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## State Water Resources Control Board

October 7, 2016

### VIA ELECTRONIC MAIL

TO: CURRENT SERVICE LIST AND INTERESTED PERSONS LIST

### **CALIFORNIA WATERFIX HEARING – RULING ON WRITTEN TESTIMONY OUTSIDE THE SCOPE OF PART 1 AND OTHER PROCEDURAL MATTERS**

This ruling addresses objections to written testimony submitted for Part 1B of the hearing on the water right change petition for California WaterFix Project on the grounds that the testimony is not relevant to the key hearing issues noticed for Part 1 of the hearing. The remaining objections to testimony and exhibits submitted for Part 1B of the hearing will be addressed after the respective parties have the opportunity to respond to the objections and present their cases in chief. This ruling also addresses several other outstanding procedural issues concerning the participation of some of the parties in Part 1B.

#### **Written Testimony Outside the Scope of Part 1**

The Department of Water Resources (DWR) and various other parties have filed objections to the written testimony of numerous witnesses submitted for Part 1B of the hearing on the grounds that the testimony is not relevant to the key hearing issues for Part 1 of the hearing.<sup>1</sup> We have reviewed the objections, responses to objections, and written testimony in question, and concluded that some of these objections have merit. With the exception of one subject area, the testimony that falls outside the scope of Part 1 of the hearing is relevant to the key hearing issues for Part 2 of the hearing, and affected parties will be permitted to resubmit the testimony during that part of the hearing. To ensure that the hearing is conducted in an organized manner, however, the parties identified below are directed to withdraw their testimony for Part 1B of the hearing or to revise and resubmit their testimony in accordance with the guidance contained in this letter by noon on October 17, 2016.

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<sup>1</sup> Evidentiary objections to Part 1B cases in chief were due by noon on September 21, 2016. Due to an oversight, DWR neglected to submit some of its objections by the deadline, and as a result some of DWR's objections were submitted several hours after the deadline. Several parties have argued that we should disregard DWR's objections if they were late. We will consider DWR's objections, however, because DWR made a good faith effort to submit its objections on time, and no party appears to have been prejudiced by DWR's failure to submit all of its objections by noon.

The October 30, 2015, hearing notice set forth the following key issues for Part 1 of the hearing:

1. Will the changes proposed in the Petition in effect initiate a new water right?
2. Will the proposed changes cause injury to any municipal, industrial or agricultural uses of water, including associated legal users of water?
  - a. Will the proposed changes in points of diversion alter water flows in a manner that causes injury to municipal, industrial, or agricultural uses of water?
  - b. Will the proposed changes in points of diversion alter water quality in a manner that causes injury to municipal, industrial, or agricultural uses of water?
  - c. If so, what specific conditions, if any, should the State Water Board include in any approval of the Petition to avoid injury to these uses?

The key issues reserved for Part 2 of the hearing included whether the changes proposed in the petition would unreasonably affect fish, wildlife, or recreational uses of water, or other public trust resources, and whether the proposed changes are in the public interest.

In response to questions raised during the pre-hearing conference concerning issues that do not fit squarely within Part 1 or Part 2, we clarified in a ruling dated February 11, 2016, that “generally Part 1 focusses on human uses of water (water right and water use impacts) and Part 2 focusses on environmental issues. Part 1 can address human uses that extend beyond the strict definition of legal users of water, including flood control issues and environmental justice concerns. If a human use is associated with the health of a fishery or recreation, testimony on this matter should be presented in Part 2.”

Despite this guidance, several parties submitted written testimony that addresses the potential impacts of the California WaterFix Project on fish and wildlife or recreation. This testimony, including any related testimony concerning potential impacts to human uses associated with the health of a fishery or recreation, must be withdrawn and resubmitted in Part 2. For example, any testimony concerning potential impacts to hunting or fishing, or economic impacts to recreation-oriented businesses, should be presented during Part 2.

Several parties objected to the written testimony of a number of witnesses that addressed the potential impacts attributable to construction of the WaterFix Project. Some of the testimony in this category concerns potential impacts to groundwater wells or water distribution systems, and is at least arguably relevant to the issue of injury to legal users of water. To the extent that it is not relevant to the issue of legal injury, the testimony concerning construction-related impacts is relevant to the issue of whether the project would be in the public interest. Although this issue is noticed for Part 2 of the hearing, we will permit all testimony concerning construction-related impacts to be presented in Part 1B, provided that it does not concern potential impacts to fish, wildlife, recreation, or other public trust resources. The parties are strongly encouraged, however, to present testimony concerning all construction-related impacts during Part 2. Before Part 2 begins, the Final California Environmental Quality Act (CEQA) documentation for the Project will be available, which may afford more information concerning construction-related impacts and mitigation. Accordingly, waiting until Part 2 to present testimony concerning

construction-related impacts may be more efficient and avoid the need to present testimony on the same topic during both parts of the hearing.

Another issue that should be addressed during Part 2 is the economic feasibility of the WaterFix Project. This issue is not relevant to any of the key issues for Part 1, but it is relevant to the issue of whether the project is in the public interest, which is an issue allowable in Part 2. In Part 1B, we will permit testimony concerning the potential, indirect economic impacts attributable to the proposed changes in point of diversion, such as testimony concerning any costs attributable to any impacts to water quality that may be caused by the proposed changes. Similarly, testimony concerning the potential effects of the project on funding for levee maintenance may be presented in Part 1B. Any testimony concerning the cost of constructing the WaterFix Project, however, or how it will be funded, should be presented in Part 2, subject to additional direction from the Hearing Officers. Finally, the written testimony for several witnesses addresses the consistency of the WaterFix Project with the Delta Reform Act or the California Water Plan. These issues are not relevant to the key issues for Part 1 and therefore should be presented in Part 2.

In addition to clarifying the scope of Parts 1 and 2 of the hearing, we have explained in prior rulings that, as the lead agency under the CEQA, the DWR is responsible for preparing an Environmental Impact Report (EIR) for the WaterFix Project that satisfies CEQA requirements. Consistent with the State Water Resources Control Board's (State Water Board) more limited role as a responsible agency under CEQA, we have ruled that the adequacy of the DWR's EIR for the WaterFix Project for purposes of CEQA compliance is not a key hearing issue, and we directed the parties not to submit evidence or argument on that issue.

Contrary to this direction, several parties submitted written testimony that addresses the adequacy of the Revised Draft EIR/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) for the WaterFix Project. This testimony is not relevant to any key issue, and should be withdrawn. However, specific testimony concerning the adequacy of the information contained in the RDEIR/SDEIS as it relates to a specific hearing issue is permissible, but testimony that opines on whether the RDEIR/SDEIS satisfies the requirements of CEQA or the National Environmental Policy Act (NEPA) is not relevant and will not be admitted into evidence.

The parties and witnesses who submitted testimony that is partially outside the scope of Part 1 are identified in the table below. The parties are directed to revise the testimony to eliminate the subject areas identified in the table. The parties may not add any substantive testimony. **Revised, written testimony should be submitted as soon as possible, but no later than noon on October 17, 2016.** Deletions must be shown in strike-through and any additions must be underlined. As an alternative to revising witness testimony, the parties may elect to withdraw their witness testimony altogether and present the testimony in Part 2 if the testimony is relevant only to the issue of whether the project is in the public interest.

In light of the volume of objections and testimony, this ruling may not address every issue concerning whether testimony submitted for Part 1B exceeds the scope of Part 1, and the table below may not identify every witness who has submitted testimony that is outside the scope of Part 1. All of the parties who may have submitted testimony that may exceed the scope of Part 1 are encouraged to review their own testimony and make any revisions that may be warranted. In addition to the testimony identified in this ruling, we may exclude any other testimony that we subsequently determine to be outside the scope of Part 1. In addition, please note that this ruling applies only to written testimony. Exhibits have not been reviewed for relevancy. **The parties must review all of their exhibits in light of the guidance afforded by this ruling,**

**and remove any exhibits that are not relevant to Part 1 issues. In particular, any exhibits associated with testimony that is reserved for Part 2, such as witness qualifications, power point presentations, and documents authenticated by witnesses who will no longer testify in Part 1, should be removed or revised.** Parties who withdraw and reserve for Part 2 any testimony or exhibits should submit a revised exhibit index that lists only the testimony and exhibits that will be presented in Part 1. **Revised exhibit identification indexes should be submitted together with any revised, written testimony, and are due no later than noon on October 17, 2016.**

Written Testimony Outside Scope of Part 1						
Party	Witness	Subject Area of Testimony				
		Environmental Impacts	Impacts to Recreation	Economic Feasibility	CEQA/NEPA Compliance	Misc. Public Interest
South Delta Water Agency						
	Dr. Jeffery Michael		X	X		
	Dante Nomellini	X			X	Consistency with Delta Reform Act
Save the California Delta Alliance						
	Janet McCleery		X			
	Frank Morgan	X	X			
	Michael Brodsky					Consistency with Delta Reform Act
California Sportfishing Protection Alliance						
	Bill Jennings	X				
	Chris Shutes				X	
	G. Fred Lee		X			

<b>Written Testimony Outside Scope of Part 1</b>						
<b>Party</b>	<b>Witness</b>	<b>Subject Area of Testimony</b>				
		<b>Environmental Impacts</b>	<b>Impacts to Recreation</b>	<b>Economic Feasibility</b>	<b>CEQA/NEPA Compliance</b>	<b>Misc. Public Interest</b>
California Water Impact Network						
	Arve Sjovold			X		
AquAlliance						
	Barbara Vlamis				X	
	James R. Brobeck	X				
Restore the Delta						
	Tim Stroshane			X		Consistency with Delta Reform Act
	Esperanza Vielma		X			
	Gary Mulcahy	X				
	Roger Mammon	X				
	Xuily Lo	X				
North Delta Cares						
	Steve Haze	X		X		Consistency with California Water Plan

A number of parties objected to the written testimony submitted by Westlands Water District (Westlands) on the grounds that it is not relevant to Part 1 issues. Westlands submitted testimony that addresses the benefits to Westlands if the WaterFix Project is approved and the adverse impacts to Westlands if the project either is not approved or is approved with more significant operational limitations than exist today. Similarly, Friant Water Authority and its member agencies (Friant) submitted written testimony that that describes the harm to Friant that would occur if Central Valley Project (CVP) exports are reduced and less water is delivered to Friant as a consequence. In Friant's opening statement, Friant argues that the change petition could injure Friant because limitations on the draw-down of CVP reservoirs and new restrictions on Old and Middle River reverse flows could reduce exports.

Although we acknowledge that both Westlands and Friant are legal users of water, the key issue noticed for Part 1 is whether the proposed changes would cause injury to any legal user of water, not whether approval of the petition would benefit any legal user, or whether disapproval of the petition would injure any legal user. Similarly, the focus during Part 1 is on the effects of the proposed changes on legal users of water, not the effects of any operational limitations that may be imposed as conditions of approval. The issues raised by Westlands and Friant are relevant to the issue whether approval of the petition, with or without conditions, is in the public interest. Accordingly, Westlands and Friant will not be permitted to present their testimony in Part 1B of the hearing. They may resubmit their testimony during Part 2.

### **Order of Group Presentations and Cross Examination**

We received thirteen letters regarding proposed grouping assignments with requests for order of presentation for joint testimony and/or cases in chief. Based on the information received, parties will generally remain within their previously assigned groups and groups will present their cases in chief in roughly the same sequence as in Part 1A. For consistency with Part 1A, we will not assign new group numbers for Part 1B. Specific requests to present joint testimony included: Sacramento Valley Water Users group of parties (Group 7), East Bay Municipal Utility District (Group 15) and Sacramento County Water Agency's (Group 7) request to present a joint witness panel as part of their individual cases in chief immediately following the case in chief of the Sacramento Valley Water Users group of parties; Local Agencies of the North Delta et al. (Group 19), Daniel Wilson (Group 20), and County of San Joaquin et al.'s (Group 24) request to coordinate their cases in chief and witness panels; and Pacific Coast Federation of Fishermen's Association (PCFFA) and Institute for Fisheries Resources (IFR) and Deirdre Des Jardins' request to present coordinated cases in chief, with Deirdre Des Jardins presenting after PCFFA and IFR. The presentation of joint panels and joint cases in chief will serve to improve the efficiency of the hearing and these requests are approved.

In addition, parties generally requested to conduct cross examination in the same order as in Part 1A except to allow for coordination between certain parties. We encourage parties to coordinate cross examination as much as possible to avoid duplication and increase efficiency. Parties will therefore conduct cross examination in the same sequence as Part 1A, subject to modification upon request and with the approval of the hearing officers.

Finally, because of limitations on the availability of some of its witnesses in November and early December 2016, Restore the Delta requested to present its case in chief in early to mid-January, 2017. **In order to accommodate this request, Restore the Delta must provide a schedule of its witness availability to the WaterFix hearing team by October 28, 2016. Likewise, any other parties with scheduling conflicts should contact the hearing team by October 28, 2016, if they have not already done so.**

### **Patrick Porgans' Request to Present a Case in Chief in Part 1B**

By email dated August 31, 2016, Patrick Porgans requested permission to amend his Notice of Intent to Appear (NOI) and present a case-in-chief in Part 1 of the hearing. Mr. Porgans' original NOI indicates intent to participate in Part 1 by cross examination and/or rebuttal only. The basis for the request is that Mr. Porgans found the responses of petitioners' witnesses to questions asked during cross examination unsatisfactory. The fact that petitioners' witnesses did not provide the answers that Mr. Porgans was expecting, however, does not justify his failure to indicate on his original NOI his intent to present a case in chief in Part 1 of the hearing. Accordingly, this request is denied.

### **Request of Friends of the River et al. for Official Notice and Dismissal of the Petition**

Friends of the River, Sierra Club, and the Planning and Conservation League, (Friends of the River et al.) submitted a joint opening statement that included requests for official notice and a joint motion to reconsider a previous motion to dismiss the petition. Parties presenting a case-in-chief may make an opening statement that briefly and concisely states the objectives of the case-in-chief, major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. (Hearing Notice, p. 35.) It is not proper for Friends of the River et al. to submit an opening statement for Part 1 because they are not presenting a case in chief in Part 1B. In addition, the majority of this submittal is argument appropriate for a closing brief (when and if requested) or facts that could be presented as part of a case-in-chief in Part 2 of the hearing. Accordingly, the opening statement of Friends of the River et al. will be treated as a procedural motion, which is addressed in more detail below.

Friends of the River et al. request that the State Water Board take “official notice” of “certain facts and actions” including the U.S. Environmental Protection Agency’s NEPA comments, various findings in the U.S. Bureau of Reclamation’s Biological Assessment (BA), a Guidance document issued by the Council on Environmental Quality, and court opinions.

The regulations governing evidentiary hearings before the State Water Board provide that the Board or hearing officer may take official notice of any facts which can be judicially noticed by the courts. (Cal. Code Regs., tit. 23, § 648.2.) These include decisional, constitutional, and public statutory law, various rules of pleading practice and procedure, and facts and propositions “of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.” (Evid. Code, § 450 et seq.) Generally, the State Water Board’s practice is to take official notice of statutes, court decisions, and precedential Board orders or decisions that are cited as legal authority in parties’ closing briefs without the need for a formal request for official notice. Accordingly, Friends of the River et al.’s request for official notice of legal authority is unnecessary.

To the extent that Friends of the River et al. seek official notice of certain documents that are relevant to factual issues that will be addressed in Part 2 of the hearing, these documents should be submitted as exhibits as part of their case in chief in Part 2. In addition, consistent with an email sent to the service list on September 28, 2016, parties who are not presenting a case-in-chief in Part 1B may offer any exhibits that are identified during cross examination into the record at the end of Part 1B.

Friends of the River et al. also request reconsideration of previous and repetitive motions to dismiss the petition based on the timing of the proceeding and adequacy of relevant documents. These issues have been addressed multiple times and will not be revisited at this time. (See Rulings issued on February 11, 2016, March 4, 2016, April 25, 2016, and July 22, 2016.)

### **San Joaquin River Exchange Contractors Water Authority’s Request to Amend Its NOI and Call DWR Witnesses**

On August 30, 2016, the San Joaquin River Exchange Contractors Water Authority (SJRECWA) sent notice to DWR requesting the appearance of DWR witnesses pursuant to Government Code section 11450.50. SJRECWA’s witness amendment sheet indicates its intent to substitute DWR employees and consultants instead of its previously listed witness Christopher H. Neudeck. On September 2, 2016, DWR requested that the State Water Board reject or deny

SJRECWA's request for being procedurally improper and substantively unfair. In its opposition, DWR argues that the witness substitution impermissibly broadens the topic of Mr. Neudeck's testimony and constitutes the submittal of a new NOI.

The rules governing evidentiary hearings before the State Water Board provide for the issuance of subpoenas to compel the testimony by witnesses in a proceeding. (Wat. Code, § 1080 et seq.; Gov. Code, §§ 11450.05-11450.50; Cal. Code Regs., tit. 23, § 649.6.) Under Government Code section 11450.50, the service of a subpoena on the witness is not required to compel the appearance of a party to a proceeding. Instead, written notice requesting the witness to attend, with the time and place of the hearing, must be served on the attorney of the party as provided under section 1987 of the Code of Civil Procedure. (Code of Civ. Pro., § 1987 [service shall be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance].) The notice must be served at least 10 days before the time required for attendance. This notice has the same effect as service of a subpoena on the witness. Parties have the same rights to object to its terms by a motion for a protective order, including a motion to quash. The presiding officer may issue any order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands.

SJRECWA's notice complies with the provisions stated above. DWR is a party to the proceeding so a subpoena is not required. The notice was served on DWR's attorney more than 10 days before Part 1B is scheduled to begin, and provides a reasonable time for preparation and travel. DWR has not made any showing that SJRECWA's request is unreasonable or oppressive. In addition, the scope of testimony falls within the scope of testimony of the original witnesses identified. In the original NOI, the scope of proposed testimony of Christopher H. Neudeck was: "Need for comprehensive agreements between SWP/CVP/local Reclamation Districts, and funding for maintenance, repair and improvement of levees and channels for conveyance and control of water across and through Sacramento/San Joaquin Delta to CVP and SWP pumps to prevent unreasonable salinity impairment of water quality . . ." In its amended NOI, DWR witnesses are listed to testify on "DWR plan and financing plan to maintain Channels and levees to support 3,000 cfs or move cross Delta flow to CVP/SWP pumps as assumed in DWR Exhibit 515, page 2." This revision falls within the scope of the proposed testimony of Christopher H. Neudeck.

DWR argues that the proposed substitution will potentially significantly delay the hearing by adding numerous hours surprise testimony and additional cross examination. We disagree. The Hearing Notice provides an exception to the advanced submittal of written testimony for adverse witnesses testifying in response to a subpoena or alternative arrangement. (Hearing Notice, p. 33, fn. 16.) Further, it does not appear that presentation of SJRECWA's case in chief will take more time as a result of SJRECWA's proposed changes. SJRECWA has not submitted written testimony for three expert witnesses listed on SJRECWA's original NOI, including Mr. Neudeck. In addition, it appears that SJRECWA has decided not to subpoena Daniel B. Steiner, Hydrologist-CVP/SWP as an expert witness to testify on a variety of issues. The estimated length of this witness' direct testimony was two hours.

Absent a showing of why SJRECWA's request is unreasonable or oppressive, the request to substitute witnesses as provided in SJRECWA's amended witness sheet is granted, and DWR is directed to coordinate with SJRECWA to arrange for the appearance of the appropriate witness or witnesses at the appropriate time.



### **City of Antioch's Request to Amend NOI**

By letter dated August 2, 2016, the City of Antioch requested approval to amend its NOI to "designate themselves as protestants" for Part 2. This request appears to stem from concern about subsequent information (such as the biological opinions and final environmental documentation) available in Part 2 as it pertains to Part 1 issues, and not necessarily Part 2 issues. As explained below, approval of the City's request is not necessary.

As explained in a previous ruling, it was not necessary to file a protest in order to participate in the hearing, and a party's participation is governed by the scope of the party's NOI, not the party's protest. The City of Antioch timely submitted an NOI indicating its intent to participate in both Parts 1 and 2 of the hearing. Accordingly, the City may participate in Part 2 of the hearing. Designating the City as a protestant for Part 2 is not necessary. In addition, if the City's interest in Part 2 is only based on new information that may have a bearing on Part 1 issues, we have already stated that it may be necessary to revisit Part 1 hearing issues after the close of Part 2 if substantial changes to the final CEQA document or other information has a material bearing on Part 1 issues. (April 25, 2016 Ruling at p. 3.) Part 1 parties will not need to file a protest in order to participate if Part 1 issues are revisited.

### **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 questions regarding this letter, please contact the hearing team at [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov) or (916) 319-0960.

Sincerely,

*ORIGINAL SIGNED BY:*

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

*ORIGINAL SIGNED BY:*

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