
State Water Resources Control Board

February 21, 2018

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING ON OUTSTANDING MOTIONS

This ruling addresses the outstanding motions to stay this proceeding until Petitioners announce a decision as to whether they intend to implement the WaterFix Project in stages and, if so, release a final supplement to the Environmental Impact Report (EIR) for the project and any other necessary supporting documentation. This ruling also addresses certain other recently-filed procedural motions. For the reasons discussed below, we hereby deny all outstanding requests to stay this proceeding. The evidentiary portion of **Part 2 shall commence at 9:30 am on February 22, 2018**, as currently scheduled.

MOTIONS TO STAY BASED ON STAGED IMPLEMENTATION APPROACH

1. Procedural Background

At 4:45 pm on February 7, 2018, the California Department of Water Resources (DWR) used the California WaterFix Service List (Service List) to serve the parties with a memorandum from DWR to local agencies participating in the WaterFix Project regarding measures DWR would take to consider the option of implementing the WaterFix Project in stages (February 7 memo). Among other details provided, the memorandum explained that under this approach, the first stage would involve the construction and, for a time, operation of one tunnel with two intakes, with construction and eventual operation of the second tunnel and third intake to begin once additional financing became available. DWR further explained that it would “fully evaluate” the environmental impacts of this staged implementation option in a supplement to its previously certified Final EIR. DWR stated its intent to issue a draft of the California Environmental Quality Act (CEQA) supplement in June of 2018, with a final in October of 2018.

In response, the Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute (collectively, NRDC) filed a February 7, 2018 motion renewing their January 31, 2018 motion for an immediate stay or continuance of Part 2 of the hearing, requesting that the Hearing Officers reconsider their February 6, 2018 ruling denying NRDC’s motion in light of anticipated changes to the California WaterFix project. NRDC alleges that proceeding with the hearing, given the potential changes in the project, would not be in the public interest, would prejudice protestants by providing them with inadequate time to analyze the impacts of the new proposed project, and would waste the

time and money of the parties and State Water Resources Control Board (State Water Board) staff. NRDC's renewed motion was joined by numerous parties.¹

On February 8, 2018, DWR [provided notice](#) to the service list that it had prepared preliminary modeling runs related to the staged implementation approach DWR was considering, including a link to the webpage where those modeling runs could be found.

At the beginning of Part 2 of the hearing on February 8, 2018, the Hearing Officers directed Petitioners to expand on their February 7 memo and to explain how it affects their change petition. Based on DWR's and several protestants' responses during the hearing, the Hearing Officers set a deadline for 5:00 PM Friday, February 9, 2018, for Petitioners to respond to NRDC's February 7, 2018 Renewed Motion, other comments and issues raised during the hearing that day, and the following six questions:

1. Does the certified final EIR address all potential impacts if the WaterFix Project is constructed and operated in stages? In the supplement to the EIR, what additional analyses will be performed and what specific environmental issues will be evaluated?
2. If DWR constructs and operates the WaterFix Project in stages, to what extent would the U.S. Bureau of Reclamation (Reclamation) participate during the first stage? Would the WaterFix Project be operated differently if Reclamation does not participate?
3. If the WaterFix Project is intended to be constructed and operated in stages, is an amendment to the change petition or any additional supporting information under Water Code sections 1701.1, 1701.2, and 1701.3 necessary? Why or why not?
4. If the WaterFix Project is constructed and operated in stages, are there potential impacts to legal users of water, fish and wildlife, the public interest, or consideration of appropriate Delta flow criteria that would warrant revisiting any Part 1 or Part 2 key hearing issues? Which issues?
5. If a supplement to the EIR is entered into the administrative record, what is the most efficient way to address any new information included in the supplement?

¹ The joining parties include Restore the Delta (RTD); City of Antioch; Deirdre Des Jardins; California Sportfishing Protection Alliance, California Water Impact Network, and AquAlliance (CSPA, et al.); North Delta CARES; Carter Mutual Water Company, El Dorado Irrigation District, El Dorado Water & Power Authority, Howald Farms, Inc., Maxwell Irrigation District, Natomas Central Mutual Water Company, Meridian Farms Water Company, Oji Brothers Farm, Inc., Oji Family Partnership, Pelger Mutual Water Company, Pleasant-Grove Verona Mutual Water Co., Princeton-Cordora-Glenn Irrigation District, Provident Irrigation District, Reclamation District 108, Sacramento Municipal Utility District, Henry D. Richter, et al., River Garden Farms Company, South Sutter Water District, Sutter Extension Water District, Sutter Mutual Water Company, Tisdale Irrigation and Drainage Company, Windswept Land and Livestock Company, North Delta Water Agency, Reclamation District 999, Reclamation District 2060, Reclamation District 2068, Brannan-Andrus Levee Maintenance District, Reclamation District 407, Reclamation District 2067, Reclamation District 317, Reclamation District 551, Reclamation District 563, Reclamation District 150, Reclamation District 2098, Reclamation District 800 (Byron Tract), and Tehama-Colusa Canal Authority and its member districts (collectively, the Downey Brand Protestants); County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, The Mokelumne River Water and Power Authority, Local Agencies of the North Delta, Bogle Vineyards, Diablo Vineyards, and Stillwater Orchards; County of Yolo; South Delta Water Agency, Central Delta Water Agency, Lafayette Ranch, Heritage Lands, Mark Bachetti Farms, and Rudy Mussi Investments L.P. We refer to these parties in this ruling collectively as NRDC, et al.

6. Would any conditions necessary to adequately protect the rights of legal users, fish and wildlife, or the public interest be different if the WaterFix Project were constructed in stages? Would appropriate Delta flow criteria be different? Why or why not?

The Hearing Officers gave remaining parties until 12:00 noon on Tuesday, February 13, 2018, to both respond to Petitioners' February 9, 2018 submittal and brief all or some of questions three through six.

In addition to DWR's February 9, 2018 submittal, we received responses from CSPA, et al., Friends of the River and Sierra Club California, Grassland Water District, NRDC, State Water Contractors, American River Water Agencies, RTD, Ms. Des Jardins, Save the California Delta Alliance, County of San Joaquin, et al., East Bay Municipal Utility District, PCFFA, et al., and the Downey Brand Protestants.

2. Disposition of Motions to Stay Part 2

After reviewing the parties' briefing on the subject, we find that proceeding with Part 2 of this water right hearing as currently scheduled makes the most efficient use of the State Water Board's and the parties' time and resources taking into consideration all relevant factors, including present uncertainty over how Petitioners intend to proceed with the WaterFix Project. First, DWR's recent statements do not indicate a decision to abandon its current WaterFix Project proposal and instead implement the project in stages. For this reason, a stay of the proceeding would be both premature and needlessly disruptive. Second, even if Petitioners already had decided to implement WaterFix in stages, Part 2 still would be necessary and relevant to the potential impacts of the complete project and the State Water Board's consideration of whether to approve the changes associated with the completed project and, if so, under what conditions. Third, the parties have already submitted their testimony and exhibits for Part 2. Revising their cases-in-chief to address staged implementation would take time and effort, which could prove to be unnecessary. For these reasons, the most efficient way forward is to continue to hear evidence relevant to the complete project while Petitioners analyze and consider staged implementation. We will postpone evidence and argument regarding any potential differences in project benefits and impacts from staged implementation until a subsequent part of the hearing, as discussed below.

a. Petitioners Still Have Not Decided to Pursue Staged Implementation

Although a staged approach to the WaterFix Project is less speculative now than it was at the time of our February 6, 2018 ruling, DWR's recent statements and submittals in the record still fall short of an intention to proceed with construction and operation of the WaterFix Project in stages. So far, all that DWR has communicated is that it is making preparations that would allow it to consider at some future date whether to construct and operate the WaterFix Project in stages. Indeed, DWR has indicated its intent to prepare an EIR supplement to inform its decision whether to pursue staged implementation of the WaterFix Project. So long as Petitioners' proposed project consists of concurrent construction and operation of a two-tunnel, three-intake WaterFix project, however, we find it appropriate to proceed with the hearing based on that proposal.

Further, proceeding with Part 2 based on the parties' current submittals does not foreclose future consideration of new evidence and argument specific to staged implementation. DWR has already committed in its written submittals to do the following if and when Petitioners decide to exercise the

option of proceeding with staged implementation of the WaterFix Project: (1) inform us and the other parties; (2) introduce the EIR supplement and testimony that addresses whether it is necessary to revisit Part 1 or Part 2 hearing issues in light of the staged implementation; and (3) make its witnesses available for cross-examination by the parties. Because Petitioners have not yet communicated a decision to proceed with the WaterFix Project in stages, we find no reason at this point in time to grant a stay and modify the procedures for this hearing to accommodate that possibility.

b. Part 2 Remains Necessary and Relevant to This Water Right Hearing

Even if DWR had already decided to pursue staged implementation of WaterFix, consideration of the change petition still would require us to receive evidence on Part 2 key hearing issues pertaining to the operation of the WaterFix Project at full build-out. As DWR emphasized in its submittals, Petitioners still propose to construct and operate a two-tunnel, three-intake WaterFix Project eventually. Thus, whether Petitioners ultimately decide to proceed with the WaterFix Project in stages or as currently proposed, Parts 1 and 2 of this water right hearing still serve a necessary purpose: to inform the State Water Board's consideration of the potential impacts of the changes associated with the completed project and conditions to address those impacts if the change petition is approved.

Some parties make a compelling case that the evidence and analysis for certain Part 2 issues would be materially different for staged implementation as compared to Petitioners' current proposal. For example, staged implementation would entail an extended timeline for construction activities in the Delta, which could increase the duration and possibly the intensity of certain construction-related impacts that were disclosed in the Final EIR. In addition, a number of parties raised a variety of issues concerning potential changes to State Water Project and Central Valley Project (CVP) operations, hydro-dynamics in the Sacramento-San Joaquin Delta Estuary, and CVP deliveries based on the preliminary modeling of a staged approach conducted by DWR. As discussed below, should Petitioners indicate their decision to proceed with staged implementation of the WaterFix Project, the parties will have the opportunity to cross-examine Petitioners' witnesses and introduce evidence regarding any corresponding new or increased impacts.

We acknowledge some parties' argument that proceeding with Part 2 as originally scheduled may prove inefficient compared to staying the hearing until Petitioners announce their decision whether to implement WaterFix in stages. Some Part 2 witnesses may end up having to appear a second time to testify separately regarding impacts from staged implementation, whereas staying the hearing until Petitioners decide on an approach might allow those witnesses to appear only once. However, based on what we know now, the opposite may well be true: if Petitioners ultimately decide to proceed with their current WaterFix Project proposal rather than staged implementation, a stay would only result in lost time that could have been spent receiving Part 2 evidence that the State Water Board would have to consider regardless of which WaterFix approach Petitioners pursue. Moreover, the parties already have prepared their testimony and exhibits for their cases in chief for Part 2. Revising cases in chief to address staged implementation would take time and effort, and could prove to be unnecessary. Likewise, allowing cross-examination and rebuttal during Part 2 to address staged implementation would complicate and expand the scope Part 2, and could prove to be a waste of time. For these reasons, we find that proceeding with Part 2 as currently scheduled properly balances the risk of inefficiency in light of present uncertainty. In the event that Petitioners decide to pursue staged implementation, the implications should be addressed in a subsequent part of the hearing.

c. Staged Implementation of WaterFix Would Require a Part 3

Answers to the six questions set forth above were intended to inform our understanding of whether and to what extent we could properly consider staged implementation of the WaterFix project within the parameters of our current hearing procedures. In that context, we are primarily concerned with the following question: Would staged implementation result only in impacts within the footprint of those analyzed for the full project, or would staged implementation result in new or increased impacts that bear on key hearing issues in Parts 1 and 2 of this water right hearing? We appreciate the thoughtful and detailed consideration that the parties have been able to provide on these issues in such a short amount of time, particularly given that much of the information that ideally would inform such analysis is not yet available.

Even based on the paucity of information available, we find that the parties have demonstrated sufficient controversy regarding the implications of staged implementation for Part 1 and Part 2 key hearing issues that it will be necessary to conduct another stage of the hearing if and when Petitioners decide to exercise the option to implement the WaterFix Project in stages. Should that occur, we will convene Part 3 of this hearing to consider Part 1 and Part 2 key hearing issues only to the extent of any alleged differences from the analysis applicable to Petitioners' current proposal.² (The scope of Part 3 could also encompass the introduction of evidence relevant to any Part 1 issues that warrant revisiting in light of evidence presented in Part 2.)

Because the parties will have the opportunity to present testimony and evidence regarding staged implementation if and when we convene Part 3, cross-examination and rebuttal on issues related to staged implementation will not be allowed during Part 2. Postponing discussion of those issues until it becomes necessary and there is more detailed supporting documentation to inform the parties' presentations will make the most efficient use of the State Water Board's and the parties' time and resources in light of present uncertainty.

Absent Part 3 as described above, the State Water Board would lack an adequate basis in the administrative record to approve changes to Petitioners' water rights consistent with staged implementation of the WaterFix Project. Such staged implementation would fall beyond the scope of any changes that the Board might approve based upon the Part 1 and Part 2 record alone.

d. CEQA Consultation for EIR Supplement

Some parties inquired whether and to what extent members of the hearing team would interact with DWR staff during the preparation of the EIR supplement that DWR referenced in its materials regarding staged implementation of the WaterFix Project. No doubt, these questions are informed by recent allegations of improper ex parte communications that were the subject of our February 6, 2018 ruling. For reasons detailed in that ruling, State Water Board staff's prior consultation with DWR staff was born of necessity due to unusual circumstances, and we continue to stand by the legal analysis in that ruling.

² Ms. Des Jardins' February 7, 2018 Request for Official Notice and February 8, 2018 Motion to Require Petitioners to Submit Supplemental Information both are rendered moot by this ruling and accordingly are hereby denied.

At present, we do not anticipate that State Water Board staff's contacts with the DWR staff involved in that CEQA document will consist of anything other than routine written comments. To the extent that State Water Board staff find any additional communication with DWR staff necessary, such communications will be shared with the parties to this water right hearing.

COUNTY OF SACRAMENTO, ET AL.'S, MOTION FOR RECONSIDERATION BY THE FULL BOARD AND MOTION FOR STAY

On February 9, 2018, County of Sacramento and numerous other parties³ filed a [petition](#) requesting reconsideration by the full State Water Board of our February 6, 2018 ruling denying petitioners' motion to stay or continue the hearing to address alleged ex parte communications between State Water Board staff and DWR. In support of the petition, County of Sacramento essentially repeats the same arguments that they made previously in support of the contention that it would be a violation of their due process rights to proceed with the hearing before conducting discovery to determine the full extent of ex parte communications, replacing staff who participated in ex parte communications, and holding a hearing to determine whether and how the hearing should proceed. County of Sacramento, et al., requested a response to the petition by February 20, 2018, and a stay or continuance for an additional 90 days.

The petition is procedurally improper because our February 6, 2018 procedural ruling on petitioners' motion is not a final order or decision that is subject to reconsideration by the State Water Board pursuant to Water Code section 1122 and California Code of Regulations, title 23, sections 768-770. (State Water Board Order WR 2015-0001 at pp. 6-9 [denying as premature hearing officers' procedural ruling addressing due process concerns with reopening a hearing because the ruling was not a final decision or order subject to reconsideration under Water Code section 1122]; see also *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1489 [a party must proceed through the full administrative process to a final decision on the merits before seeking judicial review of an intermediate or interlocutory action].)

Although the State Water Board could, in its discretion, review our February 6, 2018 ruling, the State Water Board does not normally review petitions for reconsideration of procedural rulings in pending proceedings, and we do not recommend that the State Water Board depart from its usual practice in this instance. We are aware of only one occasion when the State Water Board elected to review a request for reconsideration of a procedural ruling. In a proceeding to consider the revocation of a water right license held by the Morongo Band of Mission Indians, the State Water Board reviewed and upheld the hearing officer's ruling denying the Morongo Band's petition to disqualify the enforcement

³ This petition was submitted by County of Sacramento, Sacramento County Water Agency, Sacramento Regional County Sanitation District, City of Stockton, County of San Joaquin, Local Agencies of the North Delta, City of Antioch, County of Yolo, County of Contra Costa, Contra Costa County Water Agency, County of Solano, Central Delta Water Agency, South Delta Water Agency, CSPA, et al., Sacramento Valley Group, Sacramento Municipal Utility District, , North Delta Water Agency and Member Districts, Brannan-Andrus Levee Maintenance District, Reclamation District 407, Reclamation District 2067, Reclamation District 317, Reclamation District 551, Reclamation District 563, Reclamation District 150, and Reclamation District 2098, Reclamation District 800 (Byron Tract), Tehama-Colusa Canal Authority and its member districts, Friends of the River and Sierra Club California, Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources (PCFFA, et al.), and Deirdre Des Jardins. This petition was joined by Patrick Porgans. We refer to these parties in this ruling collectively as County of Sacramento, et al.

team on the grounds that the attorney representing the enforcement team had served as an advisor to the State Water Board in an unrelated proceeding. (State Water Board Order WR 2004-0034, pp. 5-6.) In that case, the hearing officer had stayed the proceeding and requested the State Water Board to review his ruling because the procedural issue raised by the Morongo Band had significant implications for the ability of both the State Water Board and all nine Regional Water Quality Control Boards to conduct enforcement proceedings using existing staff resources. (*Ibid.*)⁴ The State Water Board recognized the potential disruption to adjudicative proceedings that would stem from routine challenges to procedural rulings, and expressly declined to hold that parties are entitled to interlocutory review of procedural rulings. (*Id.* at p. 6.) Since then, the State Water Board has reaffirmed that petitions for reconsideration of procedural rulings in water right hearings are not allowed. (*E.g.*, State Water Board Order WR 2015-0001.)

In this case, the issues raised in the petition for reconsideration filed by County of Sacramento do not warrant interlocutory review. Unlike the situation in the case involving the Morongo Band, no compelling reason exists to expedite resolution of those issues at the expense of the orderly conduct of this proceeding. For the reasons stated in our February 6, 2018 ruling, we disagree with County of Sacramento, et al., that proceeding with the hearing will violate their due process rights. Accordingly, we decline to reconsider our ruling, or to recommend that the State Water Board consider County of Sacramento's petition for reconsideration.

OTHER OUTSTANDING PROCEDURAL REQUESTS⁵

On January 2 and January 10, 2018, Clifton Court, L.P. (CCLP) sent out successive Public Records Act (PRA) requests to DWR using the Service List. On February 7, 2018, DWR served all parties with objections to both PRA requests and included a request to strike CCLP's requests from the record.⁶

We remind the parties that the Service List should be used only for communications and submittals that relate directly to participation in this water right hearing. Such participation includes written submittals in accordance with the hearing procedures, following direction that we provide either in ruling letters or orally during the hearing, and the submittal of procedural motions that are not repetitive. However, not all communications between parties pertaining to the WaterFix Project relate to participation in this hearing, and thus not all such communications need to be served on all parties using the Service List.

The PRA provides a statutory right to request records from public agencies independent of whether a person participates in this water right hearing. Unless a PRA request has some relevance to a procedural matter in this hearing, PRA requests should not be served on all parties using the Service List.

⁴ Ultimately, the State Water Board's order denying the Morongo Band's request for reconsideration was upheld by the California Supreme Court. (*Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731.)

⁵ Ms. Des Jardins submitted several motions requesting that we reconsider various issues upon which we have already ruled. We reiterate our previous admonition to the parties that excessive motion practice is discouraged, and we may ignore or summarily deny duplicative motions. Accordingly, we hereby deny Ms. Des Jardins's January 31, 2018 motion, her February 7, 2018 Motion for Reconsideration Regarding Rulings Barring Objections to Modeling Evidence, her February 8, 2018 Motion for Reconsideration of Ruling Regarding Ex Parte Matters, and her February 13, 2018 motion – none of which raised arguments that were not addressed in our previous rulings.

⁶ On February 9, 2018, DWR served an errata to its February 7, 2018 objections with minor corrections.

CCLP's PRA requests will not be included in the evidentiary record. They will be included in the administrative record, however, along with other, non-evidentiary materials that we receive throughout the hearing, such as policy statements.

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