
State Water Resources Control Board

August 31, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING REGARDING SCHEDULING OF PART 2 AND OTHER PROCEDURAL MATTERS

This ruling grants the Department of Water Resources' (DWR) August 3, 2017 request to establish a schedule for Part 2 of the hearing before the State Water Resources Control Board (State Water Board) on the water right change petition for the California WaterFix Project. A number of protestants have called for the indefinite delay of Part 2 pending the issuance of a Record of Decision (ROD) by the U.S. Bureau of Reclamation (Reclamation) pursuant to the National Environmental Policy Act (NEPA), and further consultation between Reclamation and the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) pursuant to section 7 of the federal Endangered Species Act (ESA). As discussed below, we conclude that a continuation of the hearing is not legally required, and that the public interest weighs in favor of proceeding with the hearing, taking into consideration: (1) the substantial information available concerning the potential effects of the project, (2) DWR and Reclamation (collectively petitioners) have the burden of demonstrating that each element necessary for approval of their petition has been met, (3) the risks and costs of postponing for an indefinite period the conclusion of the evidentiary hearing, and (4) either the hearing or the State Water Board's decision on the petition can be re-opened if necessary and appropriate to consider new information. We also conclude that the project description is adequate to allow the parties to participate meaningfully in Part 2, but petitioners are directed to clarify whether any proposed operating criteria have changed through the section 7 consultation process.

Although we have concluded that it is in the public interest to proceed with the hearing, we shared protestants' expectation that the NEPA and ESA processes would be complete at this juncture, and we did not anticipate that USFWS and NMFS would defer a more detailed level of review of certain elements of the project to a future consultation process. As a consequence, petitioners may need to supply more information than anticipated through the hearing process in order to meet their burden of proof without the benefit of a ROD and complete consultation under section 7 of the ESA. Similarly, protestants may need additional time to develop their cases-in-chief. We have taken this into consideration in establishing an appropriate schedule for Part 2.

The schedule for Part 2, including a tentative pre-hearing conference date, is set forth below. This ruling also establishes important deadlines for participation in Part 2, including deadlines for the submission of supplemental Notices of Intent to Appear and the submission of written testimony and exhibits. The parties are advised to read this ruling carefully, especially those parties who did not participate in Part 1 and may not be familiar with the State Water Board hearing procedures. In addition, all of the parties are expected to have read the

October 30, 2015 [Notice of Public Hearing and Pre-Hearing Conference](#) (Hearing Notice), including Enclosure D, and our previous rulings in this hearing. The Hearing Notice and rulings are posted on the State Water Board's webpage at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/ruling_notices.

This ruling also addresses the scope of Part 2, limits on evidentiary objections, Deirdre Des Jardins' request to conduct a rulemaking proceeding to establish "appropriate Delta flow criteria" pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009, and the City of Stockton's request to move sur-rebuttal exhibits into evidence.

1. SCHEDULE AND DEADLINES FOR PART 2 OF THE HEARING

Request to Delay Part 2 Pending Completion of other Environmental Review Processes

Procedural Background

The proper timing of this hearing relative to other environmental review processes for the WaterFix Project was discussed in our Hearing Notice issued on October 30, 2015. The Notice proposed that the second part of the hearing begin only after the California Environmental Quality Act (CEQA), ESA, and California Endangered Species Act (CESA) processes were complete. (Hearing Notice, p. 11.)¹ Specifically, those processes entail: (1) DWR's preparation of a Final Environmental Impact Report (FEIR) pursuant to CEQA, (2) Reclamation's consultation with NMFS and USFWS under section 7 of the ESA, and (3) issuance of an Incidental Take Permit (ITP) by the California Department of Fish and Wildlife (CDFW) pursuant to CESA. The Hearing Notice explained that, as a responsible agency under CEQA, the State Water Board would rely on the FEIR prepared by DWR.

In subsequent rulings, we confirmed that we would not begin Part 2 of the hearing until all of the environmental review processes were complete based on our understanding that the ESA, CESA, and NEPA processes would conclude around the same time as the EIR was finalized. During the pre-hearing conference, Reclamation stated that it was engaged with DWR "in a joint NEPA/CEQA process, so our timing has been parallel to that of the state in the development of the EIR/EIS." (R.T. (January 28, 2016) p. 28:13-16.) During the hearing, petitioners consistently stated that, after completing the FEIR/EIS, Reclamation would complete the NEPA process by issuing a ROD. (Petitioners' Letter to Hearing Officers, November 28, 2016, p. 2. ["Reclamation targets the issuance of the Record of Decision (ROD) approximately a week after receipt of the BiOps. DWR expects to certify the EIR and make a decision on the project and file an NOD completing the CEQA process at approximately the same time as Reclamation's issuance of the ROD."].)

Over the course of the hearing, the schedule for the CEQA/NEPA and ESA/CESA processes was extended by approximately nine months. By letter dated February 25, 2016, petitioners informed us and the other parties that they expected to complete the FEIR/EIS by June 2016 and issue the ROD and Notice of Determination (NOD) by September 2016. The target date for issuance of Biological Opinions was September 2016, and the target date for issuance of an ITP was October 2016. Subsequently, petitioners completed the FEIR/EIS in December 2016.

¹ The Hearing Notice did not reference completion of environmental review under NEPA.

NMFS and USFWS issued “mixed programmatic” Biological Opinions for the project in June 2017.² DWR filed an NOD on the final, certified EIR in July 2017, and CDFW issued an ITP in July 2017. By e-mail dated August 1, 2017, DWR confirmed the public availability of the environmental documents and stated that Reclamation continues to “contemplate” the ROD that will accompany the FEIS. (E-mail from Bobbie Randhawa, DWR, August 1, 2017.)

Requests and Objections by the Parties

On August 3, 2017, DWR formally requested that the hearing officers notice Part 2 of the hearing, notwithstanding the lack of a definitive schedule for the issuance of the ROD. On the same day, Save the California Delta Alliance (SCDA) submitted a letter, requesting the State Water Board not to schedule Part 2 of the hearing until the ESA and NEPA processes are complete and petitioners have submitted a complete project description pursuant to section 794 of the State Water Board’s regulations. We required responses to either of these requests to be filed by noon on August 11, 2017, and replies to the responses to be filed by noon on August 14, 2017. Between August 4 through 11, 2017, we received more than a dozen letters, some of which were written on behalf of multiple parties, joining in SCDA’s request, plus several individual objections to DWR’s request.

SCDA requests in its letter of August 3, 2017, that Part 2 of the hearing be continued until: (1) petitioners submit a succinct and complete project description, (2) petitioners complete ESA standard level consultation on all project elements, and (3) Reclamation issues a ROD and certifies the EIS. SCDA also asks the State Water Board to require petitioners to provide an updated description of project operating criteria in a short, tabular format to identify any alternations in the operating criteria as between the EIR/EIS and the Biological Assessment prepared for the section 7 consultation process under the ESA. Natural Resources Defense Council, The Bay Institute, and Defenders of Wildlife (collectively, NRDC et al.) objected to DWR’s request to proceed with Part 2 of the hearing on the grounds that the federal ESA process is not complete. NRDC et al. assert that without complete standard-level Biological Opinions and incidental take statements petitioners cannot demonstrate compliance with the ESA, protestants will be prejudiced, and the State Water Board will face a difficult and time-consuming task in making independent findings and devising appropriate terms and conditions to meet the State Water Board’s public trust and other obligations. Sacramento Valley Water Users (SVWU) object to proceeding without the ROD on the grounds that Reclamation’s decision would resolve uncertainty concerning how the Central Valley Project (CVP) would be operated with the WaterFix Project, which will determine potential impacts of the project relevant to key hearing issues. SVWU also asserts that proceeding with Part 2 will constrain the action alternatives available to Reclamation in violation of NEPA.

² For the limited purposes of this ruling, we take official notice of nature and scope of the analysis contained in the Biological Opinion and Appendices A1-H issued by NMFS, dated June 16, 2017, available at: http://www.westcoast.fisheries.noaa.gov/central_valley/CAWaterFix.html, the Biological Opinion issued by USFWS dated June 23, 2017, available at: https://www.fws.gov/sfbaydelta/HabitatConservation/CalWaterFix/documents/Final_California_WaterFix_USFWS_Biological_Opinion_06-23-2017.pdf, and the Incidental Take Permit issued by CDFW, dated July 26, 2017, available at: https://www.californiawaterfix.com/docs/CWF_ITP_FinalSigned_with_Attachments.pdf Official notice is taken pursuant to California Code of Regulations, title 23, section 648.2 (authorizing the State Water Board to take official notice of matters that may be judicially noticed) and Evidence Code section 452, subdivision (c) (authorizing judicial notice of official acts of the legislative, executive, or judicial departments of the United States).

DWR submitted a brief response to SCDA's August 3, 2017 letter on August 11, 2017, and seven parties responded to DWR's response on or before the deadline of August 14, 2017.

Discussion

In our initial decision not to begin Part 2 until the CEQA/NEPA and ESA/CESA processes were complete, as expressed in our February 11, 2016 ruling, we reasoned that the benefit of additional information that we expected to obtain from these processes and final documents justified bifurcation of the hearing and postponement of certain issues until a later date. Our decision rested on the expectation that the environmental processes would be completed in parallel and within a reasonable period of time prior to the commencement of Part 2 of the hearing. We did not find that completion of all environmental review was necessary, but that the circumstances justified a staged approach. With the exception of the certified, final EIR, the environmental review documents are not legally required for the State Water Board to process the water right change petition for the WaterFix Project. Whether or not to proceed with Part 2 without the benefit of these documents is a discretionary determination based on a weighing of the informational benefits of having these documents against the risks and costs of delaying this proceeding for an indefinite period of time.

The objecting parties raise three arguments in support of their assertion that we cannot and should not proceed with Part 2 of the hearing without a ROD and a standard-level Biological Opinion for all aspects of the project: (1) the documents are legally required before we can act upon the petition, (2) the documents are necessary so as to properly inform the evidentiary hearing and our decision-making with respect to impacts on fish and wildlife, and (3) the documents are necessary so as to clearly define the operational criteria proposed for the project. We address, first, the role of the ROD and, then, the Biological Opinions in our decision-making process, and explain why we are not persuaded that these documents are legally required, or that they are necessary to properly inform Part 2 of the hearing. Next, we address the risks and costs of postponing the hearing indefinitely. Finally, we address the adequacy of the project description, including proposed operating criteria, for purposes of participating in Part 2 of the hearing.

1. Need for the Record of Decision.

A ROD is a "concise public record of decision" prepared by the lead federal agency under NEPA that contains a statement of the decision, identification of all alternatives considered, identification of the environmentally preferable alternative, a statement as to whether all practical means to avoid or minimize environmental harm from the alternative selected have been adopted (and if not, why they were not), and a summary of monitoring and enforcement where applicable for any mitigation. (40 C.F.R. § 1505.2.) A final EIS and ROD pursuant to NEPA is not necessary for the State Water Board to act upon a water right change petition, and indeed, we routinely act upon petitions in which no environmental document has been prepared under NEPA because no federal action is at issue. We agree that having the ROD in the record might be useful, particularly if it contains a concise summary of the FEIS; but substantively, we anticipate that the informational value of the ROD will be limited. The ROD should not disclose any new impacts that have not already been discussed and analyzed in the FEIS. Reclamation has offered no indication that the ROD will contain additional details about Reclamation's participation in the project or operational criteria.

Reclamation may intend to wait until the State Water Board has decided whether and under what terms and conditions to approve the project before making a final determination as to the

agency's participation. Although this order of decision-making increases the difficulty of our process, we recognize that Reclamation has the prerogative to take a wait-and-see approach. We are unpersuaded by SVWU's argument that proceeding without the ROD would place Reclamation in the position of violating NEPA by constraining the action alternatives available to the agency. If alternatives are constrained through the State Water Board's petition process, it is the State Water Board and not Reclamation that will be doing the constraining and NEPA does not apply to the State Water Board's actions. San Joaquin County and others take the position that without the ROD, the State Water Board cannot be assured that Reclamation will abide by the conditions that petitioners have represented will constrain operation of the project. (County of San Joaquin et al., August 14, 2017, p. 3.) On this point, the objecting parties are mistaken. The State Water Board has the authority through the petition process to define and impose conditions to constrain project operations. Identifying necessary and appropriate conditions for approval of the petition, if the petition is approved, is one of the primary purposes of this hearing. In the alternative, we may find that the lack of definitive operational constraints prevents us from making the findings necessary to approve the petition, in which case petitioners will have failed to carry their burden of proof.

2. Need for Standard-Level Biological Opinions.

The lack of a standard-level Biological Opinion from USFWS that addresses operations and all elements of construction of the project is at first glance of more concern to us. The Biological Opinions issued by USFWS and NMFS are "mixed programmatic actions" as defined by 50 Code of Federal Regulations part 402.02. A mixed programmatic action includes a mix of standard consultation on approved actions that will not be subject to further section 7 consultation, and programmatic consultation on actions that will require future federal approvals and subsequent section 7 consultation to proceed. The USFWS Biological Opinion is standard-level and requires no further section 7 consultation with respect to construction of the tunnels and certain other actions related to the construction of new facilities, and includes an incidental take statement for those actions. The USFWS Biological Opinion addresses operation of CVP and State Water Project (SWP) facilities under dual conveyance, construction of the North Delta diversion facilities, and other project elements at a programmatic level only. In contrast, the NMFS Biological Opinion is standard-level and requires no further section 7 consultation with respect to most construction and operational activities, and includes an incidental take statement for those actions. The NMFS Biological Opinion addresses at a programmatic level compensatory mitigation for operational impacts, habitat restoration, monitoring, and adaptive management.

The completion of consultation under section 7 of the ESA and issuance of an incidental take statement are also not legally required for the State Water Board to act upon a water right petition. We routinely act upon petitions in which there is no consultation under section 7 of the ESA because no federal action is at issue. Where compliance with the federal ESA is required, the State Water Board may act prior to issuance of a standard-level Biological Opinion or incidental take permit by conditioning its approval upon reasonable assurances that the project proponent will comply with the ESA. For example, in 2002, the State Water Board approved the petition of Imperial Irrigation District (IID) and San Diego County Water Authority for the long term transfer of Colorado River water prior to issuance of incidental take permits by USFWS and CDFW. Rather than waiting for these documents to be finalized, the State Water Board conditioned its approval of the transfer petition on IID obtaining the necessary approvals under the federal ESA and CESA. (Revised Order WR 2002-0013, pp. 83 & 91.)

In this case, section 7 consultation is not complete for some project elements, but impact assessments from the fish and wildlife agencies are available. The state and federal environmental review processes have produced a final EIR, an EIS, a Biological Assessment, two Biological Opinions and incidental take statements from the federal wildlife and fishery agencies, and a state-issued ITP. The NMFS Biological Opinion is standard-level with respect to operations, includes extensive analysis of potential impacts to anadromous species, and the accompanying incidental take statement identifies reasonable and prudent measures to protect those species. The ITP issued by CDFW covers many of the same species addressed in the USFWS Biological Opinion including Delta smelt, and imposes a list of operating restrictions necessary to protect covered species such as new spring Delta outflow criteria. (CDFW ITP, pp. 177-190.) Last, though the Biological Opinion issued by USFWS is programmatic with respect to operations and certain elements of construction, it includes a lengthy discussion of impacts, including operational impacts, on Delta smelt and critical habitat for Delta smelt. "An analysis and conclusion of whether or not the entire CWF action as described in the [Proposed Alternative] is likely to jeopardize listed species or destroy or adversely modify critical habitat is included in this BiOp." (USFWS Biological Opinion, p. 9.) Although further section 7 consultation would likely have some informational value, substantial information is already available concerning potential environmental impacts. If additional definition of operational criteria is necessary as a condition of any approval of the petition to avoid unreasonable impacts to fish and wildlife, we have the authority to define and impose those conditions.

3. Risks and Costs of Postponing Part 2.

On the other side of the equation, we must consider the risks and costs that may result from postponing Part 2 of this proceeding. We do not know the length of the delay that would be necessary for a ROD to be issued and for section 7 consultation to be completed. There is no indication from the petitioners that a ROD is expected to be forthcoming in the near future. There is also no specific time frame offered by USFWS for issuance of a standard-level Biological Opinion. USFWS suggests that it will engage in standard-level consultation for operation of the WaterFix Project in the context of reinitiation of the 2008 Biological Opinion for the Coordinated Operations of the CVP and SWP. (See USFWS Biological Opinion, p. 246.) If so, that process is likely to take place years in the future. In sum, the delay to the hearing and our action on the petition if we were to wait for these documents is indeterminate, but could be a matter of years and not months. As a practical matter, the hearing record will become stale, memories of testimony will fade, and members of our staff and the State Board will relocate and retire. The same is true of the staff and representatives of the parties to this proceeding.

The call for delay pending the completion of other regulatory processes highlights a fundamental dilemma that arises with any complex project. Pausing our process would not prevent other regulatory agencies from having to act without complete information. It is simply not possible for every agency to act with full knowledge of the terms and conditions that each other agency intends to impose. To some extent, the processes must be iterative. The concerns raised by NRDC et al. about the difficulty for the State Water Board to make findings concerning significant environmental effects and devise appropriate terms and conditions without the benefit of the fish and wildlife agencies' detailed opinions on those impacts, could equally be applied in reverse. Surely there was some difficulty to the fish and wildlife agencies in assessing the impacts of the project without the benefit of the State Water Board's assessment of potential impacts to other legal users, public trust resources, and other matters within the scope of the State Water Board's jurisdiction. Indeed, USFWS explains in its Biological Opinion that it has taken "a programmatic approach to evaluate the elements of the [proposed action] that will be subject to future project-specific consultations because of

subsequent Federal approvals,” in recognition of the fact that certain criteria presented in the Biological Assessment, including operational criteria, will likely be modified to satisfy subsequently imposed regulatory requirements.” (USFWS Biological Opinion, pp. 9 & 250.) The solution to the challenge of interdependent approvals is not to wait until all other processes are complete, but to reserve authority to modify an approval as necessary in light of future decisions by other agencies. For this reason, we may re-open either part of the evidentiary hearing and we intend to reserve authority to re-open our decision on the petition upon a showing of good cause that new information or newly imposed regulatory criteria not previously available, including but not limited to issuance of a ROD, justifies doing so.

Given the substantial environmental information that is already available, the indeterminate informational value of the ROD and further section 7 consultation, the costs and burdens of an indefinite hold on the State Water Board’s decision-making process, and the Board’s authority to re-open the hearing or our decision if appropriate to consider new information, we find that the public interest weighs in favor of proceeding with Part 2 of the hearing. We recognize, however, that the petitioners and other parties should be given the opportunity to supply information that we expected to be provided by additional environmental review or the ROD, and therefore we will afford parties additional time to prepare testimony and exhibits for Part 2 of the hearing as reflected in the schedule set forth below.

4. *Adequacy of the Project Description.*

Last, SCDA has again raised the argument that petitioners have not submitted a complete project description in satisfaction of California Code of Regulations, title 23, section 794. We addressed this objection in our ruling of July 22, 2016, concerning whether to begin Part 1, and in subsequent rulings. Consistent with our prior rulings, we conclude that the project description provided by petitioners in their case-in-chief is adequate to allow the parties to participate meaningfully in Part 2. “[N]ot all uncertainties need to be resolved for an adequate project description, and one of the purposes of this proceeding is to hear evidence and argument concerning proposed operating conditions.” (Ruling Denying SVWU’s Request to Hold Open Part 1 of the Hearing, July 27, 2017, p. 2.) That said, proposed project operations do seem to have been refined through the section 7 process, and SCDA has raised legitimate questions concerning whether some of the proposed operating criteria have changed. For example, SCDA points out that the operating criteria described in the FEIR/EIS includes a minimum flow of 3,000 cubic feet per second on the Sacramento River at Rio Vista from January through August, but the description of the proposed action in the Revised Biological Assessment does not include this requirement. SCDA also points to discrepancies between the CEQA documentation and the section 7 documentation with respect to the description of the proposal to preferentially operate southern Delta export facilities from July through September, and in the proposed calculation of the export to inflow ratio. To eliminate any confusion concerning petitioners’ current proposal, we direct the petitioners to provide an updated summary of operating criteria that makes explicit whether particular criteria are proposed conditions of operation or are set forth solely as modeling assumptions. This summary shall be submitted by petitioners by September 8, 2017.

Schedule for Part 2 of the Hearing

Part 2 of the hearing will commence in accordance with the schedule below and in Part 2 Attachment A, which establishes specific hearing dates and room locations. Please note that the start times may be earlier than 9:30 a.m. if the hearing officers determine that an earlier start time is necessary. Any change in start times will be announced at the conclusion of the

previous hearing day. Details concerning the deadlines and hearing process are set forth below.

Summary of Hearing Schedule and Important Deadlines for Parties

12:00 noon, September 8, 2017	Due date for receipt and service of petitioners' summary of operating criteria.
12:00 noon, September 22, 2017	Due date for parties' pre-hearing conference agenda topics
12:00 noon, September 22, 2017	Due date for parties' Supplemental Notices of Intent to Appear in Part 2.
9:30 am, October 19, 2017	Pre-Hearing Conference to discuss Part 2 procedural issues.
12:00 noon, November 30, 2017	Due date for receipt and service of parties' cases-in-chief, including written opening statements, witnesses' proposed testimony, as well as a summary of that testimony, witness qualifications, exhibits, exhibit identification index, identification of any witness panels and a statement of service for Part 2 of the hearing.
12:00 noon, November 30, 2017	Due date for receipt and service of proposed groupings and order of parties for cross-examination in Part 2 of the hearing.
9:30 am, January 18, 2017	Part 2 begins with policy statements, followed immediately by petitioners' case-in-chief and cross-examination of petitioners' witnesses. Following any redirect and re-cross of petitioners' witnesses, other parties will have the opportunity to present their Part 2 cases-in-chief followed by cross-examination of their witnesses by the petitioners and other parties.

Pre-Hearing Conference

A pre-hearing conference is tentatively scheduled for October 19, 2017, at 9:30 am in the Byron Sher Auditorium, Second Floor, 1001 I Street, Sacramento, CA 95814. The purpose of the pre-hearing conference is to resolve procedural issues before the hearing resumes in order to have an efficient and productive hearing. The pre-hearing conference will not be used to hear arguments on, or determine the merits of, any hearing issues, other than procedural matters, unless the parties agree prior to the pre-hearing conference to resolve a hearing issue by stipulation. Following the pre-hearing conference, we may in our discretion modify the hearing procedures or issues set forth in the Hearing Notice and subsequent rulings in whole or in part.

We encourage the parties to submit suggestions for pre-hearing conference agenda topics. Please submit any suggested agenda topics to CWFhearing@waterboards.ca.gov and copy the current [Service List](#) **no later than 12:00 noon on September 22, 2017**. Following receipt and consideration of these suggestions, we may determine that a pre-hearing conference is unnecessary. We will either confirm the date and issue an agenda or cancel the pre-hearing conference on or before October 12, 2017.

Parties are not required to attend the pre-hearing conference. Any parties who do not attend the conference, however, waive their right to comment on any decisions that we make at the pre-hearing conference or in a subsequent pre-hearing conference ruling.

Parties Who May Participate in Part 2 and Supplemental Notices of Intent to Appear

Only those parties who are listed in Table 1 of the current [Service List](#) and who indicated on their Notice of Intent to Appear (NOI), as of March 16, 2016,³ that they intend to call witnesses and/or participate in cross-examination and/or rebuttal in Part 2 will be allowed to participate in the evidentiary portion of Part 2 of the hearing, unless otherwise granted party status by the hearing officers.⁴ All other interested persons may make a policy statement as described below.

The NOI form that parties submitted prior to Part 1 of this hearing noted that parties calling witnesses in Part 2 would be required to submit a supplemental NOI. Parties that previously submitted an NOI indicating their intent to call witnesses to testify during Part 2 of this hearing must complete the attached Supplemental NOI form. If a party no longer intends to call witnesses during Part 2 of the hearing, they must indicate that change on the form.

Supplemental NOIs are due no later than noon on September 22, 2017. Failure to submit the Supplemental NOI may be construed as intent not to present witnesses in Part 2 of the hearing.

Submission and Service of Exhibits and Other Hearing Materials

If you are participating in the hearing for the first time, we recommend you read Enclosure D of the October 30, 2015 Hearing Notice, entitled, "Information Concerning Appearance at the California WaterFix Hearing" to familiarize yourself with the hearing procedures. As set forth in the Hearing Notice, exhibits include the written testimony of witnesses, statements of qualifications of expert witnesses, and other documents to be used as evidence. Exhibits that comprise a party's case-in-chief must be submitted in advance of the hearing, together with an [exhibit identification index](#). For parties in Part 2 of the hearing, copies of **written opening statements, witnesses' proposed testimony, as well as a summary of that testimony, witness qualifications, exhibits, exhibit identification indexes, identification of any witness panels, and a statement of service** must be received by the State Water Board and served on each of the parties on the current Service List, no later than **12 noon on**

³ In our March 2, 2016 ruling we allowed parties who previously stated on their NOI that they would participate in Part 2 only, but later proposed to participate in Part 1 in addition to or instead of Part 2 to submit Revised NOIs by March 16, 2016.

⁴ On July 31, 2017, we received a motion from Grassland Water District (Grassland) to file a protest and NOI in Part 2 of the hearing, seeking for the first time to participate as a party. We will take action on Grassland's motion in a forthcoming ruling.

November 30, 2017. With each new submittal to the State Water Board, parties must include a statement of service that certifies that all hearing parties have been served and describes the manner of service. The parties are encouraged to use the statement of service form posted on our website at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20160311_stateservform.pdf.

We note that some modifications have occurred to the hearing procedures following the issuance of the notice via hearing officer rulings. In particular, our [March 4, 2016 Ruling Letter](#) describes in detail two methods for submitting and serving hearing materials electronically, one for general correspondence and other pleadings and a separate method for exhibits (presumably larger documents).⁵

In short, general correspondence and other pleadings should be sent by email to the State Water Board at CWFhearing@waterboards.ca.gov and copied to the current Service List. The Service List includes parties that must be copied on all documents and correspondence addressed to the State Water Board Members or staff regarding this hearing. To avoid typographical errors when entering the Service List email addresses, a text file with all of the email addresses has been posted on the State Water Board's website along with the current Service List at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml. Different email service providers may use different methods to delineate between email address recipients; therefore, hearing team staff have provided two additional service list text files that use either a comma or semicolon to delineate between email addresses. All three of the text files are identical and contain the full list of email addresses on the service list with the exception of how they are delineated. Parties should visit the above listed hyperlink and cut and paste the most recent list of email addresses contained in the text file into the email's addressee list **each time** they email correspondence to the Service List, as the email addresses are updated over time.

The State Water Board has also developed a secure File Transfer Protocol (FTP) website for submitting exhibits to the State Water Board and serving exhibits on the hearing parties to avoid file size limitation issues and other issues that may interfere with the electronic exchange of larger exhibit files. During Part 1, hearing staff provided each party on the Service List, including parties participating in Part 2 only, a party-specific FTP account with a username and password. Parties can upload their exhibits to their account folder on the FTP website. All parties to the hearing have access to a shared account on the FTP site, which will allow parties to view and download other parties' exhibits. The shared FTP account is accessible at [https://ftp.waterboards.ca.gov/?u=water fix download&p=waterfix123](https://ftp.waterboards.ca.gov/?u=water%20fix%20download&p=waterfix123). The FTP site allows parties to upload exhibits ahead of the due date and no other parties will be able to view those exhibits until after the submittal deadline. Currently, the FTP account folders and their contents are visible to all parties and the public. Please note that all files on the FTP website will be deleted two weeks from the date of this ruling, as described below, in preparation for Part 2. At that time, the account folders will become private and will no longer be viewable to other parties or the public. If any party has misplaced their login information for the FTP site or has difficulty uploading information to that site, please contact the hearing team at

⁵ The one exception to the electronic service procedures is service of exhibits and other documents by the petitioners on Clifton Court, L.P. who has not agreed to electronic service by the petitioners. Clifton Court, L.P. has agreed to electronic service by all other parties.

CWFhearing@waterboards.ca.gov or (916) 319-0960. We recommend that you upload information to the FTP site well in advance of any deadline to make sure you do not have any last minute difficulties.

To serve exhibits on the other parties, parties should send an email to the Service List stating that the party's exhibits are available on the FTP site with the name of the FTP account folder where the exhibits are stored (e.g., DWR).

Opening Statements/Closing Briefs

Written opening statements are due at the same time as the written testimony and exhibits for each party's case in chief and shall include an overview of the party's legal arguments. Written opening statements shall be limited to 20 pages in 12-point Arial font, except for good cause shown in a written request that is approved by the hearing officers. Parties will have 20 minutes each to summarize their opening statement. There will be an opportunity to provide more detailed legal arguments in written closing briefs submitted after completion of Part 2. A summary of written, direct testimony is also required to be submitted with witnesses' testimony.

Time Limits and Consolidation of Parties

The time limits specified in the Hearing Notice remain in force and effect. Parties must show good cause for any proposed time limits that differ from what is provided in the Hearing Notice. Parties must include any requests and justification for additional time with their written testimony and exhibits. Identification of any proposed groupings with other parties for direct testimony or cross-examination and any proposals regarding the order of parties are due by **12:00 noon, November 30, 2017**, as specified above. We may provide additional details on time limits following the pre-hearing conference.

Policy Statements

Policy statements will be heard at the beginning of Part 2 of the hearing, on January 18, 2017. Interested persons who are not participating in the evidentiary portion of the hearing may submit a written policy statement or present an oral policy statement. We strongly discourage duplicative policy statements. Members of organizations that have already given a policy statement should indicate their concurrence with their previously submitted statement, rather than repeating it. Please see the Hearing Notice for more information concerning policy statements. Petitioners' opening statements and testimony for Part 2 will start immediately following policy statements.

A person or entity that is not a party does not gain party status by appearing and presenting a policy statement, and will not be allowed to make objections, offer evidence, conduct cross-examination, make legal argument or otherwise participate in the evidentiary phases of the hearing. Policy statements will be limited to **three minutes** per person. We may adjust this time limit in light of the number of presenters. While not mandatory, we request that policy statements be provided in writing before they are presented and, if possible, that they be submitted by electronic mail to CWFhearing@waterboards.ca.gov. In addition, while there is no maximum page limit for policy statements, we request that written policy statements be ten pages or less. Written policy statements should also be copied to the service list as described below under "Service of Hearing Materials."

During Part 1 of the hearing, some parties, including the petitioners, requested to make policy statements and present cases-in-chief. In our June 10, 2016 ruling, we permitted petitioners and other parties to make policy statements in order to provide some flexibility for hearing party representatives to make policy comments. However, in order to maintain an efficient hearing, we still limited policy statements by party representatives to three minutes per speaker, and the time a party spent on policy statements was deducted from the 20 minutes afforded to each party to present an opening statement. Parties were asked to track their time on the honor system and deduct the time used to present policy statements from any opening statement. We will allow the same flexibility for parties in Part 2. The order of speakers making policy statements will be determined at the beginning of Part 2 of the hearing depending on the elected officials present and any scheduling issues that the participants may have.

2. OTHER PROCEDURAL MATTERS

Scope of Part 2

Generally, Part 1 of the hearing focused on the potential effects of the petition on agricultural, municipal and industrial uses of water and associated legal users of water and conditions that should be placed on any approval of the petition to protect those uses. Part 2 of the hearing will focus on the potential effects of the petition on fish and wildlife and recreational uses and conditions that should be placed on any approval of the petition to protect those uses, including consideration of appropriate Delta flow criteria for the WaterFix Project as required by the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act). Detailed key hearing issues for Part 2 are provided below. The parties should review our previous rulings concerning the scope of Parts 1 and 2 of the hearing, including our rulings dated February 11, 2016, and October 7, 2016. In particular, we would like to remind the parties that, consistent with the State Water Board's more limited role as a responsible agency under CEQA, the issue of whether the FEIR/EIS for the WaterFix Project satisfies CEQA or NEPA requirements is not a key hearing issue, and testimony on that issue will not be admitted.

The State Water Board's order following this proceeding must be based upon evidence in the record developed at the hearing. Only one record will be developed in this proceeding, comprised of evidence submitted and accepted during both Parts 1 and 2 of the hearing. Therefore, evidence accepted during Part 1 of the hearing should not be resubmitted in Part 2. Please review the existing record carefully and avoid any duplication of exhibits or exhibit numbers.

Parties to Part 2 of the hearing should submit exhibits and testimony responsive to the following issues that will be considered during this portion of the hearing:

3. Will the changes proposed in the petition unreasonably affect fish and wildlife or recreational uses of water, or other public trust resources?
 - a. Will the proposed changes in points of diversion alter water flows in a manner that unreasonably affects fish, wildlife, or recreational uses of water?
 - b. Will the proposed changes in points of diversion alter water quality in a manner that unreasonably affects fish, wildlife, or recreational uses of water?

- c. If so for a and/or b above, what specific conditions, if any, should the State Water Board include in any approval of the Petition to avoid unreasonable effects to fish, wildlife, or recreational uses?
 - d. What Delta flow criteria are appropriate and should be included in any approval of the petition, taking into consideration the 2010 Delta flow criteria report, competing beneficial uses of water, and the relative responsibility of the Projects and other water right holders for meeting water quality objectives?
4. Are the proposed changes requested in the petition in the public interest? What specific conditions, if any, should be included in any approval of the Petition to ensure that the changes are in the public interest?
 5. Should the Final Environmental Impact Report be entered into the administrative record for the Petition?

Evidentiary Objections in Part 2

As stated in our February 21, 2017 ruling letter on evidentiary objections to the admission of testimony and exhibits into evidence, we received an excessive number of objections to the evidence presented as part of cases-in-chief in Parts 1A and 1B of the hearing that either lacked merit or went to the weight of the evidence, not its admissibility. Moving forward, we directed parties to be more judicious in making evidentiary objections, and to follow the guidance set forth in our February 21, 2017 ruling concerning the types of objections that should be addressed through cross-examination or rebuttal or reserved for closing briefs.

Consistent with this general direction, we will continue to place limits on the timing of any objections to testimony and exhibits in Part 2 of the hearing. First, parties should not make any objections to the admissibility of testimony (which must be submitted in writing by **12:00 noon on November 30, 2017**) before the hearing resumes for presentation of Part 2 cases-in-chief. We will review the written testimony carefully before the hearing resumes to ensure that the testimony is relevant, within the scope of Part 2, and sufficiently reliable to be admissible. To the extent necessary, we will exclude any witnesses' proposed testimony on our own motion before the witnesses present their testimony. Second, any objections to the admissibility of testimony that we do not address on our own motion, and any objections to the admissibility of exhibits, must be made, orally or in writing, during the hearing no later than when the testimony and exhibits are offered into evidence. **We will not consider any objections to the admissibility of a party's testimony or exhibits that are made after the party's testimony and exhibits are offered into evidence.** Third, any objections that go to the weight of testimony or exhibits, including hearsay objections, should be reserved for the parties' closing briefs. Finally, parties should be prepared to offer their testimony and exhibits into evidence immediately after their witnesses have summarized their direct testimony and been subject to cross-examination, and any re-cross and re-direct.

Parties should review our [February 21, 2017 ruling](#) regarding evidentiary objections to admission of testimony and exhibits. As we concluded in the ruling, the bar for the admission of evidence is low in administrative proceedings, and evidence may be admissible even though its probative value is limited. The parties are responsible, however, for submitting their testimony and exhibits on time, and for providing adequate foundation to demonstrate that their exhibits are relevant and reliable. We will defer any final decisions on the weight to afford testimony and

exhibits until such time when the entire record is before us and we have the opportunity to carefully consider all of the evidence.

To assist the parties in determining what types of objections are appropriate in State Water Board proceedings, and whether a particular type of objection is likely to go to the weight of the evidence, as opposed to its admissibility, some key points from our February 21, 2017 ruling are summarized below:

- Argumentative Objections: Evidentiary objections should not be used to argue the merits of an issue. Arguments concerning the merits of a witness' testimony or the contents of an exhibit are more properly addressed through cross-examination of the witness, rebuttal, or closing briefs.
- Objections Based on the Kelly Rule: The *Kelly* rule does not apply. Accordingly, expert testimony based on a new scientific technique does not require a showing that the technique has been generally accepted in the relevant scientific community.
- Objections Based on Expert Witness Qualifications: Expert witnesses are not required to be qualified as experts before they may testify. As a general rule, objections to a witness' qualifications go to the weight of the witness' testimony, not its admissibility.
- Objections to Lay Opinion: Lay person opinion is permitted. In general, objections to a lay person's testimony on a given subject on the grounds that the person lacks knowledge or expertise concerning the subject matter go to the weight to be afforded the testimony, not its admissibility.
- Objections to Legal Conclusions and Ultimate Issue Opinions: Witnesses may testify concerning mixed issues of law and fact. Rather than parsing testimony to exclude any portions that concern pure questions of law, the hearing officers may admit the testimony, but disregard any portions concerning pure questions of law that have no probative value. Witnesses also may offer their opinions concerning the key hearing issues. Any such testimony is not objectionable on the grounds that it embraces an ultimate issue to be decided by the trier of fact.
- Objections to Testimony on Contracts and Agreements: The best evidence rule does not apply, and therefore testimony concerning the content of a contract or agreement is not prohibited. To the extent that portions of testimony interpreting a contract or other document is inconsistent with the plain language of the document, itself, the hearing officers may disregard the testimony rather than exclude it.
- Objections on the Grounds of Relevance: Evidence is relevant if it has a tendency in reason to prove or disprove any disputed fact of consequence in a proceeding. Testimony or exhibits may not be objectionable on the grounds that they do not explicitly address or discuss a key hearing issue because their relevance may be explained in an opening statement or closing brief.
- Objections for Lack of Foundation or Authentication: Exhibits must have some foundational support to be admitted, but a proper trial-like foundation is not required. Some exhibits, such as official records, published reports, and formal letters, may not

require formal authentication through witness testimony or a declaration if the nature and reliability of the exhibits are readily identifiable on their face.

- Hearsay Objections: Hearsay evidence is admissible, but over timely objection may only be used for purposes of supplementing or explaining other evidence, and may not serve as the sole support for a finding, unless it would be admissible over objection in a civil court case. Technical reports prepared by expert witnesses for purposes of this proceeding will be considered part of their testimony, not hearsay. Expert witnesses may rely on documents prepared for purposes other than this proceeding to the extent reasonable, but witnesses may not convert documents prepared for other purposes into non-hearsay testimony simply by incorporating those documents by reference into their testimony. Testimony of another witness in the same proceeding is not hearsay, except to the extent that the testimony narrates the statements of third parties made outside the proceeding.

Deirdre Des Jardins' Request Regarding "Appropriate Delta Flow Criteria"

On August 4, 2017, Ms. Deirdre Des Jardins sent a letter to the Hearing Officers on behalf of California Water Research, requesting that the State Water Board adopt "appropriate Delta flow criteria" according to the provisions for rulemaking under the Administrative Procedure Act (APA) prior to acting on the water right change petition for the WaterFix Project. The Delta Reform Act requires that "appropriate Delta flow criteria" be included as a condition of any approval of the WaterFix petition. (Wat. Code, § 85086, subd. (c)(2).) In our Hearing Notice of October 30, 2015, we identified consideration of appropriate Delta flow criteria as a key issue to be addressed in Part 2 of the hearing. We held in our ruling of March 4, 2016, that we are not required to engage in a separate process to determine appropriate Delta flow criteria, and that conducting a separate process for this purpose would be inefficient. Consistent with our prior ruling, we conclude that the State Water Board is not required to develop appropriate Delta flow criteria through a separate rulemaking process subject to the APA, and deny the request from Ms. Des Jardins.

The State Water Board will develop appropriate Delta flow criteria to be included as a condition of any approval of the WaterFix petition through the adjudicative process applicable to consideration of the petition. The appropriate Delta flow criteria would not be a rule of general application as the criteria would be applicable only to the exercise of the water rights at issue in this proceeding. We also note that this proceeding is subject to and has been conducted in compliance with Chapter 4.5 of the APA, which is the portion of the APA that pertains to adjudicatory rather than rulemaking processes. (Cal. Code Regs., tit. 23, § 648, subd. (b).) Ms. Des Jardins appears to conflate the flow criteria developed by the State Water Board through an informational proceeding in 2010 (see State Water Board Resolution 2010-0039), as required by Water Code section 85086, subdivision (c)(1), with appropriate Delta flow criteria to be imposed as a condition of any approval of the WaterFix petition, as required by Water Code section 85086, subdivision (c)(2). The former were developed through a non-regulatory informational process to aid in future planning for the Delta. The latter will be developed through this adjudicative proceeding, and will be informed by the analysis conducted in the 2010 informational process, as well as consideration of other beneficial uses and users in the Delta.

City of Stockton's Request to Move Sur-Rebuttal Exhibits into Evidence

On August 14, 2017, the City of Stockton (Stockton) made a motion to have exhibits STKN-51, STKN-52, and STKN-53 accepted into evidence. Stockton used these exhibits during cross-

examination. On July 11, 2017, we stated that any requests to move cross-examination exhibits into the evidentiary record were due by July 17, 2017. (R.T. (July 11, 2017) p.4). On June 22, 2017, Stockton moved exhibits STKN-39 through STKN-50 into the evidentiary record, but Stockton did not move STKN-51, STKN-52, and STKN-53 into the record until Stockton's August 14, 2017 letter. Stockton's motion to have exhibits STKN-51, STKN-52, and STKN-53 accepted into the evidentiary record is denied because the motion is untimely.

Files on the WaterFix FTP Website Will Be Deleted

Staff will be deleting all files on the WaterFix FTP website in preparation for Part 2. Parties are hereby advised that if they will have two weeks from the date of this ruling to download files from the FTP website before they are deleted. It is the parties' responsibility to download files they feel are pertinent to their cases. Hearing staff will not be available to retrieve and share Part 1 deleted files for parties.

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

Attachments: Part 2 Attachment A: Hearing Dates and Room Schedule
Part 2 Attachment B: Supplemental Notice of Intent to Appear
Part 2 Attachment C: Notice of Intent to Appear, Policy Statement Only