
State Water Resources Control Board

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VIA ELECTRONIC MAIL

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CALIFORNIA WATERFIX HEARING – RULING REGARDING PART 1 EVIDENTIARY OBJECTIONS AND ADMISSION OF SUR-REBUTTAL EXHIBITS

Part 1 of the hearing on the water right change petition for the California WaterFix Project (WaterFix) has been completed. This ruling addresses outstanding evidentiary objections to sur-rebuttal evidence and other procedural issues raised during Part 1.

1. ADMISSION OF SUR-REBUTTAL EXHIBITS

The following sections address outstanding offers by the parties to move evidence into the record, and any pending objections to the admittance of that evidence.

Groups 1 and 2

DWR's and DOI's Exhibits

On June 23, 2017, the California Department of Water Resources (DWR) and U.S. Department of the Interior (DOI) offered the following sur-rebuttal exhibits into evidence: DWR-930 through DWR-933, DWR-936, DWR-937, DWR-942 through DWR-947, DWR-949, DWR-950, DOI-37, DOI-38, SWRCB-101, and SWRCB-104. On July 7, 2017, we granted DWR's request for official notice of sur-rebuttal exhibits DWR-936, DWR-937, DWR-946, DWR-947, DWR-949, and DWR-950, and admitted those exhibits into evidence.

Objection to DWR-932

On June 16, 2017, Deirdre Des Jardins of California Water Research submitted a written objection to the admission of Dr. Parviz Nader-Tehrani's written sur-rebuttal testimony, DWR-932, on the grounds that: 1) DSM2 and CALSIM II modeling lack foundation and, therefore, Dr. Nader-Tehrani cannot reasonably rely on DSM2 modeling for his opinion; and 2) the parties have not had adequate opportunity to examine and rebut the CALSIM II and DSM2 modeling evidence which is the foundation for Dr. Nader-Tehrani's opinion. On June 20, 2017, DWR responded that the hearing officers have already ruled on the issues raised in Ms. Des Jardins' objection letter. No other objections to the admission of DWR's sur-rebuttal exhibits remain outstanding.

The objection by Ms. Des Jardins is overruled. The issues raised by Ms. Des Jardins have been reviewed, considered, and addressed in our ruling dated February 21, 2017, so we will not reexamine them here.

Objection to DOI-37 and DOI-38

During the hearing on June 16, 2017, protestants Cities of Folsom and Roseville, Sacramento Suburban Water District, and San Juan Water District objected to the admission of portions of sur-rebuttal exhibits DOI-37 and DOI-38 (written sur-rebuttal and PowerPoint presentation by Nancy Parker). At the request of the hearing officer, the objecting parties submitted their objection in writing on June 19, 2017, to which parties represented by Downey Brand LLP joined. The specific portions of the exhibits to which protestants object are:

- DOI-37: Pages 9 through 13 (section headed “CalSim Allocation Logic Is Appropriate for a Long Term Water Supply Reliability Planning Model”); 19 through 25 (“Technical Appendix – CalSim Decisions in a Drought Sequence”); and
- DOI-38: Page 2, second and fourth bullets; page 8, second and fourth bullets; pages 9 through 13; page 14, second and fourth bullets; page 16, second and fourth bullet; pages 17 through 22; page 26, second and fourth bullets.

DOI responded by letter on June 20, 2017. No other objections were received to the admission of DOI’s sur-rebuttal exhibits.

The objecting parties seek to prevent the admission into evidence of portions of exhibits DOI-37 and DOI-38 for lack of foundation and as contrary to the rules concerning the admission of model results stated in our October 30, 2015 Notice of Petition and Notice of Public Hearing. The objecting parties assert that because Ms. Parker and Erik Reyes (who reviewed and contributed to her testimony) did not respond to questions during cross-examination as to whether DWR and the U.S. Bureau of Reclamation (collectively petitioners) had adjusted the Water Supply Index-Delivery Index (WSI-DI) to account for climate change, their testimony concerning the water-supply allocation logic in petitioners’ CalSim models and related modeling results that depict results of that allocation logic should not be admitted into evidence. DOI responded in its letter of June 20, 2017, that the objecting parties’ line of questioning about adjustments to the WSI-DI to account for climate change was outside of the scope of Ms. Parker’s sur-rebuttal testimony and that the requested information is not necessary to establish a foundation for that testimony.

The objection is overruled for several reasons. First, the reliability of the overarching opinions expressed by Ms. Parker in her sur-rebuttal testimony does not depend on whether or not the particular WSI-DI curve applied in her examples was adjusted to account for climate change. Ms. Parker asserts that “the CalSim allocation logic is appropriate for long term water supply reliability planning because it uses a consistent and reproducible methodology,” (DOI-37, p. 9) and she disagrees with MBK’s modeling “because it doesn’t use an algorithm to calculate allocations,” (DOI-37, p. 13). Examples of model runs of the no-action alternative for the Biological Assessment (BA_NAA) are provided by Ms. Parker in support of her opinions about the type of methodology that should be used to model allocation decisions in long term water supply reliability planning. The assumptions underlying the particular WSI-DI curve used in the examples provided by Ms. Parker are not foundational to those opinions. Second, the objection appears to be untimely because DWR submitted the BA modeling results, DWR Exhibit DWR-907, during the rebuttal phase of the hearing, and they were admitted without objection. (R.T. (May 18, 2017) 15:6-12.) Presumably, the data relied upon as examples in Ms. Parker’s testimony were included in DWR-907. Finally, and as discussed in more detail in our ruling of February 21, 2017, this type of objection to petitioners’ modeling goes to the weight of the evidence and not its admissibility. Whether or not petitioners’ model appropriately

accounts for climate change will be considered by the Board in determining the proper weight to afford petitioners' modeling evidence.

Disposition: Exhibits DWR-930, DWR-931, DWR-932, DWR-933, DWR-942 through DWR-945, DOI-37, DOI-38, SWRCB-101, and SWRCB-104 are admitted into the evidentiary record.

Group 7

Cross-Examination Exhibits of Cities of Folsom and Roseville, Sacramento Suburban Water District, San Juan Water District, and Yuba County Water Agency

On July 7, 2017, the Cities of Folsom and Roseville, Sacramento Suburban Water District, San Juan Water District, and Yuba County Water Agency offered into evidence exhibits used in sur-rebuttal cross-examination of Ms. Parker and Mr. Reyes: BKS-200, BKS-201, BKS-202, and BKS-204. We did not receive any objections to the admission of these exhibits into evidence.

Disposition: Exhibits BKS-200, BKS-201, BKS-202, and BKS-204 are admitted into the evidentiary record.

Groups 19, 20, 21 and 24

LAND Cross-Examination Exhibits and LAND-SJC-SDWA Joint Exhibits

By letter dated July 12, 2017, Local Agencies of the North Delta et al. (LAND) moved to enter cross-examination exhibits LAND-115 and LAND-116 and joint sur-rebuttal exhibits SJC-200 and SJC-201, SJC-203 through SJC-218, SJC-220 and SJC-221; and SDWA 263. SJC-220 and SJC-221 were already accepted into the record orally on June 22, 2017 (R.T. 192:15-17), and SDWA 263 was accepted into the record orally on June 23, 2017 (R.T. 75:4-9). DWR objected to the admission of LAND-113 and LAND-116, which is overruled for the reasons given below in conjunction with the ruling on DWR's motion to strike certain questions and responses on cross-examination of Dr. Nader-Tehrani.¹ We did not receive any other objections to admission of the LAND and SJC exhibits.

Disposition: Exhibits LAND-115 and LAND-116 are hereby admitted into the record. The disposition with respect to SJC-200, SJC-201, and SJC 203 through SJC-218 is set forth below.

Group 24

Exhibits of San Joaquin County, et al.

On July 12, 2017, San Joaquin County, et al. (San Joaquin County) offered into evidence sur-rebuttal exhibits SJC-84 through SJC-189 and SJC-200, SJC-200-errata, SJC-201, SJC-203 through SJC-218, SJC-220, and SJC-221. SJC-220 and SJC-221 were already accepted into the evidentiary record during the hearing on June 22, 2017.

¹ DWR referenced LAND-113 and LAND-116 in its motion to strike and objection. There is, however, no exhibit identified as LAND-113. During the hearing, Ms. Meserve misidentified LAND-116 as LAND-113, which may have been the source of the confusion. Presumably, DWR has no objection to the admission of LAND-115.

Objection to SJC-84 through SJC-189

Previously, on June 26, 2017, San Joaquin County submitted an offer of proof and request to admit into evidence Progress Reports of Permittee filed with the State Water Board between the years 2010 and 2016 for the water rights that are the subject of the petition at issue in this proceeding. The annual reports are identified as exhibits SJC-84 through SJC-188. Exhibit SJC-189 is the testimony of Russel Frink authenticating the exhibits as files downloaded from the website of the State Water Board. San Joaquin County stated in its offer of proof that the exhibits respond to rebuttal testimony by petitioners' witnesses regarding past operations of the State Water Project and Central Valley Project (collectively projects). The exhibits are submitted to show past operations of the projects as reported to the State Water Board. DWR objects to the admission of these exhibits into evidence. DWR asserts that the exhibits are not relevant to the hearing issues, beyond the scope of appropriate sur-rebuttal, and prejudicial.

We conclude that records of past operations of the projects appropriately respond to petitioners' rebuttal evidence about past operations and compliance of the projects with regulatory requirements. Petitioners introduced evidence on rebuttal to show that aspects of operation will remain unchanged and therefore will not injure other users. Although DWR may disagree with the usefulness of the annual reports, we find that they are relevant to the issues and within the scope of sur-rebuttal. DWR's claim that admission of the exhibits would be prejudicial as surprise evidence is unconvincing. The records were submitted by petitioners to this Board as official reports containing true and correct information about diversions and storage pursuant to the water rights at issue before us. If San Joaquin County had not offered the records into evidence, we might have taken official notice of them on our own motion. DWR's objections to admission of the exhibits are overruled.

Disposition: Exhibits SJR-84 through SCJ-189, SJC-200, SJC-200-errata, SJC-201, and SJC-203 through SJC-218 are admitted into the evidentiary record.

Group 41

Exhibits of Snug Harbor Resorts, LLC

Following the presentation of sur-rebuttal testimony by Snug Harbor Resorts, LLC (SHR) and cross-examination of Nicole Suard on July 11, 2017, we instructed Ms. Suard to submit her list of sur-rebuttal exhibits in writing by noon on July 12, 2017. We allowed petitioners until noon on July 13, 2017, to file written objections to the exhibits. Pursuant to instructions, by letter dated July 12, 2017 Ms. Suard requested that sur-rebuttal exhibits SHR-360-Errata, SHR-363-Errata, SHR-363-2, SHR-363-3, SHR-363-4, SHR-363-5, SHR-364, SHR-504, SHR-504-Errata, SHR-715, SHR-716, SHR-723, and SHR-730 be admitted into evidence. Petitioners did not submit objections to SHR's sur-rebuttal exhibits by the July 13 deadline.

Disposition: SHR's sur-rebuttal exhibits identified above are accepted into the evidentiary record.

Group 43

Exhibits of Clifton Court, LP

In our ruling of July 7, 2017, we granted DWR's request for official notice of documents related to the condemnation of land in connection with the original construction of Clifton Court

Forebay. As part of that ruling, we allowed Clifton Court the opportunity to submit any court records or other official documents concerning the condemnation of land in connection with the construction of Clifton Court Forebay that were not listed in DWR's request for official notice. Clifton Court offered CCLP-34 (the written, sur-rebuttal testimony of Suzanne Womack) into evidence during the hearing on July 11, 2017. By email dated July 13, 2017, Clifton Court submitted Exhibits CCLP-36 and CCLP-37 and requested official notice of the exhibits.

As set forth in our July 7, 2017 ruling, we may take official notice of matters that may be judicially noticed, including "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Cal. Code Regs., tit. 23, § 648.2; Evid. Code, § 452, subd. (h).)

CCLP-36 is a copy of a letter dated January 4, 1971, written on letterhead of the State of California Department of Public Works and addressed to Mr. Elmer Danielson. CCLP-37 appears to be a copy of an aerial photograph of the tidal barrier gates at Clifton Court Forebay and farmland south of the forebay. The document is stamped "State of California, Department of Water Resources," dated July 14, 1970, and contains the notation "Legal – Seepage from Clifton Court Forebay towards Danielson Property." Both documents purport to have been created or modified by agencies of the State of California and petitioners have not disputed their authenticity.

Disposition: We take official notice of CCLP-36 and CCLP-37 as public records currently or previously in the possession of the State of California, and admit Exhibits CCLP-36 and CCLP-37 into the evidentiary record. In addition, CCLP-34 is admitted into the evidentiary record.

2. MOTION TO STRIKE BY DEPARTMENT OF WATER RESOURCES

During the hearing on June 15, 2017, DWR raised objections to certain questions asked by LAND and the City of Stockton during the cross-examination of Dr. Nader-Tehrani. On June 19, 2017, DWR submitted a written motion to strike certain cross-examination questions and Dr. Nader-Tehrani's responses. The motion included an objection to the admission of exhibits used during this cross-examination, namely, LAND-116, STKN-51, STKN-52, and STKN-53. DWR's motion and objection assert that the cross-examination questions and associated exhibits related to proposed habitat restoration are beyond the scope of this hearing, are irrelevant to the issues before the State Water Board, and are beyond the proper scope of sur-rebuttal cross-examination. LAND and the City of Stockton submitted a joint response to the motion and objection on June 20, 2017.

Dr. Nader-Tehrani's sur-rebuttal testimony critiques Dr. Susan Paulsen's rebuttal testimony about the water quality impacts of Boundary 1 and Boundary 2 because she relies in part on impact analyses for alternatives in the Final Environmental Impact Report/Environmental Impact Statement (FEIR/EIS) that include up to 65,000 acres of restoration. The line of questioning pursued by LAND and the City of Stockton sought to explore Dr. Nader-Tehrani's conclusion that "there is no similarity between Boundary 1 or 2 and Alternatives 1A, and 3 . . .," because those alternatives included 65,000 acres of habitat restoration (DWR-932, p. 8), and that "the water quality [for Boundary 1] would be somewhat along the lines of the other three alternatives, namely 4A, 2D, and 5 -- 5A." (R.T. (June 15, 2017) 237:24 – 238:1.)

We conclude that the questions by LAND and the City of Stockton on cross-examination directly followed from Dr. Nader-Tehrani's testimony and his responses are relevant to and within the

scope of this hearing. Although the potential impacts of habitat restoration projects that are now proposed as part of California EcoRestore are outside the scope of this hearing, those impacts are not readily separable from the potential impacts of the WaterFix Project, which also includes some habitat restoration. The challenge here stems from the FEIS/EIR, which contains alternatives that include habitat restoration projects that are no longer part of the WaterFix Project. Petitioners' own witnesses, including Dr. Nader-Tehrani, have relied on the analysis of impacts under those alternatives in support of their testimony concerning the potential impacts of the Boundary 1 and Boundary 2 operating scenarios. It is Dr. Nader-Tehrani who asserted that the water quality impacts identified by Dr. Paulsen were the result of habitat restoration that is not part of the WaterFix Project. It was appropriate for LAND and the City of Stockton to explore Dr. Nader-Tehrani's conclusion. Their questions concerning the water quality impacts of habitat restoration, and Dr. Nader-Tehrani's responses, are relevant and permissible because they were directly related to the potential impacts of the WaterFix Project.

DWR's motion to strike is denied and DWR's objection is overruled.

3. OTHER PROCEDURAL OBJECTIONS

Procedural Objection of Deirdre Des Jardins

On July 11, 2017, Ms. Des Jardins submitted a "Procedural Objection" to any attempt by petitioners to alter the change petition submitted to the State Water Board. At this point, petitioners have made no request to amend the petition before us, and therefore, we will not address Ms. Des Jardins' objection. Ms. Des Jardins also reiterated her request to brief the issue of the adequacy of the information submitted in support of the petition. Ms. Des Jardins may address this issue in her closing brief, provided that her discussion of this issue is related to the key hearing issues.

4. PART 1 CLOSING BRIEFS - OPTIONAL

As stated in our March 15, 2017 ruling and at the hearing on July 11, 2017, parties are permitted to submit written closing 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, 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 by **noon on November 8, 2017**. Transcripts for the entirety of Part 1 of the WaterFix hearing are available on the State Water Board's website at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/transcripts.shtml. Part 1 closing briefs should be limited to 40 pages in 12 point Arial font. Since the petitioners will likely need to respond to most, if not all, protesting parties in their Part 1 closing briefs, the DWR and the DOI may have an 80-page limit for each of their closing briefs. The number of pages used for Part 1 closing briefs will not be subtracted from the total number of pages allowed for closing briefs filed after the conclusion of Part 2 of the hearing, provided that Part 1 closing briefs are filed by the deadline and do not exceed the page limit.

We encourage parties with common interests to work together and submit joint closing briefs that efficiently summarize their positions. Closing briefs should not cite to evidence outside the evidentiary record or attempt to introduce new evidence. We may provide further guidance regarding briefing topics in a subsequent ruling.

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