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## State Water Resources Control Board

April 13, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

### **CALIFORNIA WATERFIX HEARING – RULING REGARDING REBUTTAL PHASE OF PART 1**

This ruling addresses the following issues pertaining to the Part 1 rebuttal phase of the water right change petition hearing for the California WaterFix Project: (1) admissibility of written rebuttal testimony, (2) location changes for certain hearing dates, (3) order of presentation for rebuttal testimony, (4) time limits for rebuttal testimony and cross-examination, (5) sur-rebuttal, and (6) changes to the hearing team.

#### **Inadmissible Rebuttal Testimony**

In accordance with our March 15, 2017 ruling, we have reviewed written rebuttal testimony and determined that most of what has been submitted appears to be within the scope of Part 1 of the hearing, responsive to another party's case-in-chief, and sufficiently reliable to be admissible. As explained in greater detail below, however, part of the testimony of some witnesses is not admissible because it either addresses issues outside the scope of Part 1 or is not clearly responsive to another party's case-in-chief. The written rebuttal of those witnesses must be revised in accordance with this ruling to be admissible.

#### American River Water Agencies

We appreciate the American River Water Agencies' (ARWA) attempt to comply with our direction to bifurcate the presentation of evidence supporting their proposed permit terms consistent with the scopes of Parts 1 and 2 of the hearing. A few statements contained in the rebuttal testimony of James Peifer and Tom Gohring, however, are outside the scope of Part 1. Specifically, paragraph 4 of Mr. Peifer's testimony (CITYSAC-35) should be revised to eliminate the assertion concerning the effect of low flow conditions in the lower American River on fish. Similarly, parts of Mr. Gohring's testimony (ARWA-300) in paragraphs 17, 18, and 20 concerning the effects of low storage levels in Folsom Reservoir on fisheries in the lower American River should be withdrawn and resubmitted in Part 2. Other statements in Mr. Gohring's testimony that mention fishery concerns as part of his description of the development and co-equal objectives of the Modified Flow Management Standard constitute acceptable background information.

#### San Joaquin County et al.

The rebuttal testimony of Marc Del Piero (SJC-76), submitted on behalf of San Joaquin County and a number of other parties, including the California Sportfishing Protection Alliance (CSPA) and the Local Agencies of the North Delta (LAND), addresses several issues that are either

outside of the scope of Part 1 of the hearing, or outside the scope of the hearing altogether. These issues include: (1) failure of past efforts to protect public trust resources in the Sacramento-San Joaquin Delta (Delta), (2) effects of State Water Project (SWP) operations in general, and the California WaterFix Project in particular, on public trust resources, and (3) failure to enforce various environmental laws that “assist in the equitable distribution of water ...” To the extent that these issues are relevant to the potential effects of the California WaterFix Project on fish, wildlife, or recreational uses of water, the testimony may be presented in Part 2.

Mr. Del Piero’s testimony concerning the requirements of a water availability analysis is outside the scope of the hearing. Although one of the key hearing issues for Part 1 is whether the proposed changes would initiate a new right, that issue does not extend to what would be required to support an application for a new water right permit if a new water right permit were required for the California WaterFix Project.

#### Snug Harbor Resorts, LLC

Nicole S. Suard’s written rebuttal testimony (SJRrebuttal3-23-17) contains some testimony that is not relevant to the key hearing issues, including Ms. Suard’s opinion that administration of the drinking water program conflicts with consideration of the WaterFix Project and Ms. Suard’s opinions regarding water exports and transfers in general. In addition, Ms. Suard’s testimony concerning our decision not to admit one of Snug Harbor Resorts’ exhibits into evidence is not responsive to another party’s case-in-chief, and therefore is not proper rebuttal testimony.

#### Patrick Porgans

Patrick Porgans’ written rebuttal testimony (PORGANS EXHIBIT-300) is very difficult to follow, and significant portions of his testimony do not appear to be relevant to the key hearing issues in Part 1 of the hearing or responsive to another party’s case-in-chief. Only Mr. Porgans’ testimony concerning SWP and Central Valley Project (CVP) compliance with Delta water quality standards and a small portion of his testimony concerning the issue of whether the proposed changes would initiate a new water right appear to be admissible rebuttal testimony.

We appreciate Mr. Porgans’ good faith efforts to comply with hearing requirements, but in spite of those efforts, his testimony does not comply with procedural requirements. Accordingly, we are directing our staff to review Mr. Porgans’ written rebuttal testimony to exclude all but the testimony concerning SWP and CVP compliance with Delta water quality requirements and the testimony on page 10, lines 13-14. Staff will provide the admissible testimony to Mr. Porgans and the other parties by the deadline set forth below. We will expect Mr. Porgans to limit the oral summary of his rebuttal testimony to the admissible testimony. Staff will also advise Mr. Porgans and the other parties which rebuttal exhibits do not appear to be admissible because they are associated with excluded rebuttal testimony.

ARWA, the City of Sacramento, San Joaquin County et al., and Snug Harbor Resorts are directed to revise the testimony identified above to eliminate the subject areas that are outside the scope of Part 1 or are not responsive to another party’s case-in-chief. The parties should also review their exhibits and withdraw any exhibits associated with testimony that is deleted.

**Revised, written testimony must be submitted no later than noon on April 19, 2017.**

Deletions must be shown in strike-through and any non-substantive additions must be underlined. No testimony may be added.

Consistent with our March 15, 2017 ruling, any objections to the admissibility of rebuttal testimony that we have not addressed, and any objections to the admissibility of rebuttal exhibits, must be made, orally or in writing, during the hearing when the testimony and exhibits are offered into evidence, or earlier. Parties should review our March 15, 2017 ruling (pp. 2-4) for additional instructions regarding objections to rebuttal testimony and what types of objections are appropriate in State Water Resources Control Board (State Water Board) proceedings.

### **Changes to the Hearing Schedule and Room Locations**

A revised Attachment A, with the rebuttal hearing date schedule and room locations, is attached. Changes from the schedule included with our February 21, 2017 ruling are shown in red strikeout and underline. All rebuttal hearing dates will now be held at the Joe Serna Jr. – CalEPA Building. In addition, please note that we will not conduct the hearing on April 26, May 31, and June 28 - 30, 2017.

### **Order of Rebuttal and Cross-Examination**

Consistent with our prior rulings, we will not accept notices of unavailability from parties. Parties should be ready to present their rebuttal testimony and exhibits when they are called. If a party cannot present on a particular day, it is that party's responsibility to coordinate with another party to take their place in line and give at least three days' notice to the hearing officers and the Service List. Proposals to present out of order are subject to approval by the hearing officers.

In a letter dated April 7, 2017, the Department of Water Resources and the U.S. Department of the Interior (collectively petitioners) stated that they will present their witnesses in three or four panels. The petitioners provided a list of witnesses to be included in the first panel, but requested flexibility to re-order the remaining panels depending on the availability of the witnesses. In their letter, petitioners listed dates on which their witnesses are unavailable.

While the petitioners may be able to present rebuttal testimony and make their witnesses available for cross-examination without delays in the hearing if we allow a witness to be moved from one panel to the next due to scheduling conflicts, the order of the witness panels and the witnesses included on each panel must be established in advance for the benefit of the parties preparing for cross-examination. By petitioners' own account during Part 1B, it is difficult for parties to prepare for cross-examination of witnesses without knowing the order of testimony in advance. (See R.T. [October 26, 2016] 6:11-7:2.)

Petitioners have known that they would be called first to present rebuttal testimony since our December 19, 2016 ruling and have known the hearing dates for rebuttal since our February 21, 2017 ruling. Petitioners' witnesses are therefore expected to appear when their panel is called. If a witness is not available for cross-examination when called, the witnesses' written testimony will not be accepted into evidence. Any proposal to appear out of order must be requested in advance and is subject to our approval. Based on the subject of the rebuttal testimony submitted, petitioners will present their witnesses in the order and as described in Attachment B.

Petitioners must notify the hearing team and Service List by **noon, April 19, 2017**, if they have any changes to the panels listed in Attachment B. Otherwise, we will proceed in the above order.

We received proposed grouping assignments with requests for order of presentation for joint rebuttal testimony from the following parties. Based on the information received, parties will generally present rebuttal in the order of their previously assigned group numbers, except for the changes described below. For consistency with Parts 1A and 1B, we will not assign new group numbers for rebuttal. See Attachment B for the order of presentation of rebuttal testimony. We will assume that parties who plan to call more than one witness but did not submit a proposed grouping will present their witnesses as a panel.

We approve the following requests to present joint rebuttal testimony, witness panels, and changes in group order:

- Sacramento Valley Water Users (SVWU) group of parties (Group 7) asked to present a shared witness panel consisting of witnesses Walter Bourez (SVWU-200) and Dan Easton (SVWU-203), followed by any additional witnesses on behalf of specific members of the SVWU;
- ARWA (Group 7) asked to present a single witness panel consisting of Keith Durkin (SJWD-17), James Peifer (CITYSAC-35), Marcus Yasutake (Folsom-28), Tom Gohring (ARWA-300) and Jeff Weaver (ARWA-400) after other Group 7 panel(s) that will address issues concerning the Sacramento Valley more broadly;
- North Delta Water Agency and Member Districts (NDWA or Group 9) asked to present a witness panel consisting of witnesses Gary Kienlen (NDWA-300) and Shankar Parvathinathan (NDWA-301);
- City of Stockton (Group 22) and City of Antioch (Group 27) asked to present rebuttal on the same day because they are calling the same witness, Dr. Susan Paulsen; and
- County of San Joaquin, et al. (Group 24) asked to present a witness panel shared with CSPA et al. (Group 31) and LAND et al. (Group 19) in Group 31's spot in the order of presentation of rebuttal. The panel consists of witnesses Marc Del Piero (SJC-76) and Brandon Nakagawa (SJC-70).

On March 28, 2017 we received a letter from NDWA requesting Department of Water Resources (DWR) staff to appear as rebuttal witnesses for NDWA and bring relevant documents. On April 12, 2017, DWR sent us a motion for protective order based on NDWA's notice requesting witnesses and production of documents. This issue remains pending and we will not rule on this matter at this time.

Parties will conduct cross-examination in the same sequence as in Part 1. Prior to requesting a change in the order of cross-examination, parties must arrange with another party to take their place in line so that other parties are not affected. Proposals to cross-examine out of order are subject to approval by the hearing officers.

### **Time Limits**

Parties are encouraged to be efficient in presenting their rebuttal and in conducting cross-examination. Each rebuttal witness will be allowed up to 15 minutes to summarize his or her written testimony, subject to extension for good cause. With the exception of Dr. Paulsen, who submitted different testimony on behalf of two different parties, witnesses representing more

than one party will not be allowed more than 15 minutes by virtue of the fact that they are representing more than one party.

Cross-examiners will be limited to **one hour** per witness or panel of witnesses. We may allow additional time for cross-examination if there is good cause demonstrated in an offer of proof.

### **Sur-Rebuttal**

Based on the amount of new information contained in the written rebuttal testimony and exhibits that have been submitted, we anticipate that the parties will seek to present sur-rebuttal evidence. Sur-rebuttal testimony and exhibits will be permitted. Consistent with our usual practice with respect to rebuttal, sur-rebuttal will begin immediately after all parties present their rebuttal testimony and their witnesses have been cross-examined. Sur-rebuttal testimony and exhibits will not be required to be submitted in advance. Sur-rebuttal testimony must be responsive to evidence submitted during rebuttal. Sur-rebuttal does not include evidence that should have been presented during the case-in-chief or rebuttal of the party submitting sur-rebuttal evidence. It also does not include repetitive evidence. Cross-examination of sur-rebuttal witnesses will be limited to the scope of their sur-rebuttal. Unless we approve changes, the order of presentation of sur-rebuttal will be the same as for rebuttal.

### **Hearing Team Members**

The October 30, 2015 Notice of Petition and Notice of Public Hearing and Pre-Hearing Conference to Consider the Petition listed the hearing officers and hearing team members. The hearing team staff list was later updated in the hearing officers' April 25, 2016 ruling to replace Richard Satkowski with Kyle Ochendusko. In addition, Conny Mitterhofer, Supervising Water Resource Control Engineer, is now the chief of the Hearings and Special Projects Section of the Division of Water Rights and has joined the hearing team. John Gerlach has left State Water Board employment and is no longer a member of the hearing team.

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:*

*ORIGINAL SIGNED BY:*

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

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

Attachments

**Revised Attachment A (April 13, 2017):**

Hearing Dates and Room Schedule for the Continuation of Part 1  
of the California WaterFix Water Right Change Petition Hearing

**PART 1** of the hearing will resume at **9 a.m. on April 25, 2017** and continue, as necessary, at **9 a.m. on each of the following dates** and **at the locations** shown in the tables below. **Start times may be earlier than 9 a.m. on subsequent hearing days if the hearing officers determine it is necessary.** Any change in start times will be announced at the conclusion of the previous hearing day. **Please note that the hearing rooms are not all at the same street address, as shown below. Changes in hearing room locations from the schedule in Attachment A of the hearing officers' February 21, 2017 ruling are shown in red.**

| <b>DATE</b>                                | <b>HEARING ROOM*</b>   |
|--|--|
| April 25, 2017                             | Byron Sher Auditorium  |
| <del>April 26, 2017</del> <b>Cancelled</b> | <del>RWQCB-5</del>   |
| April 27, 2017                             | <del>RWQCB-5</del> Coastal Hearing Room  |
| April 28, 2017                             | Coastal Hearing Room   |
| May 04, 2017                               | Sierra Hearing Room  |
| May 05, 2017                               | Coastal Hearing Room   |
| May 09, 2017                               | <del>RWQCB-5</del> Byron Sher Auditorium   |
| May 10, 2017                               | <del>RWQCB-5</del> Sierra Hearing Room   |
| May 11, 2017                               | <del>RWQCB-5</del> Byron Sher in the morning<br>Sierra Hearing Room in the afternoon |
| May 12, 2017                               | Byron Sher Auditorium  |
| May 18, 2017                               | Coastal Hearing Room   |
| May 19, 2017                               | Coastal Hearing Room   |
| May 23, 2017                               | Coastal Hearing Room   |
| May 24, 2017                               | Coastal Hearing Room   |
| May 25, 2017                               | <del>City Hall*</del> Sierra Hearing Room  |
| May 26, 2017                               | Sierra Hearing Room  |
| May 30, 2017                               | Byron Sher Auditorium  |
| <del>May 31, 2017</del> <b>Cancelled</b>   | <del>City Hall*</del>  |
| June 01, 2017                              | Byron Sher Auditorium  |
| June 02, 2017                              | Byron Sher Auditorium  |
| June 08, 2017                              | Byron Sher Auditorium  |
| June 09, 2017                              | Byron Sher Auditorium  |
| June 13, 2017                              | Sierra Hearing Room  |
| June 14, 2017                              | Sierra Hearing Room  |
| June 15, 2017                              | Byron Sher Auditorium  |
| June 16, 2017                              | Byron Sher Auditorium  |
| June 22, 2017                              | Coastal Hearing Room   |
| June 23, 2017                              | Coastal Hearing Room   |
| June 27, 2017                              | Coastal Hearing Room   |
| <del>June 28, 2017</del> <b>Cancelled</b>  | <del>Coastal Hearing Room</del>  |
| <del>June 29, 2017</del> <b>Cancelled</b>  | <del>Coastal Hearing Room</del>  |
| <del>June 30, 2017</del> <b>Cancelled</b>  | <del>Coastal Hearing Room</del>  |

| DATE            | HEARING ROOM*         |
|-----------------|-----------------------|
| July 11, 2017   | Byron Sher Auditorium |
| July 12, 2017   | Sierra Hearing Room   |
| July 13, 2017   | Sierra Hearing Room   |
| July 14, 2017   | Sierra Hearing Room   |
| July 20, 2017   | Byron Sher Auditorium |
| July 21, 2017   | Byron Sher Auditorium |
| July 25, 2017   | Coastal Hearing Room  |
| July 26, 2017   | Coastal Hearing Room  |
| July 27, 2017   | Coastal Hearing Room  |
| July 28, 2017   | Coastal Hearing Room  |
| August 03, 2017 | Byron Sher Auditorium |
| August 04, 2017 | Byron Sher Auditorium |
| August 08, 2017 | Sierra Hearing Room   |
| August 09, 2017 | Sierra Hearing Room   |
| August 10, 2017 | Byron Sher Auditorium |

\* Room is subject to availability.

If the hearing must be moved from one hearing room to another on a particular date, then the parties on the [Current Service List](#) will be notified and a revised schedule will be posted on the State Water Resources Control Board's California WaterFix hearing webpage at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/ruling\\_notices/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/ruling_notices/) prior to the hearing date.

The addresses of the hearing rooms in the table above are as follows:

| HEARING ROOM   | LOCATION/ADDRESS  |
|--|---|
| Sierra Hearing Room,<br>Coastal Hearing Room, and<br>Byron Sher Auditorium | Joe Serna Jr.-CalEPA Building<br>1001 I Street, Second Floor<br>Sacramento, CA 95814<br><a href="#">MAP</a>   |
| <b>RWQCB-5</b>   | <del>California Regional Water Quality Control Board<br/>Central Valley Region (5), Sacramento Main Office<br/>11020 Sun Center Drive, Suite 200<br/>Rancho Cordova, CA 95670<br/><a href="#">MAP</a></del> |
| <b>City Hall</b>   | <del>City of Sacramento<br/>City Hall Council Chamber<br/>915 I Street, 1st Floor<br/>Sacramento, CA 95814<br/>(Across the street from the CalEPA Building)</del>   |

**Broadcasts of the hearing will be available via the internet and can be accessed at:**  
<https://video.calepa.ca.gov/>.

**Attachment B (April 13, 2016)**  
**Order of Presentation for Part 1 Rebuttal**  
**California WaterFix Petition Hearing**  
**Scheduled to Continue on April 25, 2017**

| Order of Rebuttal Testimony | Group | Party  | Witness Panels  |
|-----------------------------|-------|--|---|
| <b>1<sup>st</sup></b>       | 1&2   | California Department of Water Resources (DWR) and U.S. Department of the Interior (DOI) | <p><b>Panel 1: Engineering and Groundwater:</b></p> <ul style="list-style-type: none"> <li>▪ John Bednarski (DWR)</li> <li>▪ Shanmugam Pirabarooban (DWR)</li> <li>▪ Sergio Valles (DWR)</li> <li>▪ Gwen Buchholz (DWR)</li> </ul> <p><b>Panel 2: Operations, Modeling, Water Quality, and Water Rights:</b></p> <ul style="list-style-type: none"> <li>▪ Maureen Sergent (DWR)</li> <li>▪ John Leahigh (DWR)</li> <li>▪ Dr. Parviz Nader-Tehrani (DWR)</li> <li>▪ Michael Bryan (DWR)</li> <li>▪ Douglas M. Owen (DWR)</li> <li>▪ Ellen Preece (DWR)</li> <li>▪ Armin Munevar (DWR)</li> <li>▪ Chandra Sekhar Chilmakuri (DWR)</li> <li>▪ Nancy Parker (DOI)</li> <li>▪ Ron Milligan (DOI)</li> <li>▪ Kristin White (DOI)</li> </ul> <p><b>Panel 3: Agricultural Practices and Economics:</b></p> <ul style="list-style-type: none"> <li>▪ Dr. Christopher Thornberg (DWR)</li> <li>▪ Dr. Joel Kimmelshue (DWR)</li> </ul> |
| <b>2<sup>nd</sup></b>       | 7     | Joint testimony of Group 7 parties:<br>Sacramento Valley Water Users (SVWU) group        | <ul style="list-style-type: none"> <li>➤ Walter Bourez</li> <li>➤ Dan Easton</li> </ul>   |
| <b>3<sup>rd</sup></b>       | 7     | Joint testimony of Group 7 parties:<br>American River Water Agencies (ARWA) group        | <ul style="list-style-type: none"> <li>➤ Tom Gohring</li> <li>➤ Jeff Weaver</li> <li>➤ Keith Durkin</li> <li>➤ Marcus Yasutake</li> <li>➤ James Peifer</li> </ul>   |
| <b>4<sup>th</sup></b>       | 9     | North Delta Water Agency & Member Districts (Reclamation Districts 99, 2060, and 2068)   | <ul style="list-style-type: none"> <li>➤ Gary Kienlen</li> <li>➤ Gomathishankar Parvathinathan</li> <li>➤ DWR's Witnesses</li> </ul>  |



| <b>Order of Rebuttal Testimony</b> | <b>Group</b> | <b>Party</b>   | <b>Witness Panels</b>  |
|------------------------------------|--------------|--|--|
| 5 <sup>th</sup>                    | 18           | The San Joaquin Tributaries Authority (SJTA), Merced Irrigation District, Modesto Irrigation District, Oakdale Irrigation District, South San Joaquin Irrigation District, Turlock Irrigation District, and City and County of San Francisco                           | ➤ <b>Dan Steiner</b>   |
| 6 <sup>th</sup>                    | 19           | Local Agencies of the North Delta; Bogle Vineyards/Delta Watershed Landowner Coalition (DWLC); Diablo Vineyards and Brad Lange/DWLC; Stillwater Orchards/DWLC; Brett G. Baker; and Islands, Inc. (LAND, et al.)  | ➤ <b>Dr. Michelle Leinfelder-Miles</b><br>➤ <b>Erik Ringelberg</b> |
| 7 <sup>th</sup>                    | 21           | Central Delta Water Agency, South Delta Water Agency ("Delta Agencies"), Lafayette Ranch, Heritage Lands Inc., Mark Bachetti Farms and Rudy Mussi Investments L.P.   | ➤ <b>Tom Burke</b><br>➤ <b>Chip Salmon</b>                         |
| 8 <sup>th</sup>                    | 22           | City of Stockton   | ➤ <b>Susan Paulsen</b>   |
| 9 <sup>th</sup>                    | 27           | City of Antioch  | ➤ <b>Susan Paulsen</b>   |
| 10 <sup>th</sup>                   | 19, 24, & 31 | (19) LAND, et al., (24) County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority, and (31) California Sportfishing Protection Alliance, California Water Impact Network, and AquAlliance | ➤ <b>Brandon Nakagawa</b><br>➤ <b>Marc Del Piero</b>               |
| 11 <sup>th</sup>                   | 37           | Deirdre Des Jardins  | ➤ <b>Dr. Tom Williams</b><br>➤ <b>Deirdre Des Jardins</b>          |
| 12 <sup>th</sup>                   | 40           | Patrick Porgans  | ➤ <b>Patrick Porgans</b>   |
| 13 <sup>th</sup>                   | 41           | Snug Harbor Resorts, LLC   | ➤ <b>Nicole S. Suard</b>   |
| 14 <sup>th</sup>                   | 43           | Clifton Court, L.P.  | ➤ <b>Suzanne Womack</b>  |