
State Water Resources Control Board

September 18, 2018

VIA ELECTRONIC MAIL

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CALIFORNIA WATERFIX HEARING – RULING ON PART 2 REBUTTAL CROSS-EXAMINATION EXHIBITS AND CLARIFICATION REGARDING PART 2 SUR-REBUTTAL

This ruling addresses outstanding objections to Part 2 rebuttal cross-examination exhibits, South Delta Water Agency, et al.'s (SDWA) request for clarification, and a motion for reconsideration by Clifton Court, L.P. (CCLP).

Objections to Cross-Examination Exhibits

September 4, 2018, was the deadline to offer into evidence exhibits introduced during cross-examination of Part 2 rebuttal witnesses. Any objections to cross-examination exhibits were due by September 6, 2018. The following parties offered cross-examination exhibits into evidence: the Department of Water Resources (DWR), Westlands Water District, Placer County Water Agency, City of Folsom, et al., Friends of Stone Lakes, et al., Local Agencies of the North Delta et al., SDWA, California Sportfishing Protection Alliance, et al., Deirdre Des Jardins, and Natural Resources Defense Council, et al. Except as otherwise provided herein, the Part 2 rebuttal cross-examination exhibits are hereby accepted into evidence.

We received timely objections to DWR's Part 2 rebuttal cross-examination exhibits from SDWA.¹ SDWA objects to the admission of the following exhibits: DWR-1400, DWR-1401, DWR-1402, DWR-1403, DWR-1404, DWR-1406, and DWR-1408.² DWR introduced these exhibits in connection with its cross examination of SDWA's expert witness, Thomas K. Burke. Legal counsel for DWR and the State Water Contractors (SWC) conducted a joint cross-examination of Mr. Burke on August 28, 2018, and August 31, 2018. In general, SDWA objects to the admission of these exhibits on the grounds that they are outside the scope of Mr. Burke's rebuttal testimony and lack foundation. For the reasons given below, SDWA's objection is sustained in part and overruled in part.

SDWA's objection to the admission of DWR-1400 and DWR-1408 is overruled. DWR-1400 is a DSM2 input file and DWR-1408 contains data extracted from DWR-1400. On August 28, 2018,

¹ DWR submitted a response to SDWA's objection, to which SDWA objected in turn on the grounds that we had not allowed for responses to objections to cross-examination exhibits. Although we did not allow for responses to objections, we did not explicitly prohibit them either, and therefore we have reviewed and considered DWR's response.

² SDWA also objected to the admission of DWR-1293, which is the PowerPoint presentation of Erik Reyes, whose rebuttal testimony was stricken pursuant to an earlier ruling. In its response to SDWA's objection, DWR stated that it had offered this exhibit into evidence inadvertently. This exhibit will be excluded from the evidentiary record.

Mr. Burke stated that he was familiar with the file and explained the methodology he had used to plot cross-sections of channels in the south Delta using DSM2 data from the file. (R.T. (Aug. 28, 2018) 185:15 – 193:11.) In response to further cross-examination on August 31, 2018, however, Mr. Burke questioned whether the file that comprises DWR-1400 was the same one that he had used. On that basis, we sustained SDWA's objection to further cross-examination concerning the exhibit. (R.T. (Aug. 31, 2018) 72:12-80:8.) Mr. Burke's uncertainty concerning whether DWR-1400 comprises the exact same file that he had used, however, does not render DWR-1400 so unreliable as to be inadmissible. The objection to DWR-1400 and DWR-1408 goes to the weight to be afforded those exhibits.

SDWA's objection to the admission of DWR-1401 is also overruled. DWR-1401 is a draft report concerning the calibration and validation of DSM2. The draft report itself identifies when it was prepared and by whom, and we have no reason to doubt its authenticity. In addition, Mr. Burke stated during cross-examination that he had looked at the report in the past, and he answered questions based on the report. (R.T. (Aug. 28, 2018) 203:18 – 208:22.) The record includes adequate foundation to admit DWR-1401 into evidence.

SDWA's objections to DWR-1402, DWR-1403, and DWR-1404 are sustained. DWR-1402 consists of three figures that are described as examples of Middle River channel cross sections from the DSM2 2009 calibration. No foundation was laid for this exhibit, and it does not appear to have been used during Mr. Burke's cross-examination. DWR-1403 is a PowerPoint presentation entitled "DSM2 Version 8.1 Calibration Status Update." Mr. Burke was not familiar with this document and therefore was unable to answer questions based on it during his cross-examination. (R.T. (Aug. 28, 2018) pp. 216:5 - 218:12.) In its response to SDWA's objection, DWR concedes that DWR-1404 was not used during Mr. Burke's cross-examination and should be excluded from the evidentiary record.

Finally, SDWA's objection to the admission of DWR-1406 is overruled. DWR-1406 consists of three maps of a segment of Middle River. Mr. Burke prepared and authenticated the first map and answered questions about it during cross-examination. (R.T. (Aug. 31, 2018) pp. 52:17 – 60:8.) DWR prepared the other two maps and introduced them for demonstrative purposes. SDWA objected to cross-examination based on these two maps because they had not been authenticated by an expert witness and Mr. Burke was unfamiliar with them. We ruled that SDWA's objection would go to the weight to be afforded Mr. Burke's testimony during cross-examination. (*Id.* at pp. 60:9 – 67:11.) Similarly, the two maps prepared by DWR will be admitted as demonstrative exhibits. Absent adequate foundation establishing the reliability of the information depicted on the maps, we will treat those two maps as only providing a basis for asking what were essentially hypothetical questions regarding the locations of DSM2 nodes and cross-sections along the river channel.

Clarification Regarding Scope of Sur-Rebuttal

In its joinder to the September 11, 2018 motion by Local Agencies of the North Delta et al. and Friends of Stone Lakes, et al., SDWA requested clarification of the first item in the list of rebuttal evidence that is subject to sur-rebuttal in our September 10, 2018 ruling, which states:

New information concerning the changes to the WaterFix Project that are described in the administrative draft California WaterFix Supplemental EIR/EIS (SWRCB-113) and the associated environmental impact analysis;

SDWA notes that a public draft Supplemental EIR/EIS for the project is now available and inquired whether that document should be the basis for sur-rebuttal rather than the administrative draft. However, the purpose of this sur-rebuttal phase is to allow parties the opportunity to respond to certain evidence received during Part 2 rebuttal, including the administrative draft Supplemental EIR/EIS and testimony about that document. The public draft Supplemental EIR/EIS was not entered into evidence during Part 2 rebuttal, nor did we receive testimony regarding that document.

As indicated in our September 10, 2018 ruling, the State Water Board is required by law to consider the final Supplemental EIR/EIS when making a final decision in this matter. Thus, that document – which should encompass the public draft and provide responses to comments on the public draft – ultimately must enter the evidentiary record. The parties will have an opportunity at a later date to provide input as to whether the final Supplemental EIR/EIS necessitates changes to the hearing.

Clifton Court, L.P.'s Motion for Reconsideration

Background

The scope of Part 2 Rebuttal included not only rebuttal evidence, but also the presentation of evidence and cross-examination of Petitioners' witnesses about the administrative draft EIR/EIS Supplement. We explicitly granted CCLP's request to question Petitioners' witnesses about potential injury to CCLP's water rights given that DWR no longer intends to expand Clifton Court Forebay to include CCLP's property. As has been our practice in this proceeding, we allowed each party one hour to cross-examine each panel of witnesses, unless the party demonstrated good cause for additional time.

CCLP conducted cross-examination of Petitioners' first panel of witnesses on August 2 and August 3, 2018. We allowed CCLP an hour of cross-examination. CCLP questioned the panel about traffic impacts for more than half of the allotted time, and then proceeded to address noise, climate change, and recreation. Because CCLP reserved questions about potential injury to its water rights until last, it did not have the opportunity to ask those questions of the panel. As an accommodation, we allowed CCLP to submit written questions of DWR's witnesses about potential injury to CCLP's water rights in light of changes to the WaterFix Project described in the administrative draft EIR/EIS Supplement. CCLP submitted its list of questions on August 9, 2018. DWR provided written responses to the questions on August 14, 2018. On August 23, 2018, CCLP submitted detailed objections and moved to strike DWR's responses as inadequate and nonresponsive.

On September 10, 2018, we ruled that DWR's responses were insufficient, in part because the responses provided were not affirmed by a witness. Because the issue of injury to water rights is one that is central to our consideration in this proceeding, we directed DWR to produce one or more witnesses with knowledge about the WaterFix Project's potential impacts to CCLP's water rights to be available to answer questions during the sur-rebuttal phase. We deferred any ruling on CCLP's objections or motion to strike. On September 13, 2018, CCLP submitted a motion for reconsideration and request for clarification of our September 10, 2018 ruling.

Ruling

We find that the most efficient way to ensure a clean evidentiary record and afford CCLP due process is to strike DWR's prior written responses and proceed as follows:

By September 24, 2018, Petitioners are directed to provide written testimony – affirmed by a witness (or witnesses) – that identifies potential impacts to CCLP’s water rights from the WaterFix Project and possible mitigation measures, including but not limited to any potential impacts that may result from coordinated operation of the proposed Byron Tract Forebay and Clifton Court Forebay. The testimony should identify and describe any analysis that has been conducted, or is planned to be conducted, about potential impacts to CCLP’s water rights. To the extent Petitioners assert that a particular set of issues already has been addressed by prior testimony, they must support that assertion by specifying the exhibit and page number or the appropriate citation to the hearing transcript.

Petitioners are further directed to make the testifying witness(es) available for questioning by CCLP during the sur-rebuttal phase of the hearing. Questions will be strictly limited to issues relating to potential impacts to CCLP’s water rights from the WaterFix Project. CCLP had an adequate opportunity to cross-examine Petitioners’ witnesses about issues not specific to CCLP’s water rights, and other parties with similar interests had the opportunity to explore those topics in detail. Several of the questions submitted in writing by CCLP on August 9, 2018, will not be allowed on cross-examination of Petitioners’ witness(es), unless CCLP can demonstrate that the questions are intended to elicit testimony that directly relate to CCLP’s water rights. Petitioners’ witness(es) will be scheduled to appear on a date falling within the sur-rebuttal phase of the hearing that we will announce shortly.

Finally, CCLP requests the opportunity to rebut forthcoming testimony by Petitioners’ witness(es) about impacts to CCLP’s water rights. We recognize that Part 2 rebuttal was the first opportunity for parties to cross-examine witnesses about new project information in the administrative draft EIR/EIS Supplement, so the upcoming portion of the hearing will include sur-rebuttal evidence and, with respect to the administrative draft EIR/EIS Supplement, rebuttal evidence. Although DWR’s forthcoming testimony regarding potential injury to CCLP’s water rights will not constitute sur-rebuttal testimony, it is not yet clear to us whether it is necessary to provide CCLP yet another opportunity to provide responsive evidence. We will consider after cross-examination of Petitioners’ witness(es) whether presentation of responsive evidence by CCLP or any other party is warranted and would assist the Board in its decision making.

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:

ORIGINAL SIGNED BY:

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

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