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## State Water Resources Control Board

June 10, 2016

### VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST AND INTERESTED PERSONS LIST](#)

### **DEADLINE EXTENSION REQUESTS, POLICY STATEMENTS, FORMAT OF PETITIONERS' CASE-IN-CHIEF, PARTIES' PARTICIPATION, AND OTHER PROCEDURAL MATTERS**

This ruling addresses deadlines and clarifies certain issues concerning the parties' participation in the State Water Resources Control Board (State Water Board) hearing on the joint water right change petition (petition) filed by the Department of Water Resources and the U.S. Department of Interior (collectively petitioners) for the California WaterFix Project (WaterFix). More specifically, this ruling addresses: requests to extend hearing deadlines and delay the hearing; issues pertaining to policy statements; petitioners' proposal for the organization and presentation of their case-in-chief; a request to modify a party's participation; a request to add a party; the use of staff exhibits; and other procedural matters.

### **Requests for Extension of Time for Procedural or Evidentiary Objections and Delay of the Hearing**

On June 1, 2016, AquAlliance, California Sportfishing Protection Alliance, Environmental Justice Coalition for Water, Environmental Water Caucus, Friends of the River, Planning and Conservation League, Restore the Delta, and Sierra Club California (AquAlliance et al.) submitted a letter requesting that the deadline to submit procedural or evidentiary objections concerning the petitioners' case-in-chief be extended from June 15, 2016, to July 12, 2016, a 27-day extension. AquAlliance et al. contend that they need more time to review the large volume of exhibits submitted by petitioners, as well as modeling data that petitioners recently made available, and formulate any appropriate objections. Following AquAlliance et al.'s request, several other parties also requested a 27-day extension of time to submit procedural or evidentiary objections.<sup>1</sup>

On June 2, 2016, Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources (PCFFA and IFR) submitted a letter requesting a two-month extension for all

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<sup>1</sup> The County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority submitted a letter on June 2, 2016. Islands Inc. and Local Agencies of the North Delta, Bogle Vineyards, Diablo Vineyards and Brad Lange, Elliot-Stillwater Orchards, Delta Watershed Landowner Coalition, and Friends of Stone Lakes National Wildlife Refuge (Local Agencies of the North Delta et al.) submitted letters on June 6, 2016.

hearing deadlines and a two-month delay in the start of the hearing. On June 3, 2016, South Delta Water Agency, Central Delta Water Agency et al., and North Delta CARES submitted similar requests, as did Ms. Deirdre Des Jardins on June 9, 2016.

The petitioners submitted a letter on June 3, 2016, opposing other parties' requests to extend the deadlines for the hearing. The petitioners state that time extensions are not needed because they submitted "concise testimony (133 pages for a total of 8 lead witnesses)" and a majority of submitted testimony and exhibits have been publicly available since February 2016. The State Water Board received additional comments in opposition to the petitioners' response from AquAlliance et al., PCFFA and IFR and Mr. Patrick Porgans. The above letters and other information regarding the hearing are available on the State Water Board's WaterFix [website](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/water_right_petition.shtml) at: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/water\\_right\\_petition.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/water_right_petition.shtml).

The parties' request to extend the deadline to submit procedural or evidentiary objections by 27 days is warranted and is accordingly hereby granted. In addition, this ruling hereby relaxes the requirement so that only objections that, if valid, would preclude petitioners' witnesses from testifying must be submitted by the extended deadline. **At a minimum, any motions to disqualify any of petitioners' witnesses, or to exclude a witness's testimony, in whole or in part, must be filed and served on petitioners and the other parties by 12:00 noon on July 12, 2016.** The parties are strongly encouraged, but not required, to submit any other procedural or evidentiary objections by the July 12, 2016 deadline. For example, objections concerning petitioners' exhibits, or objections that go to the weight that should be afforded petitioners' testimony or exhibits, but not their admissibility, may be made after the July 12, 2016 deadline, although we would prefer to receive all objections in writing by 12:00 noon July 12, 2016.

For the reasons stated in petitioners' opposition letter, additional time beyond the 27-day extension to review petitioners' testimony and exhibits is not warranted. Many parties stated that they need more time to review the modeling data provided by the petitioners on May 25, 2016. Any procedural or evidentiary objections at this stage of the hearing, however, should concern petitioners' testimony or exhibits, and petitioners have not submitted the May 25 modeling data as an exhibit. For these reasons, the requests to extend all hearing deadlines by two months, and to delay the beginning of the hearing, are denied.

Extending the deadline for procedural or evidentiary objections to July 12, 2016, will reduce the amount of time that petitioners have to respond to objections and the amount of time that the hearing officers have to rule on them before the hearing. As such, the parties are advised that written rulings may not be issued before the hearing begins on any procedural or evidentiary objections that have been submitted before the hearing. Consistent with past practice in hearings before the State Water Board, some objections may be addressed orally in the course of the hearing or in the final order taking action on the petition.

**Please note that the deadline to submit proposed groupings and order of parties for cross-examination in Part 1A is still 12:00 noon, June 15, 2016.** All other hearing deadlines stated in the [April 25, 2016 ruling letter](#) also remain unchanged.

### **Requests by Petitioners and Parties to Make Policy Statements and Opening Statements**

Some parties, including the petitioners, have indicated in their notices of intent to appear (NOIs) that they intend to make policy statements and present cases-in-chief. The petitioners specifically indicated in their May 31, 2016 letter submitted with their case-in-chief that they intend to make several 20-minute policy statements. Petitioners also requested confirmation that representatives from the Natural Resources Agency and the Department of Interior could present policy statements at the beginning of the hearing.

The [March 4, 2016 ruling letter](#) indicated that parties to the hearing should not make policy statements, but should instead incorporate their policy-related comments into their opening statements. The ruling also established a three-minute limit for policy statements, subject to adjustment by the hearing officers depending on the number of presenters. The ruling did not establish a limit on written policy statements. The purpose of these limits is to ensure an efficient hearing while allowing members of the public at large a chance to provide input on the hearing process.

In order to provide some flexibility for hearing party representatives to make policy comments, petitioners and other parties will be permitted to make policy statements. However, in order to maintain an efficient hearing, policy statements by party representatives will still be limited to three minutes per speaker, and the time a party spends on policy statements will be deducted from the 20 minutes afforded to each party to present an opening statement. **So that the hearing team can keep track of time limits, all parties who wish to present policy statements in addition to opening statements must advise hearing team staff in writing by July 12, 2016, if they have not already done so.** The order of speakers making policy statements will be determined at the beginning of the hearing depending on the elected officials present and any scheduling issues that the participants may have.

### **Proposal to Present All of Petitioners' Direct Testimony Before Witnesses Are Subject to Cross-Examination**

In their May 31, 2016 letter, the petitioners proposed to present the direct testimony from all of their witnesses prior to cross-examination by other parties. Petitioners proposed to present direct testimony from eight lead expert witnesses covering five subject areas: project overview, engineering project description of the new facility, operations, hydrodynamic modeling, and water rights. After summarizing all of their direct testimony, petitioners propose that the lead witness and the secondary witnesses for each subject area be subject to cross-examination as a panel. Petitioners maintain that this proposal will be efficient and facilitate a better understanding of the evidence. The hearing team believes, however, that greater continuity and understanding of the information presented will be achieved if the lead and secondary witnesses covering each subject area are subject to cross-examination as a panel immediately after they summarize their direct testimony concerning the subject area. Accordingly, petitioners' proposal for the organization and presentation of their case-in-chief is approved, except that cross-examination of the witnesses covering each subject area will begin immediately after the lead witnesses summarize their direct testimony on that subject.

### **Save the California Delta Alliance's Request to Add a Party, Amend their Protest, and Amend their NOI**

On March 16, 2016, Save the California Delta Alliance, Janet McCleary, Michael McCleary, and Captain Morgan's Delta Adventures, LLC (Delta Alliance) requested to add Mr. Michael Brodsky as a party to Delta Alliance's Protest. In addition to adding Mr. Brodsky as a protestant, Delta Alliance also sought to amend its protest to allege injury to legal users of water within the meaning of Water Code section 1702 as additional grounds for the protest. The original protest alleged that the WaterFix petition would not be in the public interest, would be contrary to law, and would have an adverse environmental impact. Delta Alliance has also submitted an amended NOI, seeking similar changes to Delta Alliance's participation in Part 1B of the hearing. Delta Alliance's original NOI indicated that Delta Alliance intended to participate in Part 1 of the hearing by presenting a policy statement only, and to participate in Part 2 as a party by calling witnesses. Delta Alliance's amended NOI lists five witnesses, including Mr. Brodsky. The subject of their proposed testimony includes injury to human uses of water and legal users of water. The amended NOI also lists two witnesses "TBD" who would testify concerning water quality in the Delta. In support of its request, Delta Alliance noted that the Metropolitan Water District of Southern California (MWD) had made a similar request to become a party, and Delta Alliance argued that granting its request would not delay the hearing or prejudice any other party.

The March 4, 2016 ruling letter denied MWD's request to participate as a party because MWD had not provided an adequate justification for its failure to submit an NOI by the original deadline (January 5, 2016) indicating MWD's intent to participate as a party. The ruling stated that the hearing officers agreed with MWD's assertion that its participation was unlikely to significantly delay the hearing, but pointed out that if MWD's request were granted, other people or entities were likely to seek to participate as parties or add witnesses, which could delay the hearing significantly. Delta Alliance's request to add Mr. Brodsky as a party is also denied because Delta Alliance has not provided an adequate justification for Mr. Brodsky's failure to submit a NOI by the original deadline indicating his intent to appear and participate in the hearing as a party.

In addition, Delta Alliance's request to amend its protest to allege injury to legal users of water and to expand the scope of its participation in the hearing to present testimony in support of this allegation is denied. The March 4, 2016 ruling allowed parties participating in Part 2 of the hearing to submit a revised NOI by March 16, 2016, if they wished to present testimony on impacts to human uses, such as flood control or environmental justice issues, during Part 1 of the hearing instead of Part 2. The ruling did not authorize parties to add new witnesses or to expand the scope of proposed testimony described in their original NOI's to address the issue of whether the changes proposed in the WaterFix petition would cause injury to other legal users of water. Moreover, Delta Alliance has not shown adequate justification for its failure to indicate on its original NOI that it plans to participate in Part 1 of the hearing by calling witnesses to testify on the issue of injury to legal users of water.<sup>2</sup>

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<sup>2</sup> For more information concerning the distinction between impacts to human uses of water and injury to legal users within the meaning of Water Code section 1702, please see pages 5-6 of the March 4, 2016 ruling letter.

### **Labeling Opening Statements as Exhibits**

The U.S. Department of the Interior listed its opening statement as an exhibit. Opening statements are not evidence in their own right, but rather a summary of what the party's evidence is intended to establish. Accordingly, parties should not label their opening statements as exhibits or include them in their exhibit identification index.

### **Staff Exhibits By Reference (The Hearing Team Will Not Offer Staff Exhibits Into Evidence)**

As stated in previous rulings, hearing team staff do not currently propose to offer the [staff exhibits](#) posted on the State Water Board's WaterFix hearing website into evidence at the hearing (although staff may introduce exhibits if strictly necessary). Staff exhibits were compiled by hearing team staff as a convenience to the parties participating in the WaterFix hearing. In the interest of efficiency, these exhibits have been marked for identification so parties can offer them into evidence as exhibits by reference, rather than having multiple parties uploading and serving large duplicative files on the other parties. Testimony submitted by the petitioners on May 31, 2016, includes references to staff exhibits, but petitioners did not list these exhibits in their exhibit identification indexes. If the petitioners or other parties wish to enter a staff exhibit into evidence, they need to clearly identify that exhibit on their exhibit identification index and offer it into evidence at the hearing. **If petitioners propose to offer staff exhibits into evidence as part of their case-in-chief, they must submit revised exhibit identification indexes by June 22, 2016.**

In addition, modeling updates provided to the State Water Board by petitioners on May 25, 2016, are not listed as an exhibit on either of the petitioners' May 31, 2016 exhibit identification indexes. For ease of reference, the modeling updates will be marked for identification as "SWRCB-104" but will not be entered into evidence unless a party proposes to do so.

### **Statement of Service Certification**

As directed in the March 4, 2016 ruling, the petitioners and all other parties are instructed to include a Statement of Service Certification form with all hearing submittals indicating service of the submittal on the other hearing parties. To date, parties have not been consistently submitting Statement of Service forms with their electronic and hard copy submittals. Please be sure to submit this form with all communications to the State Water Board. The Statement of Service form can be found [here](#):

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/docs/20160311\\_stateservform.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20160311_stateservform.pdf).

### **Ex Parte Communications**

Please remember that ex-parte communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Parties must provide a copy of any correspondence to the hearing team concerning substantive or controversial procedural issues to all of the parties listed in Table 1 of the service list located [here](#): [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml). Any such correspondence must also be accompanied by a Statement of Service form.

If you have any non-controversial procedural questions regarding this letter, such as finding content on our website, please contact the hearing team at [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov) or (916) 319-0960. All issues concerning the merits of the key hearing issues, or requests or motions that are likely to be opposed by another party, should be copied to the Service List. All requests and motions have been or will be posted on the State Water Board's [website](#).

Sincerely,

*ORIGINAL SIGNED BY*

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