

From: Mae Empleo
To: abl@bkslawfirm.com; aferguson@somachlaw.com; ahitchings@somachlaw.com; ajr@bkslawfirm.com; akrieg@volkerlaw.com; amy.aufdemberge@sol.doi.gov; apeltzer@prlawcorp.com; awearn@nrdc.org; barbara@restorethedelta.org; barbarav@aqualliance.net; barry@solagra.com; bdalymns@citlink.net; bjohnson@tu.org; blancapaloma@msn.com; bobker@bay.org; bpoulsen@eid.org; bradpappa@gmail.com; brettgbaker@gmail.com; burkew@saccounty.net; bwright@friendsoftheriver.org; caroleekrieger7@gmail.com; colin@ejcw.org; connere@gmail.com; CWFhearing; daladjem@downeybrand.com; daniel@kaydix.com; dcooper@minasianlaw.com; dcoty@bpmnj.com; ddj@cah2oresearch.com; dean@hprlaw.net; deltakeep@me.com; dkelly@pcwa.net; dmwolk@solanocounty.com; dobegi@nrdc.org; dohanlon@kmtg.com; dorth@davidorthconsulting.com; elamoe@minasianlaw.com; empappa@gmail.com; evielma@cafecoop.org; ewehr@gwdwater.org; fetherid@ebmud.com; fmorrissey@orangecoveid.org; gadams@fclaw.com; hwalter@kmtg.com; info@californiadelta.org; jailin@awattorneys.com; jtb@bkslawfirm.com; jconway@rd800.org; jfox@awattorneys.com; Mizell_James@DWR; jennifer@spalettalaw.com; jherrlaw@aol.com; jminasian@minasianlaw.com; jminton@pcl.org; john.luebberke@stocktonca.gov; jph@tulareid.org; jrubin@westlandswater.org; jsagwomack@gmail.com; jsalmon@ebmud.com; jvolker@volkerlaw.com; kcorby@somachlaw.com; kelweg1@aol.com; kharrigfeld@herumcrabtree.com; kobrien@downeybrand.com; kpoole@nrdc.org
Subject: California WaterFix Hearing - Request for Reconsideration of Ruling on Part 2 Sur-Rebuttal
Date: Tuesday, September 11, 2018 9:47:57 AM

Dear Hearing Officers,

The September 10, 2018, ruling sets the sur-rebuttal submission deadline on noon September 17, 2017. This schedule is impractical for several reasons, including:

1. Hearing transcripts of the rebuttal testimony, including cross-examination, are not yet available. The ability to review and cite to transcripts when responding to Part 2 rebuttal testimony (e.g., when preparing sur-rebuttal responding to statements made by witnesses Acuna, Hanson, and Hutton during cross-examination) is essential to facilitating preparation of any sur-rebuttal that would be helpful to the Hearing Officers and that would also have usable citations. Relying on real-time videos would impose an onerous burden that would be so time-consuming as to be impracticable under the proposed sub-rebuttal schedule.
2. Protestants, having been warned by the Hearing Officers that if sur-rebuttal is allowed at all it would proceed on an aggressive schedule, could be reasonably expected to have tentatively lined up their sur-rebuttal witnesses, but it would be unreasonable and unfair to expect protestants to have actually moved forward with the costly process of authorizing their witnesses to begin the document review, analytical work, and drafting before even knowing if the sur-rebuttal would be allowed at all. We learned that only on September 10. One week is simply not sufficient time in which to actually prepare the testimony and related exhibits.
3. Comments on the Draft Supplemental EIR/EIS are due the same day at 5:00 p.m. Many of the same parties and counsel in the Hearing are also preparing comments on the Draft Supplemental EIR/EIS. Making sur-rebuttal due that same day prejudices the right and ability of public interest organizations, local agencies and others with more limited resources than the State to meaningfully participate in both processes.
4. DWR failed to disclose to the Hearing Officers that the Supplemental EIR/EIS has not yet been circulated by the Bureau of Reclamation for review under NEPA when asked for an update on the status of completion of the environmental review process at the last day of rebuttal hearing on August 31, 2018. (See Draft SEIR, p. ES-1 [pasted below].) Previous rulings have stated that the Hearing would not proceed past various stages until the federal NEPA review process is complete. (Oct. 30, 2015, p. 2, Jan. 15, 2016, pp. 2-3, Feb. 11, 2016, pp. 5-6.) At this time, there is no indication of when the NEPA process will be completed or what the participation of Reclamation, purportedly a co-Petitioner, will be in the Project. (See, e.g.,

statements of Mr. Mizell on 8/31/18 referring to “complexities of the interaction between the state and federal processes on the two halves of the environmental documents”... “safest estimate today would be early December” “subject to a wide set of variety ... you know, variation .. just depending on how the ... how the two halves... of the uh.. the Petitioners work out their environmental documentation.”) Thus, there is no reason to impose a sur-rebuttal schedule so draconian that it deprives protestants of the opportunity to provide sur-rebuttal testimony that addresses key Hearing issues and informs the Board’s future permitting decisions for the proposed project.

Thus, the date for the sur-rebuttal testimony deadline should be set for at least 30 days from the date (1) the transcripts are available, or (2) the Supplemental EIR/EIS has been circulated for review by Reclamation (whichever occurs later).

In addition, the scope of the sur-rebuttal indicated in the Ruling is arbitrarily limited and not supported by a reasoned analysis of the decision to limit sur-rebuttal to the listed topics. While sur-rebuttal may not always be allowed in water rights permit proceedings, this proceeding is far from the usual proposed diversion in that it would impacts thousands of water rights holders along with an entire estuary. Sur-rebuttal should be allowed on any topic that was addressed in Part 2 rebuttal as well as any new information submitted by the Petitioners (e.g., Draft SEIR, CER and DWR-1143 second revised) that is responsive to the Hearing issues.

Thank you for considering this request.

Sincerely,
Osha Meserve
Local Agencies of the North Delta et al.
Friends of Stone Lakes et al.

1 **California WaterFix Draft Supplemental EIR/EIS**
2 **Executive Summary**

3 ***Note to Readers:** Due to timing constraints, publication and release for public review of this Draft*
4 *Supplemental EIR/EIS is being done by DWR as lead agency in compliance with the requirements of*
5 *CEQA only. Separate publication and release for public review of this document by the U.S. Bureau of*
6 *Reclamation (Reclamation) as the lead agency in compliance with NEPA will be done at a later date.*

<https://www.californiawaterfix.com/resources/draft-supplemental-environmental-impact-report-environmental-impact-statement-eir-eis/>