
State Water Resources Control Board

July 22, 2016

VIA ELECTRONIC MAIL

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

CALIFORNIA WATERFIX HEARING - EVIDENTIARY OBJECTIONS AND OTHER PROCEDURAL MATTERS

This letter responds to evidentiary objections received in the hearing on the joint water right change petition (petition) filed by the Department of Water Resources (DWR) and the U.S. Department of Interior (collectively petitioners) for the California WaterFix Project. In our ruling dated June 10, 2016, we extended the deadline for motions to disqualify any of petitioners' witnesses in part 1A of the hearing, or to exclude a witness's testimony, in whole or in part, until July 12, 2016. Parties were also encouraged, but not required, to submit any other procedural or evidentiary objections by the July 12, 2016 deadline. This included objections concerning petitioners' exhibits, or objections that go to the weight that should be afforded petitioners' testimony or exhibits, but not their admissibility. Given the limited amount of time, we advised the parties that written rulings on any objections might not be issued before the hearing begins.

We received numerous objections by the extended deadline. Many of the parties objected to petitioners' written testimony and exhibits that are based on computer modeling for the California WaterFix project. In addition, many parties objected to testimony concerning legal issues or documents. Several parties also objected on the grounds that petitioners have not provided adequate information concerning proposed project operations. In addition, several parties objected to the testimony of DWR's secondary witnesses. DWR submitted a master response to similar objections on July 20, 2016.

We appreciate the parties' timely written submittals. Upon review, and with the exception of specific issues discussed below, we have determined that it is not necessary to rule on the objections at this time. It is not necessary to rule on some of the objections before petitioners present their case in chief, including cross-examination, any re-direct examination, and any re-cross examination. We have not accepted petitioners' exhibits into the record yet, and 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).) Consistent with past practice in hearings before the State Water Resources Control Board (State Water Board), some objections may be addressed orally in the course of the hearing, when petitioners move to enter their testimony and exhibits into the record after their case in chief, or in the final order taking action on the petition.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

Adequacy of Project Description

In our February 11, 2016 ruling, we agreed to stagger the order of submittals, requiring petitioners to present their cases in chief first (Part 1A of the hearing) and allowing other parties to submit the written testimony and exhibits for their cases in chief at a subsequent date (Part 1B of the hearing). The purpose of this arrangement was to allow petitioners to describe the proposed project in a more succinct and accessible format to the extent possible, and gave the other parties additional time to review and prepare their own submittals. While 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 meaningfully participate in Part 1 of the hearing.

We recognize that petitioners bear the burden of establishing that the proposed changes will not injure other legal users of water. As we stated in our February ruling, however, not all uncertainties can or need to be resolved before beginning the hearing. In fact, the purpose of this hearing is to resolve some of the issues concerning how the proposed project would be operated. At this point, any remaining uncertainty concerning the proposed project and its effects should be raised in the hearing process, including but not limited to cross-examination, and the protestants' cases in chief.

Objections to Testimony of DWR's Secondary Witnesses

On direct, petitioners propose to present eight lead expert witnesses to cover five subject areas. These lead witnesses and additional secondary witnesses that assisted with the direct testimony will then be made available for cross-examination. DWR has submitted minimal written, direct testimony for the secondary witnesses. A number of parties objected to and moved to disqualify petitioners' secondary witnesses because they had not submitted their testimony in advance of the hearing. These arguments appear to result from a misunderstanding of petitioners' proposed process for presenting their case in chief.

All parties are encouraged to present direct testimony in a succinct and organized manner, and petitioners' approach is acceptable. The parties are correct that State Water Board policy discourages the introduction of surprise testimony and exhibits. (Cal. Code Regs., tit. 23, § 648.4, subd. (a).) Accordingly, the Hearing Notice provides that all direct testimony must be submitted in advance of the hearing. On direct, witnesses may not testify outside the scope of their written testimony. DWR has not given any indication, however, that it intends to have its secondary witnesses present any additional direct testimony, and we will not permit them to do so. Moreover, making the secondary witnesses available for cross-examination should serve to improve the hearing record. During cross-examination, parties may ask questions of witnesses on any relevant matter, even if it was not covered in the direct testimony. (Gov. Code, § 11513, subd. (b).) Given the scope and complexity of the subject matter, it is not unreasonable that multiple individuals have participated in the development of evidence and these individuals should be made available to answer any questions the other parties may have regarding that evidence.

Objections Based on Issues Already Decided

In their objections, a number of parties raised issues that we addressed following the pre-hearing conference concerning the timing of this hearing relative to other regulatory processes, including environmental review under the California Environmental Quality Act and the National

Environmental Policy Act , compliance with the federal Endangered Species Act and the California Endangered Species Act , and the pending update to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary These arguments have been reviewed and considered and addressed in our February 11 ruling, and will not be reexamined.

Some parties raised new arguments concerning the timing of the hearing based on the Sacramento County Superior Court's recent ruling setting aside the Delta Plan developed by the Delta Stewardship Council pursuant to the Delta Reform Act. (*Delta Stewardship Council Cases*, JCCP No. 4758.) Nothing in the superior court's ruling, however, alters our previous statements concerning the State Water Board's compliance with the Delta Reform Act. The Delta Reform Act requires that any order approving the water right change petition for the WaterFix Project must include "appropriate Delta flow criteria." Those flow criteria must be informed by flow criteria to protect the Delta ecosystem, which the State Water Board developed in 2010. As set forth in the hearing notice, what constitutes "appropriate Delta flow criteria" is key hearing issue number 3.d., which will be considered during Part 2 of the hearing. The State Water Board is not required to certify that action on the petition complies with the Delta Stewardship Council's Delta Plan. (Wat. Code, § 85057.5, subd. (b)(1) [exempting a regulatory action of a state agency from the definition of a "covered action" that requires certification of compliance with the Delta Plan.; see also Wat. Code, §§ 85031, subd. (c) & 85320, subd. (g).)

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. Any such correspondence must also be accompanied by a Statement of Service form.

If you have questions regarding this letter, please contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.

Sincerely,

ORIGINAL SIGNED BY

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

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