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## State Water Resources Control Board

May 21, 2018

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

### **CALIFORNIA WATERFIX HEARING – RULING ON OUTSTANDING MOTIONS FROM CASE-IN-CHIEF PHASE OF PART 2**

This ruling letter addresses outstanding procedural motions from the case-in-chief phase of Part 2. A ruling addressing outstanding objections to exhibits introduced during cross-examination is forthcoming.

#### **Motions to Strike Oral Testimony**

On March 13, 2018, Dr. Fraser Shilling presented oral testimony on behalf of the Local Agencies of the North Delta and County of San Joaquin, et al. parties. On March 14, 2018, Christopher Neudeck presented oral testimony on behalf of the County of San Joaquin, et al. During each witness's direct testimony, counsel for the Department of Water Resources (DWR) objected that portions of the oral testimony being presented had strayed beyond the scope of that witness's written testimony and moved to strike those portions from the hearing transcript. After hearing discussion from the parties' counsel about whether the oral testimony properly summarized matters described in the written testimony or instead improperly elaborated on matters only generally referenced therein, we took DWR's motions under advisement. Based on that discussion and our review of the hearing transcript and the witnesses' written testimony, we are granting DWR's motion to strike as to portions of Dr. Shilling's and Mr. Neudeck's testimony specified below.

In accordance with the State Water Board's policy discouraging surprise testimony,<sup>1</sup> the hearing procedures limit witnesses' oral testimony during direct examination to summarizing the contents of their written testimony. During cases-in-chief, oral testimony elicited on cross-examination was permitted to go beyond the scope of written testimony, however, so long as it related to a Part 2 key hearing issue. At several points during their oral testimony on direct examination, Dr. Shilling and Mr. Neudeck each expounded upon information or exhibits that were only generally referenced in their written testimony. That oral testimony was not merely a summary of written direct testimony, but rather elaborated on the written testimony by providing new detail and analysis. Although some of that oral testimony was properly elicited later during cross-examination, we strike those portions of the direct oral testimony that were beyond the scope of the witnesses' written testimony as follows:

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<sup>1</sup> See Cal. Code of Regs., tit. 23, § 648.4.

R.T. (March 13, 2018), p. 158:11-17, 20-25; p. 159:1-9; p. 190:1-5; p. 192:11-16; p. 193:11-13.

R.T. (March 14, 2018), p. 88:16-24; p. 92:14-23.

The hearing team will redact the hearing transcript accordingly.

### **Motion to Strike Ms. Vlamis' Written Testimony**

On March 28, 2018, DWR objected to the Part 2 written testimony of Barbara Vlamis, on behalf of California Sportfishing Protection Alliance, California Water Impact Network, and AquAlliance (CSPA, et al.), on two grounds. First, it alleged that the testimony was duplicative because it reproduced almost verbatim Ms. Vlamis' written testimony in Part 1. DWR also noted that Ms. Vlamis' Part 2 written testimony relied on several exhibits that CSPA, et al., had introduced during Part 2 but which were already in the evidentiary record, making those exhibits duplicative, as well. Second, Ms. Vlamis' Part 2 written testimony contains sentences that were struck during Part 1. DWR argued that, if we do admit Ms. Vlamis' Part 2 testimony, those same sentences should be struck again because they describe alleged California Environmental Quality Act (CEQA) violations that are beyond the scope of this hearing.

During the hearing, we overruled DWR's motion to strike Ms. Vlamis' Part 2 written testimony in its entirety. We sustained DWR's motion to strike as to text describing CEQA violations – both the sentences struck during Part 1 and new CEQA-related text added in Part 2. The hearing team will redact those portions of Ms. Vlamis' Part 2 written testimony accordingly.

We also indicated in our oral ruling that we would address at a later date CSPA, et al.'s introduction and Ms. Vlamis' reliance on duplicative exhibits. On April 25, 2018, we admitted CSPA, et al.'s Part 2 exhibits into the evidentiary record, including exhibits that were duplicative of ones already admitted into evidence. For the sake of promptly disposing of the case-in-chief phase of Part 2, we will not recall Ms. Vlamis' written testimony solely to change references to duplicative exhibits. Going forward, however, we expect all parties to avoid introducing and referencing exhibits that are duplicative of others already admitted into evidence, and we may exclude exhibits and testimony accordingly.

### **Sacramento Valley Water Users' Subpoena to DWR**

On April 6, 2018, the Sacramento Valley Water Users (SVWU) served a subpoena on DWR demanding production of numerical modeling results for the No Action Alternative (NAA) and the operational scenario corresponding to the adopted project, CWF H3+, for 29 specified parameters, as well as comparisons of those scenarios' monthly results. DWR objects to the subpoena on the grounds that it would be improper to issue a subpoena requiring DWR to generate new data or analysis rather than merely producing data and analysis already in its possession. DWR further argues that anyone with modeling expertise can extrapolate the information requested by SVWU from what DWR already has provided. SVWU responds that, based on what DWR already has produced, it is not overly burdensome for DWR to produce and organize results from its modeling runs in the format specified in the subpoena. Additionally, SVWU argues that DWR should make the full suite of monthly modeling results available to all parties rather than objecting on authentication grounds when protestants extrapolate and introduce that same information themselves.

We need not resolve the legal question of whether, in this context, the State Water Board's subpoena power extends to requiring DWR to produce monthly comparisons of modeling results in a format that it may not have in its possession already. After reviewing the categories of information specified in SVWU's subpoena, we find that the information would aid in our evaluation of the petition and likely would assist all parties in their participation in this hearing. The information specified in SVWU's subpoena is relevant to multiple contested issues of fact that bear on several parties' cases-in-chief. Therefore, pursuant to our authority under Water Code sections 1701.3 and 1703.5, **we hereby direct DWR to provide the Service List with the information described in SVWU's April 6, 2018 subpoena by June 4, 2018.** We further direct DWR to confer with SVWU if any clarification is needed as to the nature or scope of information described in SVWU's subpoena.

### **Motion to Strike Portions of Marc del Piero's Corrected Testimony**

On April 26, 2018, DWR filed objections to Marc Del Piero's written and oral testimony in Part 2. Specifically, DWR objects to portions that it alleges pertain solely to CEQA compliance and therefore fall outside the scope of this water right hearing. DWR also identifies excerpts of Mr. Del Piero's testimony that it claims pertain only to Part 1 issues such as whether the petition requests a new water right and whether the proposed change will cause injury to other legal users of water. In written opposition filed April 30, 2018, the County of San Joaquin, et al., responds that Mr. Del Piero raised CEQA and Part 1 issues only to the extent necessary to provide testimony about what the public trust and the public interest require of the State Water Board.<sup>2</sup>

DWR is correct that issues pertaining to whether Petitioners, as a matter of law, complied with applicable CEQA and National Environmental Policy Act mandates are beyond the scope of this water right hearing. Although the Part 2 key hearing issues pertaining to the project's impact on the public interest and public trust resources can encompass a broad range of concerns, those key hearing issues should not be treated as a catch-all. Additionally, public trust and public interest cannot be invoked to justify testimony that plainly pertains only to Part 1 key hearing issues without any explanation connecting it to Part 2, as our previous rulings regarding Part 2 scope have required. Motion practice after the fact cannot cure a witness's failure to provide that explanation in his written testimony. Accordingly, the following excerpts from Mr. Del Piero's written testimony, CSPA-208-Corrected, will be stricken:

p. 5:18-19 (the sentence beginning with "The intent ..."); p. 9:3 (only the phrase "CEQA-required"); p. 18:3 (only the phrase "as required by CEQA"); pp. 21:15 to 25:6; pp. 27:13 to 29:10

The portions of the hearing transcript corresponding to oral testimony from Mr. Del Piero on these issues also will be stricken from the record by the hearing team.

### **DWR's Standing Objection Regarding Testimony on Public Interest**

On March 22, 2018, during direct examination of Paul Phillee, DWR lodged an oral, "standing objection" to testimony regarding the WaterFix Project's potential impacts on the public interest

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<sup>2</sup> Restore the Delta, South Delta Water Agency, the City of Antioch, Friends of the River, et al., and Pacific Coast Federation of Fishermen's Associations filed joinders to County of San Joaquin, et al.'s opposition.

that go beyond the State Water Board's legal authority to address with permit conditions. We heard oral argument from the parties and indicated that we would take the issue under advisement.

A key issue to be addressed in this hearing is whether the proposed changes to Petitioners' water rights would be in the public interest, and what conditions should be included in any approval to ensure that the changes are in the public interest. We have the discretion to consider a broad range of impacts in making this determination and testimony about mitigation measures in the EIR and other possible mitigation of expected impacts is generally relevant to our consideration. That being said, we agree with DWR that the types of public interest impacts that the State Water Board should consider are not precisely defined in the law.

For now, we will allow testimony related to the impacts to the public that may be only indirectly related to water resources to ensure that we are allowing the development of an adequate record on which to base our determination. DWR's standing objection is therefore overruled, but we will invite briefing at a later date on the extent of our legal authority to consider impacts to resources other than water in assessing the public interest and conditioning any potential approval of the project.

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](mailto:CWFhearing@waterboards.ca.gov) or (916) 319-0960.

Sincerely,

*ORIGINAL SIGNED BY:*

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

*ORIGINAL SIGNED BY:*

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