
State Water Resources Control Board

December 19, 2016

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING ON SUBMITTAL DEADLINES, REBUTTAL PROCESS, AND SCHEDULING

Deadlines for Outstanding Exhibits, Objections to Evidence, and Responses to Objections

Some parties have introduced exhibits during cross-examination that were not submitted as part of any party's case-in-chief. Although the parties are not required to offer these exhibits into evidence by virtue of the fact that they were introduced during cross-examination, the parties may elect to offer such exhibits into evidence, and some parties have already done so. To the extent that they have not, the deadline for all Part 1 parties who wish to enter exhibits into the record that they used for cross-examination of other parties' witnesses is **Noon, December 21, 2016.**

Motions to disqualify witnesses or to exclude a witness's testimony, in whole or in part, were due by July 12, 2016, for Part 1A of the hearing and by September 21, 2016, for Part 1B. The deadline for Part 1 parties to submit any other objections to testimony or exhibits that have been offered into evidence, including exhibits that were introduced during cross-examination, is **Noon, December 30, 2016.** Objections that seek to disqualify a witness or to exclude a witness's testimony, in whole or in part, will not be accepted unless they are based on new information that was presented during cross-examination.

Before each party's presentation of a case-in-chief, the party was required to file any responses to any outstanding objections to the party's testimony or exhibits. The deadline for each party to submit responses to any additional objections to the party's testimony or exhibits that were filed during or after presentation of the party's case-in-chief is **Noon, January 6, 2017.**

Written Rebuttal and Deadlines

Thank you to all the parties who submitted thoughtful recommendations on the structure of rebuttal testimony and closing briefs. We have considered the recommendations and are providing the general schedule for planning purposes.

We will require parties to submit written rebuttal testimony and exhibits in advance of hearing rebuttal testimony and conducting cross-examination. Parties who presented a case-in-chief in Part 1 of the hearing or who indicated their intent to participate through cross-examination and/or rebuttal in their Notice of Intent to Appear will be permitted to present rebuttal evidence. As a general reminder, rebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party's case-in-chief, and it does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence. It also does not include repetitive evidence. Cross-examination of rebuttal evidence will be limited to the scope of the rebuttal evidence.

Mr. John Herrick, attorney for South Delta Water Agency, Central Delta Water Agency, and other protestants, suggested that we hold a conference in early January 2017 to address any questions concerning the scope of rebuttal testimony. Rather than addressing issues of scope in the abstract, however, we prefer to wait until written rebuttal testimony has been submitted before addressing any objections to the testimony on the grounds that it exceeds the proper scope of rebuttal.

Because all of the cases-in-chief for Part 1 of the hearing will be complete before the parties present rebuttal, we will establish the same deadline for all the parties to submit written rebuttal testimony and exhibits. The deadline will be approximately 30 days following our ruling on admissibility of Part 1 evidence. This ruling is anticipated for release in late January or early February 2017, depending on the number and complexity of any additional objections we receive. The rebuttal deadline will be provided with issuance of the ruling.

Schedule of Rebuttal

Parties will have 30 days to review the written rebuttal testimony prior to the beginning of presentation of rebuttal evidence. A hearing schedule for presentation of rebuttal evidence will be issued in the future.

File Transfer Protocol (FTP) Use for Rebuttal Exhibits

The FTP site will be available to provide service of written rebuttal testimony. After the conclusion of all cases-in-chief in Part 1B and prior to the deadline for written rebuttal, all files in the FTP folders will be removed and the individual party folders will no longer be viewable in the shared FTP account. This will allow parties to upload their written rebuttal in advance of the rebuttal deadline in the same manner as case-in-chief exhibits. Parties will receive advance notification of these changes in the future.

For additional information regarding the FTP website please review the [March 4, 2016 ruling](#) which is available on the project webpage:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/cwf_final_030416_ruling.pdf

For any questions or concerns regarding FTP login issues, please contact the hearing team at CWFHearing@waterboards.ca.gov.

Order of Presentation and Groupings

The order of presentation of rebuttal evidence will generally proceed in the same order as Part 1 beginning with the petitioners (groups 1 and 2) and proceeding in ascending group order number.¹ This order of presentation is consistent with our usual adjudicative hearing practice. We are not persuaded by the argument that we should deviate from our normal practice and change the order of proceeding to allow the petitioners to have the “final word” because they bear the burden of proof. As stated above, rebuttal should be responsive to the other parties’ cases in chief, not the other parties’ rebuttal evidence. Accordingly, no compelling reason exists to change the order of presentation of rebuttal.

Grouping among parties is highly encouraged. Given that all current Part 1 parties may present pertinent rebuttal testimony, coordination among various parties may change. Parties must notify the hearing team and other parties of groupings by noon, two weeks after the written rebuttal evidence deadline.

We would like to reiterate our appreciation for the efforts of all the parties who were prepared to present their cases in chief in the posted order, or were able to work with other parties to go out of order for presentation of cases-in-chief. Coordinating this many schedules is a challenge, and we appreciate parties’ cooperation. We would also like to reiterate that during rebuttal and in subsequent phases of the hearing, parties will be required to present their testimony when their party is called in the posted order; or coordinate with another party to take their place. Any party who proposes to change the order of presentation must provide a written request to the hearing team and service list at least three hearing days in advance of the proposed substitution.

In the future, we will NOT accept any notices of unavailability from parties with scheduling conflicts that could have been anticipated and avoided, or parties who provide late notice of scheduling conflicts and do not make their best efforts to arrange a change in the order of presentation so the hearing can proceed without interruption.

Sur-Rebuttal

Sur-rebuttal testimony is responsive to evidence submitted during rebuttal. At this point, it is unclear whether sur-rebuttal will be warranted. We will determine whether to allow sur-rebuttal after receiving rebuttal testimony and exhibits.

Additional Hearing Rooms

Due to limited availability of hearing rooms in the Joe Serna Jr., CalEPA Building, the State Water Resources Control Board (State Water Board) is exploring the use of Sacramento City Hall, which is adjacent to the CalEPA Building. Alternative locations such as the auditorium of the Central Valley Regional Water Quality Control Board in Rancho Cordova could also be used as a possible venue. We will provide notice of the hearing dates and location in the future.

¹ The group order can be found on the following webpage:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/noi_protests/

Request to Establish Separate Hearing Part for Presentation of Terms and Conditions and Supporting Evidence

In a letter dated December 5, 2016, a number of protestants represented by Downey Brand LLP submitted a request that submittal of proposed permit conditions and any necessary supporting evidence occur exclusively after the conclusion of Part 2 in what they referred to as "Part 3" of this proceeding. Granting this request would conflict with our previous direction to the parties encouraging early submittal of this information and could delay the hearing process unnecessarily. Consistent with our prior direction, parties are encouraged to submit proposed permit terms and conditions and supporting evidence as part of their rebuttal testimony or, as appropriate, during Part 2 of the hearing. We may revisit the need for a subsequent part of the hearing to allow the parties another opportunity to submit proposed terms and conditions at a future date.

Closing Briefs

We are inclined to allow closing briefs for Part 1. Closing briefs for Part 1, if allowed, will be optional. To the extent that they have not already done so, the parties are invited to identify and submit to the Hearing Team and serve on each of the parties by **Noon, January 31, 2017**, a concise statement of issues (maximum of 10 pages) that the parties would like to address in Part 1 closing briefs with an explanation why each of the issues is more appropriately briefed at the conclusion of Part 1 rather than Part 2. After receipt and consideration of these submittals, we will notify the parties as to any issues to be briefed, page limitations, and deadlines for submittal.

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