

State Water Resources Control Board

July 16, 2018

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING ON SACRAMENTO VALLEY WATER USERS’ REQUEST AND DWR-1143

This ruling addresses an outstanding request by the Sacramento Valley Water Users (SVWU) regarding exhibit DWR-1143 and provides direction to the Department of Water Resources (DWR) regarding revision of that exhibit.

DWR-1143 AND SACRAMENTO VALLEY WATER USERS’ REQUEST

On February 28, 2018, we directed DWR to prepare a single exhibit listing each proposed operating criterion for the WaterFix Project and the regulatory requirement or other basis for each one. DWR submitted DWR-1143 on March 5, 2018. To avoid evidentiary and procedural complications due to introducing DWR-1143 partway through the case-in-chief phase of Part 2, our [March 27, 2018](#) ruling instructed DWR to submit a Part 2 rebuttal exhibit with the same purpose that motivated DWR-1143 and provided specific guidance about how the exhibit should be revised. On [June 28, 2018](#), the hearing team posted a notice (1) reminding DWR of our earlier direction about revising DWR-1143, and (2) clarifying that the revised exhibit should “specifically differentiate between regulatory requirements and operational or modeling assumptions and identify how the regulatory requirements are reflected in the operational and modeling assumptions to the extent applicable.” DWR did not timely submit a revised exhibit in accordance with our direction with its Part 2 rebuttal materials.

On [July 11, 2018](#), SVWU filed a request that we require DWR’s prompt compliance with the March 27, 2018 ruling. On [July 12, 2018](#), DWR filed a response to SVWU’s request providing a narrative explanation of where in the hearing record the WaterFix Project operating criteria are described and also included a revised DWR-1143. Later that day, SVWU [replied](#) to DWR’s filing, alleging that it still failed to comply with our March 27, 2018 ruling.

THE REVISED DWR-1143 DOES NOT COMPLY WITH OUR RULING

DWR’s July 12, 2018 submittals do not comply with our March 27, 2018 ruling. SVWU correctly notes in its response letter that our direction in that ruling was for DWR to prepare and submit with their Part 2 rebuttal “an exhibit ... with the same purpose that motivated DWR-1143.” That purpose was “a single comprehensive document that would show each proposed operating condition for the WaterFix Project and the corresponding requirement or other basis for inclusion of that operating condition.” The intent of this exhibit was to provide clarity regarding the operating conditions or rules that DWR and U.S. Bureau of Reclamation (collectively “Petitioners”) have included in their project description and according to which they currently propose to operate the WaterFix Project.

FELICIA MARCUS, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

An attorney's representation outside the evidentiary record, and which requires reference to various documents scattered across the evidentiary record, both fails to comply with our direction and defeats the exhibit's intended purpose.

Further, the revised DWR-1143 appears to have disregarded the following direction in our March 27, 2018 ruling:

We also expect the Part 2 rebuttal exhibit just described to reflect the additional time that DWR will have had to prepare it. In particular, we encourage DWR to consider whether, based on some of the questions raised by protestants, there are opportunities to provide greater specificity when tying a particular operating condition to a regulatory requirement or other source. Finally, the exhibit's preparation should anticipate and address the alleged inconsistency raised in the Downey Brand protestants' written objection.

The version of DWR-1143 received on July 12, 2018 is nearly identical to the version we excluded back in March. The only difference is the addition of general notations where DWR's CalSim II modeling assumptions for a particular operating condition are described in other exhibits. That change does not meet the purpose of this exhibit: to provide the reader with specific, meaningful, consolidated information about the operating conditions actually being proposed as part of the WaterFix Project, the basis for each operating condition, and the associated modeling assumptions. Someone reading the exhibit must be able to discern not just the *document* where an operating condition can be found (which may contain numerous regulatory requirements or modeling assumptions), but also the specific language or section of that document that DWR claims is the source of that operating condition.

Inconsistencies also remain both within the revised DWR-1143 and between that exhibit, the various source documents cited within that exhibit, and DWR's July 12, 2018 cover letter. In particular, neither the table nor DWR's cover letter reconciles the apparent conflict between how spring outflow criteria are defined in the California Environmental Quality Act (CEQA) document, the incidental take permit (ITP) application, and the ITP itself – one of the main bases for the objection referenced in the excerpt quoted above. The explanation of October/November Old and Middle River flow requirements and export constraints in DWR's cover letter also conflicts with how those requirements are described in revised DWR-1143.

DIRECTION REGARDING REVISED DWR EXHIBIT

We hereby direct DWR to submit an exhibit complying with our March 27, 2018 ruling, the June 28, 2018 notice, and this ruling, no later than **noon on July 19, 2018**.¹ The exhibit must clearly identify each proposed operating criterion for the WaterFix Project, the document where the regulatory requirement or other basis for the criterion can be found, and must either quote the specific language being referenced or cite the section/page number of that document. The column that describes operating criteria should include the most recent and accurate description of each operating criterion, and should not include operating criteria that are no longer proposed to be included as part of the project.

¹ DWR should serve the revised exhibit on all parties using the Service List, as the FTP site will be closed.

Where proposed operating criteria are described differently in different environmental, planning or regulatory documents for the WaterFix Project, the exhibit must identify those discrepancies, identify which description is the proper basis for the operating criteria in question, and explain why. In particular, the exhibit must reconcile the apparent conflict in how spring outflow criteria have been described in CEQA documents, the ITP application, and the ITP itself, and must clarify the criteria for October/November Old and Middle River flows and corresponding export constraints.

In addition, it has become evident during the hearing that discrepancies exist between certain proposed operating criteria and the manner in which those criteria were modeled, and that some modeling assumptions are not in fact proposed operating criteria. For example, the text from SWRCB-108 quoted in DWR's July 11, 2018 submittal describes a discrepancy between the spring Delta outflow criteria required by the ITP and the manner in which those operating criteria were modeled. The revised exhibit must clearly describe any significant discrepancies between operating criteria and modeling assumptions, and identify operating assumptions that were included in Petitioners' modeling runs for the WaterFix Project but are not being proposed as operating criteria. To accomplish this objective, it may be advisable to add a fourth column to the table for a description of modeling assumptions.

We are mindful that other parties are eager to review the revised exhibit and prepare cross-examination of DWR's witnesses accordingly. If DWR complies with this ruling, the parties will have two weeks to make those preparations before Petitioners' presentation of Part 2 rebuttal begins on August 2, 2018. We also expect DWR's rebuttal witnesses to be prepared to answer valid questions about the revised exhibit. If DWR does not timely submit an exhibit that complies with this ruling, or if DWR's witnesses are unable to answer valid questions about the exhibit, it may be necessary to interrupt the order of presentation for Part 2 rebuttal to ensure that other parties have the opportunity to review the exhibit and conduct cross-examination of DWR witnesses accordingly. In the meantime, Part 2 rebuttal shall continue as scheduled.

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