
State Water Resources Control Board

March 15, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING ADDRESSING PART 1 CLOSING BRIEFS, PROSPECTIVE MOTIONS TO DISMISS, AND LIMITS ON OBJECTIONS TO REBUTTAL TESTIMONY AND EXHIBITS

This ruling advises the parties that closing briefs will be permitted, but not required, after Part 1 of the State Water Resources Control Board (State Water Board) hearing on the joint water right change petition for the California WaterFix Project. This ruling also advises the parties that we will not entertain motions to dismiss at this stage in the hearing, and are imposing some limits on the timing of evidentiary objections to rebuttal testimony and exhibits.

Closing Briefs

In our December 19, 2016 ruling letter, we stated that we were inclined to allow parties to submit optional closing briefs for Part 1 of the hearing. Parties were invited to identify, and submit to the hearing team by January 31, 2017, a concise statement of issues 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. We thank the 12 parties that submitted letters regarding this matter.

After reading the parties' suggestions, we have decided to allow parties to submit written briefs at the conclusion of Part 1. Submitting closing briefs at this stage of the hearing is optional, and parties who decide not to do so will be permitted to brief Part 1 issues at the close of Part 2. In addition to briefing Part 2 issues, parties who elect to submit a closing brief after Part 1 will be permitted to submit a supplemental briefing to address any information presented in Part 2 that is relevant to Part 1 issues. Written briefs will be due approximately 30 days after transcripts are available for the entirety of Part 1 of the hearing. Staff will send an email to the Service List letting parties know when the remainder of Part 1 transcripts are available and will specify the date and time that optional Part 1 closing briefs are due. We will provide the parties with further instructions concerning closing briefs, including page limits and any formatting restrictions, after the presentation of rebuttal.

Motions to Dismiss

In their proposal concerning closing briefs, South Delta Water Agency and affiliated parties (SDWA parties) stated that they intend to file a motion to dismiss at the conclusion of Part 1 of the hearing on the grounds that the WaterFix change petition seeks a new water right and petitioners have not met their burden of establishing that the proposed changes will not result in injury to legal users of water. SDWA parties stated that they expect that other protestants will do the same, and requested a briefing schedule for motions to dismiss, oppositions, and replies.

SDWA parties cited to the State Water Board's dismissal in 2016 of the enforcement proceedings against Byron-Bethany Irrigation District (BBID) and Westside Irrigation District (WSID) in support of the argument that we should consider and rule on motions to dismiss in this proceeding before Part 2 of the hearing is held.

We decline to consider motions to dismiss at the conclusion of Part 1 of the hearing. As a general rule, motions to dismiss, akin to a motion for judgment in a civil trial, are not permitted in adjudicative proceedings before the State Water Board. (See *O'Mara v. California State Bd. of Pharmacy* (1966) 246 Cal.App.2d 8, 12 [section 631.8 of the California Code of Civil Procedure, which provides for motions for judgment in civil court trials, has no application to administrative hearings].) In the order dismissing the enforcement proceedings against BBID and WSID, the State Water Board expressly stated that it does not generally allow parties to move for judgment during the course of an evidentiary hearing, and discouraged parties in future proceedings from attempting to do so. (Order WR 2016-0015, p. 12.) The issues involved in this proceeding are fundamentally different from the issues involved in the enforcement proceedings against BBID and WSID. Accordingly, we decline to depart from our usual practice of reaching a decision on the merits based on the entire record after all of the parties have presented all of their evidence. Accordingly, any motions to dismiss filed at the conclusion of Part 1 of the hearing will be summarily denied. (See *Erika K. v. Brett D.* (2008) 161 Cal.App.4th 1259, 1271 [trial court has absolute discretion to deny section 631.8 motion for judgment regardless of the state of the evidence].)

Evidentiary Objections to Rebuttal Testimony and Exhibits

As stated in our February 21, 2017 ruling letter on evidentiary objections to the admission of testimony and exhibits into evidence, we have received an excessive number of objections to the evidence presented as part of cases-in-chief in Parts 1A and 1B of the hearing that either lacked merit or went to the weight of the evidence, not its admissibility. Moving forward, we directed the parties to be more judicious in making evidentiary objections, and to follow the guidance set forth in our February 21, 2017 ruling concerning the types of objections that should be addressed through cross-examination or rebuttal or reserved for closing briefs.

Consistent with this general direction, we have decided to place limits on the timing of any objections to rebuttal testimony and exhibits. First, the parties should not make any objections to the admissibility of rebuttal testimony, which must be submitted in writing by 12:00 noon on March 23, 2017, before the hearing resumes for presentation of rebuttal. We will review the written testimony carefully before the hearing resumes to ensure that the testimony is relevant, within the scope of rebuttal, and sufficiently reliable to be admissible. To the extent necessary, we will exclude any witnesses' proposed rebuttal testimony on our own motion before the witnesses present their testimony. Second, any objections to the admissibility of rebuttal testimony that we do not address on our own motion, 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. **We will not consider any objections to the admissibility of a party's rebuttal testimony or exhibits that are made after the party's rebuttal testimony and exhibits are offered into evidence.** Third, any objections that go to the weight of rebuttal testimony or exhibits, including hearsay objections, should be reserved for the parties' closing briefs, which as stated above may be filed after Part 1 or after Part 2 of the hearing. Finally, parties should be prepared to offer their testimony and exhibits into evidence immediately at the conclusion of their rebuttal presentation, cross-examination, and any re-cross and re-direct.

To assist the parties in determining what types of objections are appropriate in State Water Board proceedings, and whether a particular type of objection is likely to go to the weight of the evidence, as opposed to its admissibility, some key points from our February 21, 2017 ruling are summarized below.

- Argumentative Objections. Evidentiary objections should not be used to argue the merits of an issue. Arguments concerning the merits of a witness' testimony or the contents of an exhibit are more properly addressed through cross-examination of the witness, rebuttal, or closing briefs.
- Objections Based on the Kelly Rule. The *Kelly* rule does not apply. Accordingly, expert testimony based on a new scientific technique does not require a showing that the technique has been generally accepted in the relevant scientific community.
- Objections Based on Expert Witness Qualifications. Expert witnesses are not required to be qualified as experts before they may testify. As a general rule, objections to a witness' qualifications go to the weight of the witness' testimony, not its admissibility.
- Objections to Lay Opinion. Lay person opinion is permitted. In general, objections to a lay person's testimony on a given subject on the grounds that the person lacks knowledge or expertise concerning the subject matter go to the weight to be afforded the testimony, not its admissibility.
- Objections to Legal Conclusions and Ultimate Issue Opinions. Witnesses may testify concerning mixed issues of law and fact. Rather than parsing testimony to exclude any portions that concern pure questions of law, the hearing officers may admit the testimony, but disregard any portions concerning pure questions of law that have no probative value. Witnesses also may offer their opinions concerning the key hearing issues. Any such testimony is not objectionable on the grounds that it embraces an ultimate issue to be decided by the trier of fact.
- Objections to Testimony on Contracts and Agreements. The best evidence rule does not apply, and therefore testimony concerning the content of a contract or agreement is not prohibited. To the extent that portions of testimony interpreting a contract or other document is inconsistent with the plain language of the document, itself, the hearing officers may disregard the testimony rather than exclude it.
- Objections on the Grounds of Relevance. Evidence is relevant if it has a tendency in reason to prove or disprove any disputed fact of consequence in a proceeding. Testimony or exhibits may not be objectionable on the grounds that they do not explicitly address or discuss a key hearing issue because their relevance may be explained in an opening statement or closing brief.
- Objections for Lack of Foundation or Authentication. Exhibits must have some foundational support to be admitted, but a proper trial-like foundation is not required. Some exhibits, such as official records, published reports, and formal letters, may not

require formal authentication through witness testimony or a declaration if the nature and reliability of the exhibits are readily identifiable on their face.

- Hearsay Objections. Hearsay evidence is admissible, but over timely objection may only be used for purposes of supplementing or explaining other evidence, and may not serve as the sole support for a finding, unless it would be admissible over objection in a civil court case. Technical reports prepared by expert witnesses for purposes of this proceeding will be considered part of their testimony, not hearsay. Expert witnesses may rely on documents prepared for purposes other than this proceeding to the extent reasonable, but witnesses may not convert documents prepared for other purposes into non-hearsay testimony simply by incorporating those documents by reference into their testimony. Testimony of another witness in the same proceeding is not hearsay, except to the extent that the testimony narrates the statements of third parties made outside the proceeding.

Rebuttal Schedule and Availability

The parties will begin presenting Part 1 rebuttal testimony starting April 25, 2017, per the February 21, 2017 ruling letter and notice. We will keep the same order of parties and groups that we have used in Part 1 of the hearing. Consistent with our December 8, 2016 email, we will not accept notices of unavailability from parties. Parties are on notice that they 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.

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

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