-in-chief is insufficient to allow parties to meaningful participate in Part 1 of the hearing."

Board granted extensions, a staggered submittal schedule was maintained: on March 4, 2016, the dates were extended to March 30, 2016 and June 15, 2016, respectively; and then on April 25, 2016, they were extended to May 31, 2016 and September 1, 2016, respectively. On April 25, the Board granted the most generous length of time between the Part 1A and 1B deadlines, allowing Protestants 93 days to prepare their cases-in-chief after receiving Petitioner's written testimony and exhibits. The timeframes for Protestants to prepare their cases-in-chief have not been shortened, and while the Protestants may allege that the revised BA provides new information, there is no material new information that bears on the question of injury to legal users of water. Thus, Petitioners have not introduced new information relating to Part 1A since meeting the May 31, 2016 deadline to provide the public their case-in-chief.

On May 31, 2016, Petitioners submitted their case-in-chief. On June 10, 2016, the Hearing Officers issued a ruling in which they strongly encouraged, but did not require, parties to submit all procedural or evidentiary objections by July 12, 2016.[3] Protestants filed 21 objections and/or joinders, but none of them objected to the schedule. DWR responded to each of these filings.

On July 22, 2016, the Board ruled that the 93 days between the due dates for Part 1Aa and 1B cases-in-chief would give the other parties additional time to review and prepare their own submittals. They disagreed with those parties who contended that petitioners' case-in-chief is insufficient to allow parties to meaningfully participate in Part 1 of the hearing. The hearing on Part 1A began on July 26, 2016 with policy statements, followed by Petitioners' witnesses presenting summaries of their written testimony and exhibits. The witnesses have been subject to multiple days of cross examination, which has been very broad and comprehensive.

[3] The deadline for procedural/evidentiary objections was originally March 15, 2016 (February 11, 2016 ruling at page 2), and was reset to April 15, 2016 (March 4, 2016 ruling at page 3) and then to June 15, 2016 (April 25, 2016 ruling at page 4).

ARGUMENT

The Board's regulations provide that, "[t]he hearing notice may require that all parties intending to present evidence at a hearing shall submit . . . information to the Board prior to the hearing . . . and [t]he required information shall be submitted in accordance with the procedure specified in the hearing notice." (Cal. Code Regs., tit. 23, § 648.4, subd. (b), emphasis added.) The Hearing Officers have broad discretion in determining the schedule and order of this Water Rights Petition proceeding.

As described below, the Protestants' motions calling for a delay in submitting their written information are untimely, unwarranted, and pose undue burdens that prejudice other parties and witnesses relying on previous rulings. Protestants' justifications for their requests go against all considerations of fairness and would result in unnecessary expense to the Board and other parties. Petitioners have submitted written testimony, their witnesses have been subjected to extensive cross-examination, and DWR and Reclamation have been subject to ongoing demands for additional documents and data, most of which was already publicly available and some of which was already in possession of the requesters.[4] As acknowledged by this Board, this hearing was staggered in an unconventional method, requiring Petitioners to submit written testimony and exhibits far in advance of having an opportunity to review Protestants' testimony and exhibits. Petitioners believe that having Protestant's written testimony as scheduled without undue delay will assist the Board in conducting an efficient hearing, because it will allow for a better understanding of Protestant's issues and concerns.

A. The requests are unwarranted.

Protestants have not shown adequate justification for these motions. DWR and Reclamation filed their petition nearly a year ago, and it was largely based on documents

[4] On July 20 and 29, 2016, DWR provided documents, information, and data in response to 14 pages of requests by Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources. DWR continues to compile data in response to these extensive requests. DWR also responded to 11 letters and submissions by California Water Research, which included an unlimited number of demands and questions. Most recently, Sacramento County Water Agency requested modeling data and DWR is responding to this request.

available to the public since 2013, and at a minimum documents made public in 2015.[5] Protestants justify their last-minute requests primarily on the following grounds: (1) the July 2016 BA creates new information they must review; (2) Protestants have limited resources and this hearing is complex; (3) Petitioners received an extension so Protestants should as well; and (4) it is unclear what exhibits the Board will formally accept into the record such that Protestants' cannot focus their attention. These justifications are inadequate.

1. Information regarding the Proposed Project for Part 1A has been available and other processes should not change the scope of this Hearing.

As previously ruled, other permitting processes do not drive the completion of Part 1A. Procedurally, the Board has retained the right to reopen the record to take additional evidence as necessary, even after Part 1 of the hearings concludes. In their April 25, 2016 letter, the Hearing Officers held that "it may be necessary to revisit Part 1 hearing issues at the close of the hearing to the extent that any substantial changes to the final CEQA document for WaterFix relative to the draft document have a material bearing on Part 1 issues. . . ." (Board April 25, 2016 Ruling, at 3.) In their March 4, 2016 letter, the Hearing Officers noted that DWR has provided compliance schedules for endangered species laws and environmental impact review, noting that Part 2 of the hearing could not commence without completion of those processes. (March 4, 2016 Ruling, at page 2.)

Very little of what has been submitted by Petitioners as part of their case-in-chief, whether in their concise written testimony (133 pages total for 9 lead witnesses) or in their submitted exhibits, represents "new" information. Rather, much of the information contained in Petitioners' case-in-chief, including submitted exhibits, is public information

[5] The 2013 Bay Delta Conservation Plan ("BDCP") that preceded the 2013 DEIR/DEIS and 2015 RDEIR/SDEIS included a range of alternatives with associated modeling results that were publicly available. The 2015 RDEIR/SDEIS included additional alternatives and associated modeling results that were also available to the public.

previously available to all Protestants.[6] The Protestants voluminous objections to Petitioners' expert witnesses' testimony indicate they have read this information, including information available in the draft environmental documents, and should have had time to prepare their written testimony for submittal by the September 1, 2016 deadline.

Protestants' argument for more time to review the July 2016 BA, which was submitted to the federal fish agencies for initiating endangered species consultation, is clearly relevant to Part 2 but not necessary for Part 1. The Petitioners' case-in-chief includes a boundary analysis that incorporates the proposed operations under the submitted BA. The purpose of a BA is to "evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary." (50 C.F.R. § 402.12(a).) Thus, the BA is relevant to Part 2 regarding "potential effects of the Petition on fish and wildlife. . . ." (October 30, 2015 Notice, at page 2.) As noted in the October 30, 2015 Notice, Part 2 "is proposed to begin at least 30 days after the CEQA, ESA, and CESA processes have been completed such that the associated documents for these processes can be included as exhibits in the hearing record." (*Id.*)

Petitioners' witnesses Jennifer Pierre and Armin Munevar defined the proposed project for Part 1 as initial operating criteria between the range of Scenarios H3 to H4 (also described in the 2015 RDEIR/SDEIS), and described criteria and assumptions for these operations. In their case-in-chief, Petitioners seek to prove that there will be no injury to legal users of water from operations between Boundaries 1 and 2. This range is within the range of alternatives in the 2013 DEIR/DEIS, but narrows the range based on the anticipated adaptive management of future Biological Opinion requirements. Importantly, the range provided by Boundaries 1 and 2 and analyzed in Petitioners'

[6] The 2013 Public Draft EIR/EIS, 2015 RDEIR/SDEIS, draft BA and all related modeling has been available to Protestants prior to the commencement of Part 1A.

testimony is broader than the initial operating criteria (H3-H4) in the BA. Therefore no additional information in the July 2016 BA expands the scope of information available in Part 1A. Even so, there are few differences between the January 2016 BA and the July 2016 BA, "mainly that no new modeling was performed related to project operations." (August 3, 2016 letter from Petitioners regarding Update on ESA/CESA and CEQA/NEPA Schedules at page 1.) Also, in accordance with the purpose of a BA, the changes from the January 2016 BA to the July 2016 BA were focused on impacts to aquatic and terrestrial species.

2. It is undisputed the hearing topics are complicated.

Protestants note that cross examination has raised new questions and issues, and they must react to the oral testimony in order to prepare their own cross examination and their cases-in-chief. Cross examination is not the time for Protestants to elicit testimony to support their cases-in-chief. Parties should prepare rebuttal testimony in response to issues raised during cross examination. Protestants have had ample time to prepare their evidence regarding injury to legal users of water. Protestants are using cross examination as a fishing expedition to find evidence to support their cases-in-chief, which in other Board change petition hearings, would have been submitted prior to the beginning of cross examination of Petitioners' witnesses. (See October 30, 2015 Hearing Notice, at pages 35-36.)

3. The extension granted to Petitioners benefitted Protestants.

The current hearing schedule, adopted on April 25, 2016, provides even more time between when Protestants received Petitioners' case-in-chief and the due date for Protestants' cases-in-chief than the original staggered submittal structure presented in the February 11, 2016 Ruling. The February 11, 2016 Ruling conferred the substantial advantage of being able to review Petitioners' case-in-chief before preparing their cases-in-chief. Having all parties submit their cases-in-chief is the usual practice in water right hearings and was originally contemplated for this hearing as indicated in the October 30, 2015 Hearing Notice.

Protestants correctly point out that the Hearing Officers granted two extensions to Petitioners, but fail to acknowledge that all the hearing deadlines were pushed out when the extensions were granted. Thus, Protestants benefited from Petitioners' requests for extensions. Indeed, they have already benefited substantially from previous rulings: first, when the Hearing Officers agreed to the staggered submittal structure proposed by SVWU, which extended the deadline for Protestants' cases-in-chief from March 1, 2016 to May 16, 2016; and then, from the extensions requested by Petitioners, which extended the deadline for Protestants' cases-in-chief first to June 15, 2016 and then to September 1, 2016.

4. Exhibits do not need to be admitted prior to submission of Protestants' cases in chief

Some Protestants claim they cannot focus their attention because exhibits discussed in Part 1A have not been admitted or written objections have not been decided. However, the Hearing Officers have made clear that they expect Petitioners to offer their exhibits into evidence upon completion of their case-in-chief. (See Notice of Petition and Hearing (October 30, 2016), p. 35, Enclosure D at 10(b).) In addition, in the letter of July 22, 2016, the Hearing Officers further stated that it is consistent with the past practice of the Board in hearings to address evidentiary objections during the course of the hearing, or in a final order taking action on the petition. Therefore, whether exhibits have been admitted or written objections have been decided should not be used to support a request for extension.

B. The proposed extension will burden other parties.

Further extensions will burden other parties. All parties have been relying on the structure first set forth in the February 11, 2016 Ruling and the current deadlines that were set forth in the April 25, 2016 Ruling. DWR and others have made staffing commitments to review the cases-in-chief of the 74 Protestants when they are due on September 1, 2016, file objections by September 15, 2016, and be ready for the Part 1B hearing to start on October 20, 2016. In addition, the Board and Board staff will benefit

from having Protestants' cases-in-chief by September 1, 2016 to better understand Protestants' issues raised during cross examination prior to the start of Part 1B.

Protestants' proposals are unclear and a blatant attempt to gain further advantage from the Board's flexible hearing procedures. SVWU requested an extension for Part 1B cases-in-chief to October 3, 2016 and suggested that the Part 1B hearing could still start on October 20, 2016, because the Board took Protestants' objections under submission rather than ruling on them before the Part 1A hearing started. This argument ignores the prejudice to Petitioners from having to review 74 cases-in-chief to prepare for cross examination and evaluate whether to file objections all within 17 days. North Delta Cares suggested its proposed extension to October 16, 2016 would help ensure the protection of local and active public participation rights at Board Protest Hearings and the Part 1B case-in-chief deadline is "extremely restrictive due to the overall scope of cumulative hardship and social justice parameters outlined in detail in the RDEIR/SDEIS," even though it has been available since July 10, 2015. CDWA requested that Part 1B cases-in-chief be due 30 days after completion of Part 1A of the hearing, but did not mention other deadlines. SCDA joined CDWA's request, then made two proposals.

First, even though Petitioners' deadline for objections would fall after the start of the Part 1B hearing, SCDA asserts that Petitioners would not be prejudiced by this, because the Hearing Officers elected not to rule on written objections submitted by Protestants. The jumps in this logical chain are simply too large to make. In their July 22, 2016 Ruling, the Hearing Officers indicated that after reviewing the grounds stated in the Protestants' objections, it was not necessary to rule on them before the hearing began, because the evidence had not yet been offered into the evidentiary record. The grounds for Petitioners' objections, if any, will almost certainly be different from the grounds stated for Protestants' objections. The Hearing Officers may need to rule on them before Part 1B of the hearing starts. It would prejudice Petitioners significantly if the Part 1B hearing were to begin before Petitioners have the opportunity to challenge Protestants' testimony and exhibits.

Second, SCDA states that if it is necessary to delay the start of the Part 1B hearing, all the other Part 1 deadlines could be pushed back as well. To understand this proposal, some hypothetical dates need to be set out. Although uncertain, it appears that Part 1A of the hearings will finish around the end of September. This means Part 1B cases-in-chief would be due at the end of October. Then, applying the same schedule from the February 11, 2016 Ruling, the Part 1B hearings would start around December 5, 2016.

Again, delaying the start of the Part 1B hearing by up to 45 days would be inappropriate. It was not contemplated in the various hearing notices and rulings that Protestants would finish cross examining Petitioners' witnesses and incorporate the results of their fishing expeditions prior to submission of their cases-in-chief, nor is it the usual practice in water rights hearings. It would also be inappropriate because Protestants already benefited from the extensions granted to Petitioners and the proposed extensions would prejudice Petitioners and other parties.

C. The requests are untimely.

Part 1 procedural issues, especially with respect to the schedule, should already have been raised and resolved before the hearing began on July 26, 2016. The hearing officers conducted a pre-hearing conference to discuss procedural issues on January 28, 2016, more than six months ago. The hearing officers then set March 15, 2016 as the deadline for procedural/evidentiary objections, later extended the deadline to April 15, 2016 and then to June 15, 2016, and ultimately extended the deadline to July 12, 2016.

Protestants' cases-in-chief were originally due on March 1, 2016 and they have known since April 25, 2016 that they would be due on September 1, 2016. They have also known since February 11, 2016 that they would have 76 days to prepare their cases-in-chief after they received Petitioners' case-in-chief. However, in the April 25, 2016 ruling, the Board granted 93 days, an 17 additional days, between the due date for Petitioners' case-in-chief and Part 1B cases-in-chief. Also, based on the information in

the February 11, 2016 Ruling and the October 30, 2015 Hearing Notice, they have been aware that their cases-in-chief would be due before the Part 1A hearing was complete. There has been no new information presented as the basis for Petitioners' part 1A case-in-chief since the May 31, 2016 deadline on which these timeframes are premised. To the extent Protestants are arguing the submittal of the BA is new information for part 1A, they are mistaken. First, the draft BA, which contains much of the same information, has been available since January. Second, matters in the BA are properly before the Board in part 2, which is precisely the reason the Board has bifurcated these hearings into parts. Thus, there is no logical argument to support the request for extension.

Further, Protestants submitted objections to DWR's case-in-chief, but did not include any objections to the schedule at that time. Protestants had ample opportunity to make these motions earlier and have provided no justification for their failure to do so.

CONCLUSION

DWR respectfully requests that the Hearing Officers deny these and any other requests for extensions of the deadline for Part 1B cases-in-chief, because they are untimely, unwarranted, and would prejudice Petitioners and other parties.

Dated: August 15, 2016

CALIFORNIA DEPARTMENT OF WATER RESOURCES

James E. Mizell
Office of the Chief Counsel

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):

CALIFORNIA DEPARTMENT OF WATER RESOURCES' RESPONSE TO REQUESTS FOR EXTENSIONS OF THE DEADLINE FOR PART 1B CASES-IN-CHIEF

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated August 8, 2016, posted by the State Water Resources Control Board at
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

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.

For Petitioners Only:

	I caused a true and correct **hard copy** of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818: **Method of Service:** U.S. Postal

I certify that the foregoing is true and correct and that this document was executed on August 15, 2016
Date

Signature: [signature]

Name: Valentina German

Title: Legal Analyst

Party/Affiliation: DWR

Address: 1416 Ninth Street 1104
Sacramento, CA 95814