
State Water Resources Control Board

April 18, 2018

VIA ELECTRONIC MAIL

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CALIFORNIA WATERFIX HEARING – RULING REGARDING MOTIONS TO STAY AND OTHER PROCEDURAL REQUESTS

This ruling addresses motions to stay the hearing and other procedural requests based on new engineering information provided by the Department of Water Resources (DWR). We deny those motions subject to the direction provided below.

FACTUAL BACKGROUND

On the morning of March 28, 2018, counsel for DWR served notice on the Service List of “additional engineering detail proposed” for the California WaterFix Project. The notice included a cover letter explaining the contents, a fact sheet summarizing proposed changes from the Conceptual Engineering Report, and a table identifying components of the proposed project impacted by the changes. DWR contends that the changes limit potential effects of project construction and that the new information is within the scope of Part 2 rebuttal for this water right hearing. The notice indicated that a full description and impact analysis for the proposed changes would be included as part of the environmental impact report (EIR) supplement anticipated in Spring 2018. We gave the other parties until 5 p.m. on April 3, 2018, to submit written responses to DWR’s March 28, 2018 notice and DWR until 5:00 p.m. on April 4, 2018, to submit a response.

Clifton Court, LP, submitted comments on April 2, 2018. On April 3, 2018, we received a motion to stay from the California Sportfishing Protection Alliance, et al., along with similar motions from Local Agencies of the North Delta, et al. (LAND), and North Delta C.A.R.E.S. Also on April 3, 2018, Save the California Delta Alliance, et al. (SCDA), requested that (1) the change petition’s project description be updated with the proposed changes once the EIR supplement was completed, (2) the rebuttal phase for Part 2 occur only after the EIR supplement has been entered into the hearing’s evidentiary record, and (3) SCDA be allowed to consolidate its Part 2 case-in-chief with its Part 2 rebuttal so that the former could incorporate information about the latest proposed changes.¹ DWR submitted written opposition to these responses on

¹ On April 4, Snug Harbor LLC submitted a late motion to stay the hearing based on the new information submitted by DWR, a repetitive request for information accessible to a lay person, and a request to halt or prohibit any construction activity by Petitioners until final approval of the water right change petition that is the subject of this hearing. The Delta Reform Act (Wat. Code, § 85088) provides that DWR “shall not commence construction of any diversion, conveyance, or other facility” associated with new North Delta points in diversion until the State Water Board has approved a change in point of diversion. Snug Harbor has not presented any evidence that Petitioners have commenced construction activity, and in any event, this board lacks authority to enjoin such activities. Snug Harbor’s requests are hereby denied.

April 4, 2018, reiterating and expanding on its earlier assertion that the new information is properly within the scope of Part 2 rebuttal and that no modification to the hearing procedure or schedule should be necessary.

A STAY IS NOT WARRANTED

We find that the new information presented in DWR's March 28, 2018 notice does not justify a stay. We have stated in several prior rulings that not all project uncertainties need to be resolved for us to proceed with consideration of Petitioners' change petition. As explained below, however, all parties will have the opportunity to present evidence relevant to the new information referenced in Petitioners' announcement, so it is not necessary to halt the case-in-chief phase of Part 2.

We also disagree with LAND that news reports to date regarding Metropolitan Water District's (MWD) expected participation in the WaterFix Project warrant a stay. Part 2 will proceed unless we receive information convincing us that continued consideration of the full WaterFix Project – whether constructed in stages or as currently proposed – is no longer necessary.

PARTIES WILL HAVE OPPORTUNITY TO ADDRESS NEW PROJECT INFORMATION

We agree that the new project information presented in DWR's March 28, 2018 notice has the potential to materially change the basis for several parties' participation in Part 2 of this hearing. DWR's notice provides enough information to indicate Petitioners' intent to relocate certain facilities and construction activities that are the subject of some parties' Part 2 testimony. SCDA, in particular, provided detailed examples illustrating how the new information that DWR provided significantly changes the facts and analysis underlying SCDA's Part 2 case-in-chief testimony. Additionally, LAND correctly points out that the importance of Clifton Court Forebay is such that even seemingly minor changes to project facilities and operations in its vicinity have the potential to impact water quality and water levels. In that context, it is imperative that all parties have a meaningful opportunity to review detailed information regarding Petitioners' latest proposed changes to the project and incorporate that information into their participation in this hearing.

Therefore, parties will have the opportunity to submit evidence that addresses the latest project changes referenced in DWR's March 28, 2018 notice, even if that evidence touches on matters not directly raised during the case-in-chief phase of Part 2. **We hereby direct Petitioners to respond to this ruling by 5 p.m., April 20, 2018, with a date certain by which they will be able to provide the Service List with information regarding those project changes, at a level of detail comparable to the detail provided in the Biological Opinions and Final EIR for the WaterFix Project.** Petitioners may elect to provide that information as part of the forthcoming EIR supplement or separately if it is available sooner. We will issue a ruling addressing the scheduling, organization, and scope of Part 2 rebuttal at a later date.

Although we understand the predicament facing SCDA and other parties that reasonably relied on detailed information in impact analyses for the WaterFix Project that now has changed, we nonetheless deny SCDA's request to allow it to consolidate its Part 2 case-in-chief with its rebuttal during Part 2 rebuttal. It would be inappropriate to offer some parties an accommodation that is not available to others that already have presented their Part 2 cases-in-chief. SCDA should present those elements of its case-in-chief that are not affected by the new

information as scheduled and postpone presentation any affected testimony until the subsequent phase of the hearing when all parties will get to address the revised project information.

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