CALIFORNIA
Water Boards

Edmund G. Brown Jr.
Governor

Matthew Rodriguez
Secretary for
Environmental Protection

State Water Resources Control Board

July 2, 2018

VIA ELECTRONIC MAIL

TO: CURRENT SERVICE LIST

CALIFORNIA WATERFIX HEARING – RULING ON OUTSTANDING MOTIONS AND FURTHER DIRECTIONS FOR PART 2 REBUTTAL

This ruling addresses outstanding motions by County of San Joaquin, et al., Local Agencies of the North Delta, et al. (LAND), and Clifton Court, L.P. (CCLP).

COUNTY OF SAN JOAQUIN, ET AL.'S MOTION FOR RECONSIDERATION

On May 31, 2018 County of San Joaquin, et al., filed a motion for reconsideration of our May 21, 2018 ruling granting a motion to strike portions of the Part 2 testimony of Marc Del Piero.[1] County of San Joaquin, et al., reiterate that the State Water Resources Control Board's (State Water Board) public trust analysis in this matter necessitates consideration of certain Part 1 issues that Mr. Del Piero raised in his testimony, such as whether a water availability analysis – an analysis that the Water Code requires only when initiating a new water right – is required for this project.

The motion is denied. Nothing in County of San Joaquin, et al.'s motion for reconsideration speaks to the basis for our May 21, 2018 ruling, which was that Mr. Del Piero's attorneys attempted to do with post hoc briefing what Mr. Del Piero himself did not do in his testimony: explain why testimony that plainly was relevant to Part 1 key hearing issues nonetheless was relevant to Part 2 key hearing issues, as well. "Water availability analysis" is a term of art referring to an analysis that the Water Code only requires of applications for a *new water right*. Whether the water right changes proposed for the WaterFix Project constitute a new water right is a Part 1 issue. The stricken portions of Mr. Del Piero's testimony concerning the need for a water availability analysis argue this Part 1 issue while making only a vague reference to its relationship to the public trust, in violation of our Part 2 ruling on scope. County of San Joaquin, et al., may offer testimony concerning the potential for the WaterFix Project to cause an increase in diversions from the Delta during Part 2 rebuttal, provided that the testimony identifies the Part 2 case-in-chief evidence to which it is responsive.

[1] The motion was filed by the County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority, Local Agencies of the North Delta, California Sportfishing Protection Alliance, California Water Impact Network, and AquAlliance. On June 4, 2018, Restore the Delta joined this motion.

LOCAL AGENCIES OF THE NORTH DELTA, ET AL.'S REQUEST FOR MODIFICATION

On June 21, 2018, LAND filed a request for modification or reconsideration of our ruling regarding rebuttal testimony deadlines.[2] LAND's request asks either that Part 2 rebuttal materials be submitted after the Environmental Impact Report/Environmental Impact Statement Supplement (EIR/S Supplement) is certified or that Petitioners be required to present their rebuttal testimony first, so that Protestants will have an opportunity to respond. On June 25, 2018, the Department of Water Resources (DWR) filed an opposition to LAND's request.

LAND's motion is denied. The motion raises issues regarding uncertainty about the details of the project that we have already addressed on multiple occasions, notably in our February 11, 2016, July 22, 2016, September 29, 2017, and February 6, 2018 rulings. As was the case at the beginning of Part 2, changes to the project have not introduced a level of uncertainty that would warrant staggered rebuttal. Existing hearing procedures – including sur-rebuttal, if warranted – provide enough opportunities for the parties to obtain any necessary clarification regarding recent project changes from Petitioners. Our determination that Petitioners' administrative draft EIR/S supplement is adequate for proceeding with Part 2 rebuttal is not a determination that the document is *legally* adequate under the California Environmental Quality Act (CEQA); only that it contains at least the same level of detail regarding project facilities as exists in the FEIR/S for the WaterFix Project. Additionally, we disagree with the argument that the document is inadequate because it does not relate changes to the project that are evaluated in the document to the key hearing issues. Although the administrative draft EIR/S Supplement informs our consideration of key hearing issues, the document need not provide comprehensive, unassailable analysis on all conceivable key hearing issues to be adequate for Part 2 rebuttal. The purpose of the EIR/S Supplement is to evaluate and disclose the environmental impacts of the project changes in compliance with CEQA. It is up to Petitioners and other parties to provide testimony making the connection between that document and Part 2 key hearing issues. As has been the case with Petitioners' FEIR/S, parties may contradict the data, analysis or conclusions in the administrative draft EIR/S Supplement by presenting their own evidence and by cross-examining Petitioners' witnesses.

LAND, et al., also raised questions about the evidentiary status of the administrative draft EIR/S Supplement. We instructed the hearing team to assign that document a staff exhibit number, SWRCB-113. As with other staff exhibits, parties will have the opportunity to offer SWRCB-113, comprising the administrative draft EIR/S Supplement into evidence as an exhibit by reference in accordance with California Code of Regulations, title 23, section 648.3. As a reminder, it is incumbent on the parties to provide their own testimony to authenticate or otherwise support any staff exhibits they wish to rely on and offer into evidence at the hearing. Parties should review our original hearing notice, especially Enclosure D, on how to reference and properly use staff exhibits in the hearing.

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[2] The request was filed by the Local Agencies of the North Delta, Friends of Stone Lakes National Wildlife Refuge, County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and Mokelumne River Water and Power Authority. The request was joined by the City of Antioch, Restore the Delta, County of Sacramento, Sacramento County Water Agency, Deirdre Des Jardins, South Delta Water Agency (SDWA), Contra Costa County, Contra Costa County Water Agency, Solano County, Deirdre Des Jardins, and Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources.

SDWA's joinder of LAND's motion for reconsideration inquired whether rebuttal evidence includes evidence responsive to cross-examination that occurred during the case-in-chief phase of Part 2. It does. We reiterate, however, that rebuttal evidence does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence.

CLIFTON COURT, LP'S REQUEST FOR CLARIFICATION

On June 21, 2018, CCLP filed a request for clarification of the EIR/S Supplement.[3] On June 25, 2018, DWR filed an opposition to CCLP's request. CCLP requested clarification in order to formulate CCLP's rebuttal, but we find that answers to CCLP's questions could most efficiently be provided as part of Petitioners' Part 2 rebuttal. We therefore direct Petitioners to provide written testimony or evidence that answers CCLP's questions as part of their Part 2 rebuttal, and to provide one or more witnesses for cross-examination who are familiar with the issues raised in CCLP's request in case further elaboration is needed.

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 Office

[3] This request was joined by the City of Antioch.