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## State Water Resources Control Board

July 27, 2018

VIA ELECTRONIC MAIL

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### **CALIFORNIA WATERFIX HEARING – RULING ON PART 2 REBUTTAL TESTIMONY AND SUBPOENAS**

This ruling addresses testimony that is partly or wholly outside the scope of Part 2 rebuttal, as well as subpoenas served by San Joaquin Tributaries Authority (SJTA) and a notice to appear served by Deirdre Des Jardins.

This ruling does not preclude parties from raising oral objections during the hearing to the admissibility of Part 2 rebuttal exhibits, including written testimony. Any such objections should be consistent with the reasoning provided in this ruling. Objections to the admissibility of rebuttal exhibits must be made at or before the time when the exhibits are moved into evidence. For the sake of efficiency, we ask that parties lodging any objections to the admissibility of rebuttal testimony make every effort to do so before the witness in question begins presenting his or her testimony. As a reminder, objections that go to the weight of the evidence should be reserved for closing briefs.

### **ARGUMENTS THAT BELONG IN CLOSING BRIEFS**

The purpose of rebuttal is to give the parties an opportunity to present *evidence* that is responsive to evidence presented in connection with another party's case-in-chief. In general, legal or other non-expert *argument* or *interpretation* of evidence from the case-in-chief phase is not proper rebuttal when it has no independent evidentiary value and does not introduce any new evidence. Such arguments or interpretations can and should be made as part of a party's closing brief.

We recognize that this distinction can be nuanced, particularly when it comes to addressing a case-in-chief witness's credibility. For an illustrative example, the following is not permissible rebuttal testimony:

Mr. X provided testimony during the case-in-chief phase of Part 2 regarding Y, but his credentials demonstrate that his professional expertise does not extend to Y. Therefore, his testimony on Y is not reliable.

Impeaching a witness's credibility in the manner shown above does not require the submission of new evidence or new expert opinion testimony. It therefore does not belong in rebuttal. In contrast, using new expert opinion testimony and/or new evidence to demonstrate why a case-in-chief witness's prior testimony is not reliable is proper rebuttal.

Four rebuttal witnesses provided testimony that contained non-rebuttal discussion or argument that more properly belongs in a closing brief. The following portions of their testimony will be stricken accordingly:

DWR-1212 pp. 17:2-10; 23:14-20.

GWD-22 pp. 6:2-7, 9-12 (beginning with “establishes” and ending with “allocation”); 8:5-7, 9-15.

LAND-290 pp. 3:7-8, 12-16 (except “Westlands’ claim of entitlement to irrigate 600,000 acres”), 17-19 (except “deprives upstream users of”), 23-26; 4:1-7 (except “The San Luis Unit also includes three other water districts—Panoche, Pacheco and San Luis, comprising approximately 100,000 acres.”), 19 (except “Before [...] 1960, Congress had already found”); 5:3 (strike “are contrary to law. Additionally, its entitlement”), 24-25; 6:17-18, 23-25; 7:5-26 (except “Westlands’ claimed right”); 8:17-28; 9:1-14; 11:26-28; 12:1-2.

SDWA-321 p. 4:11-20.

#### **MISSING REFERENCE TO PART 2 CASE-IN-CHIEF EVIDENCE**

Rebuttal is for responding to evidence raised in connection with *another party’s* case-in-chief; it is not for supplementing a party’s own case-in-chief. To that end, our [June 18, 2018](#) ruling instructed the parties that rebuttal witnesses must indicate in their written testimony the Part 2 case-in-chief evidence to which their testimony was responsive. Six rebuttal witnesses submitted testimony that did not comply with these instructions. The following portions of their testimony will be stricken accordingly:

CCLP-50 pp. 2-4 (beginning with “If the CCF” and ending with “Delta Levee Special Flood Project Program”).

DWR-1212 pp.20:23 to 22:19.

DWR-1226<sup>1</sup> in its entirety.

PCFFA-202 p. 13:3-12.

SDWA-323 pp. 4:26-28; 5:1 (strike “by the CWF H3+ scenario.”).

SHR-701 p. 9:4-8.

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<sup>1</sup> Although his rebuttal testimony is being stricken, Mr. Reyes can and should still appear as a witness for the purpose of presenting the revised DWR-1143 and submitting to cross-examination about that exhibit in compliance with our [March 27](#) and [July 16, 2018](#) rulings.

## **SAN JOAQUIN TRIBUTARIES AUTHORITY SUBMITTALS REGARDING VERNALIS FLOW CRITERIA**

### **1. Part 2 Rebuttal Testimony**

The rebuttal testimony of Daniel Steiner ([SJTA-401](#)) and significant portions of the rebuttal testimony of Doug Demko ([SJTA-402](#)) concern the merits of one of the San Joaquin River inflow criteria contained in the State Water Board's 2010 Delta Flow Criteria Report ([SWRCB-25](#)). Specifically, the testimony concerns a flow criterion that calls for 60 percent of unimpaired flow in the San Joaquin River at Vernalis from February through June to protect Chinook salmon. (See SWRCB-25, pp. 119-123.) Mr. Steiner's written testimony comprises a detailed analysis of the flow criterion, including how frequently biologically significant target flows at Vernalis would be achieved if the flow criterion were implemented, and the potential effects of implementing the flow criterion on storage levels in New Melones Reservoir. Similarly, the majority of Mr. Demko's testimony focusses on various alleged short-comings of the 2010 Delta Flow Criteria Report's analysis of the flow criterion and the reasons why, in his opinion, implementation of the flow criterion would not substantially improve conditions for Chinook salmon populations.

The testimony just described is not appropriate rebuttal because it is not responsive to any issue that was addressed in any other party's Part 2 case-in-chief. According to a declaration submitted by Mr. O'Laughlin ([SJTA-404](#)) in support of SJTA's rebuttal testimony, the rebuttal testimony is responsive to the testimony of several witnesses who endorsed the 2010 Delta Flow Criteria Report during their Part 2 cases-in-chief. However, none of the witnesses who endorsed the report endorsed the Vernalis flow criterion in particular, which is one of many flow criteria contained in the report. The report also includes flow criteria for Delta outflow; Sacramento River inflow; and Delta hydrodynamics, such as reverse flows and export limits; among other recommendations. (SWRCB-25, pp. 98, 114, 123.)

Dr. Jonathan Rosenfield, a witness for the Natural Resources Defense Council, et al., was the only witness who made specific flow recommendations based in part on the report. But Dr. Rosenfield recommended minimum bypass flows for the proposed North Delta diversions and Delta outflow requirements; he did not recommend any requirements for flows at Vernalis. ([NRDC-58-errata](#), pp. 40-43.) Witnesses for the California Sportfishing Protection Alliance (CSPA) endorsed the report in general, and recommended that the Board give great weight to the recommendations of the fisheries agencies that were submitted in the 2010 informational proceeding that culminated in the report, but they did not recommend any particular flow criteria based on the report. ([CSPA-200-corrected](#), pp. 36-37; [CSPA-202-errata](#), pp. 4-12.) Instead, they recognized that the 2010 flow criteria considered only the needs of the fishery and they opined that the Board would need to balance other competing beneficial uses in determining what flow criteria are appropriate. (CSPA-200-corrected, p. 37; R.T. ([March 27, 2018](#)) 47:9-14.) Similarly, Dr. Richard A. Denton, a witness for Contra Costa County, et al., endorsed the report in general, but recognized that the report evaluated only the flows needed for fishery protection. (R.T. ([March 26, 2018](#)) 207:11-18.)

Mr. O'Laughlin also stated in his declaration that SJTA's rebuttal testimony is intended to respond to the 2010 report itself. The report was not admitted into evidence during Part 2 of the

hearing, however, and therefore it is not the proper subject of Part 2 rebuttal. (The Pacific Coast Federation of Fishermen's Associations offered the report into evidence during Part 1, and we admitted it into evidence in our ruling dated [February 21, 2017](#).) As Mr. O'Laughlin correctly pointed out in his declaration, the Delta Reform Act of 2009 requires the State Water Resources Control Board (State Water Board) to consider the report in determining what flow criteria would be appropriate conditions of any approval of the water right change petition. Had SJTA demonstrated its relevance to "appropriate Delta flow criteria" or other Part 2 key hearing issues, it could have presented testimony concerning the merits of the Vernalis flow criterion as part of a Part 2 case-in-chief. The scope of rebuttal is narrower than the case-in-chief phase, however; rebuttal testimony must be responsive to evidence raised in connection with another party's case-in-chief.

Even if we were to construe SJTA's detailed rebuttal concerning the Vernalis flow criterion to be responsive to other witnesses' general endorsements of the 2010 Flow Criteria Report, the testimony should be excluded because its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (See Gov. Code, § 11513, subd. (f).) The probative value of testimony concerning the merits of the Vernalis flow criterion to the petition in front of us is marginal, at best. As noted above, none of the parties have presented testimony in support of requiring increased flows at Vernalis. In addition, the U.S. Bureau of Reclamation does not propose to make any changes to Vernalis flow requirements or New Melones Project operations in connection with the WaterFix Project. The parties' decision not to focus on this issue makes sense, given that the proposed changes in points of the diversion for the WaterFix Project do not have the potential to directly affect flows at Vernalis. Moreover, the requirement to meet existing Vernalis flow objectives is a condition of the water right permits for the New Melones Project ([State Water Board Decision 1641](#), pp. 160-162), and those permits are not the subject of the change petition for the WaterFix Project. In short, whether to require increased flows at Vernalis is not a contested issue in this proceeding. If we were to nonetheless permit SJTA to present rebuttal testimony on the merits of the Vernalis flow criterion, other parties interested in San Joaquin River flows for reasons unrelated to the WaterFix Project may feel compelled to conduct lengthy cross-examination of SJTA's witnesses, and they might seek to present sur-rebuttal. Given the marginal relevance of Vernalis flow requirements in this proceeding, hearing extensive testimony on the subject would not be a productive use of our time or that of the parties.

As SJTA is well aware, the State Water Board is considering amendments to existing Vernalis flow objectives as part of the first of two ongoing proceedings to update the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary, based in part on the flow criteria developed in the 2010 Delta Flow Criteria Report. That proceeding is the appropriate forum to debate the merits of the San Joaquin River flow criteria developed in the 2010 Flow Criteria Report – not this proceeding on the WaterFix change petition.

For the foregoing reasons, the rebuttal testimony of Mr. Steiner (SJTA-401) is stricken in its entirety. Additionally, the following portions of Mr. Demko's rebuttal testimony are stricken:

SJTA-402 pp. 4:14-18 (beginning with "The DFCR claims," ending with "(doubling goal)."), 4:20 (beginning with "and reasons why") to 5:19; 6:9-12 (beginning with "As a direct consequence"), 6:20-24; 7:4-5 ("in the San Joaquin River"), 7:16 to

24:4; 26:8-9 (“Even if smolt survival to Vernalis or Chipps Island is improved under the DFCR proposal,”); 30:10-12 (beginning with “Such a large decrease”).

## **2. Subpoenas to CDFW and State Water Board Employees**

SJTA also has issued subpoenas to State Water Board employees listed as authors or contributors to the 2010 Delta Flow Criteria Report and to California Department of Fish and Wildlife (CDFW) employees associated with DFG Exhibit 3, an exhibit that CDFW (then the Department of Fish and Game, or DFG) submitted in the 2010 informational proceeding. In his declaration in support of SJTA’s rebuttal testimony, Mr. O’Laughlin indicates that he intends to question the subpoenaed State Water Board employees concerning the assumptions, limitations, analysis, findings, and conclusions contained in the 2010 Delta Flow Criteria Report. Mr. O’Laughlin also states that good cause exists for cross-examination of CDFW employees concerning Exhibit 3 because that exhibit is cited in the 2010 Delta Flow Criteria Report in support of the proposition that increased flows in the San Joaquin River and its tributaries will improve salmon survival and lead to an increase in adult salmon abundance. Mr. O’Laughlin maintains that the testimony of the subpoenaed witnesses will be relevant to the issue of appropriate Delta flow criteria and responsive to the testimony of the same witnesses to whom Mr. Steiner and Mr. Demko purport to respond in their rebuttal testimony.

We will not permit SJTA to question any subpoenaed witnesses concerning the Vernalis flow criteria contained in the 2010 Delta Flow Criteria Report for the same reasons given for striking Mr. Steiner’s and Mr. Demko’s testimony. Likewise, it does not appear that any cross-examination of subpoenaed witnesses concerning Exhibit 3 would be permissible in light of the subject matter of that exhibit, as described by Mr. O’Laughlin. It may be advisable for SJTA to meet and confer with CDFW to determine whether any permissible lines of questioning remain consistent with this ruling. To the extent that SJTA still seeks the appearance of any of the subpoenaed witnesses, SJTA shall submit proposed questions for each witness in writing to the State Water Board and to CDFW, if applicable, and serve them on the Service List by 5:00 p.m. on August 10, 2018. The reasons for requiring written questions in advance of the appearance of subpoenaed witnesses are set forth in our ruling dated [April 3, 2018](#). As stated in that ruling, we will limit direct examination to the written questions as a general rule, but may allow the subpoenaing party some flexibility to reframe questions or ask follow-up questions.

## **DWR’S MOTION TO QUASH MS. DES JARDINS’ NOTICE TO ATTEND**

On [July 13, 2018](#), Deirdre Des Jardins served a notice to attend on the Department of Water Resources (DWR) and the Service List, requiring the attendance of Tim Wehling as a witness for DWR pursuant to Government Code section 11450.50. On [July 19, 2018](#), DWR filed a motion to quash Ms. Des Jardins’ notice to attend and requested a protective order. Ms. Des Jardins filed a written opposition on [July 24, 2018](#).

DWR’s motion to quash is denied without prejudice. We hereby direct DWR and Ms. Des Jardins to meet and confer regarding the notice to attend. To the extent feasible through mutual agreement, the parties should aim to narrow the scope of any objections DWR may have to Ms. Des Jardins’ proposed lines of questioning, if not eliminate those objections entirely. Assuming DWR’s objections are resolved, Ms. Des Jardins shall serve Mr. Wehling and the Service List with a written list of her questions for Mr. Wehling by 5:00 p.m. on August 10, 2018.

Thereafter, we will schedule a date for Mr. Wehling to appear.<sup>2</sup> In the event that DWR's objections are not resolved after meeting and conferring with Ms. Des Jardins, DWR may renew its motion to quash.

The ambiguities that DWR claims justify quashing Ms. Des Jardins' notice to attend could have been resolved with a phone call to Ms. Des Jardins. In the future, we expect the parties to attempt to resolve procedural disputes informally, when possible, before resorting to motion practice.

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:*

*ORIGINAL SIGNED BY:*

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

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

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<sup>2</sup> It may be necessary to interrupt the ordinary order of presentation to accommodate Mr. Wehling's appearance. We or the hearing team will promptly notify the parties of any changes to the hearing schedule.