September 10, 2018

VIA ELECTRONIC MAIL

TO: CURRENT SERVICE LIST

CALIFORNIA WATERFIX HEARING – RULING ON OUTSTANDING OBJECTIONS TO PART 2 REBUTTAL EXHIBITS AND ORDERING PART 2 SUR-REBUTTAL

This ruling addresses outstanding objections regarding Part 2 rebuttal exhibits as well as topics and scheduling for Part 2 sur-rebuttal. We have received the parties' Part 2 rebuttal cross-examination exhibits and corresponding objections thereto. We are in the process of reviewing those objections and will issue a ruling shortly.

Part 2 Sur-Rebuttal

On August 31, 2018, we heard the parties' oral requests to present sur-rebuttal evidence. We have considered those requests and decided to allow limited sur-rebuttal that is responsive to significant, new information that was first presented during the rebuttal phase of Part 2 of the hearing. Specifically, we are limiting sur-rebuttal to evidence that is responsive to the following **rebuttal** evidence:

1. New information[1] 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;
2. New project information described in the Conceptual Engineering Report, Byron Tract Forebay Option, Volumes 1-3 (DWR-1304, DWR-1305, and DWR-1306);
3. Dr. Chandra Chilmakuri's opinion number 5 concerning salinity requirements for the City of Antioch's municipal and industrial use (DWR-1217, pp. 11-15) and opinion number 7 concerning project effects on south Delta salinity (DWR-1217, pp. 25-29), including Dr. Chilmakuri's cross-examination testimony on those topics;
4. The portions of the rebuttal testimonies of Drs. Shawn Acuña (DWR-1211-R), Charles Hanson (DWR-1223-R), and Paul Hutton (DWR-1224-R) that concern the 2010 Delta Flow Criteria Report (SWRCB-25), including those witnesses' cross-examination testimony on those topics.

Requests for sur-rebuttal that is not responsive to the rebuttal evidence encompassed within the categories specified above are denied. **As a reminder, sur-rebuttal does not include repetitive**

[1] For the purposes of sur-rebuttal, "new information" presented during the rebuttal phase of Part 2 encompasses either information contained in SWRCB-113 or Part 2 rebuttal testimony concerning the contents of SWRCB-113.

evidence, including information submitted during rebuttal. Cross-examination of sur-rebuttal witnesses will be limited to the scope of their sur-rebuttal. Unless we approve changes, the order of presentation of sur-rebuttal will be the same as for rebuttal.

Written sur-rebuttal testimony and exhibits must be submitted in writing and served on the other parties by noon on September 17, 2018. Presentation of sur-rebuttal testimony will begin at 9:30 AM on September 24, 2018. A hearing schedule with dates for sur-rebuttal is included as an enclosure.

Final EIR/EIS Supplement

At the close of Part 2 rebuttal, we asked DWR to provide an update on the schedule for completing the Final EIR/EIS Supplement for the WaterFix Project. In response, DWR's legal counsel informed us of DWR's conservative estimate that the final document will be completed sometime in December of this year. When asked whether DWR plans to offer the final document into evidence, DWR indicated that it was up to the State Water Board to decide whether to solicit the submission of the final document into the hearing record.

Consistent with the California Environmental Quality Act (CEQA) Guidelines, however, including the final document in the evidentiary record is not optional. The State Water Board must consider the Final EIR/EIS as revised by the EIR/EIS Supplement in determining whether and under what conditions to approve the project. (Cal. Code Regs., tit. 14, § 15163, subdivision (e).) For the Board to consider and make any requisite CEQA findings based on the EIR/EIS Supplement, that document must be included in the evidentiary record. Accordingly, DWR is directed to offer the Final EIR/EIS Supplement into the evidentiary record as soon as it has been completed. At that time, we will hear and consider how to resolve any objections to including the final document in the record.

Clifton Court, L.P.'s Objections to DWR's Responses to Written Questions

Our August 2, 2018 ruling granted Clifton Court, L.P.'s (CCLP) request to question Petitioners' witnesses about Part 1 issues in light of the recent changes to the proposed project. As stated in that ruling, Petitioners are no longer proposing to take all, or nearly all, of CCLP's property, which raises questions about potential injury to the exercise of CCLP's water rights that were not previously foreseeable. On August 3, 2018, after CCLP's cross-examination of DWR's witnesses, we directed CCLP to submit in writing any additional questions of DWR's witnesses about potential injury to CCLP's water rights. CCLP submitted its list of questions on August 9, 2018; DWR provided written responses on August 14, 2018. CCLP then provided detailed objections and moved to strike DWR's responses as inadequate and nonresponsive.

As a preliminary matter, we observe that DWR repeated the same mistake that it made when providing written responses to Patrick Porgans' questions: its response resembles an attorney's response to written interrogatories rather than any witness's sworn answers to cross-examination questions.[2] Effective cross-examination requires that an individual witness with knowledge – not just a party – can be held accountable for his or her answers.

[2] We have previously directed DWR to submit its written responses to questions of its witnesses with an affirmation, signed by the witness, as to the truth of the response. (California WaterFix Ruling, March 27, 2018.)

On substance, DWR's responses to CCLP also raise more questions than they answer. DWR repeatedly states that it intends to move either the control structure or CCLP's diversion structure to avoid injury to the exercise of CCLP's water rights. However, these two options likely have distinct consequences for potential impacts to CCLP's water rights and corresponding differences in appropriate monitoring and mitigation. A generalized assurance that Petitioners will address any potential impacts to CCLP's water rights with one of these two approaches does not provide CCLP or the State Water Board with sufficient information to reach sound conclusions regarding injury. This persistent ambiguity justifies providing CCLP another opportunity to question Petitioners' most knowledgeable witnesses under oath about the potential impacts to CCLP's water rights.

We hereby direct 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. CCLP's questioning of DWR's witnesses will be limited to the scope of those witnesses' sur-rebuttal testimony, if any, and potential impacts to CCLP's water rights from DWR's current proposed project. We deny without prejudice CCLP's motion to strike DWR's written responses. Based on the answers that DWR's witness or witnesses provide during the sur-rebuttal phase, CCLP may renew its motion to strike as to any incomplete or inconsistent prior written responses to the extent necessary to clarify the evidentiary record. We similarly overrule DWR's objections to CCLP's written questions without prejudice. DWR may renew those objections if and when CCLP asks those questions during the sur-rebuttal phase, and we will rule on those objections then.

DWR's Motion to Strike Deirdre Des Jardins' Exhibits

On August 28, 2018, DWR moved to strike DDJ-301 through DDJ-305 and DDJ-326. DWR alleged that DDJ-301 through DDJ-305 related solely to testimony on levee seepage issues that we had stricken as outside the scope of Part 2 rebuttal. DWR further alleged that DDJ-326, which was not cited in the rebuttal testimony of Deirdre Des Jardins' witness, was not relevant to any Part 2 case-in-chief evidence or the administrative draft EIR/EIS Supplement, and therefore was outside the scope of Part 2 rebuttal. Ms. Des Jardins responds that DDJ-326 was used during other parties' cross-examination during Part 2 rebuttal and that the seepage issues to which DDJ-301 through DDJ-305 are relevant are important and have not been addressed during the hearing yet.

DWR's motion to strike is sustained. Again, Ms. Des Jardins' arguments fail to acknowledge the baseline issue upon which we have already ruled: the fact that Petitioners are *no longer proposing* project components that might have remedied pre-existing levee seepage risk is not a change from baseline conditions, and therefore is not an impact *caused by the project*.[3] Additionally, although exhibits are not required to be cited or referenced in written testimony to be admissible, Ms. Des Jardins has not articulated for us how DDJ-326 relates back to Part 2 case-in-chief evidence, and that connection is not readily apparent to us. The exhibit's use during cross-examination does not provide a basis for admitting it as a Part 2 rebuttal exhibit. Therefore, DDJ-301 through DDJ-305 and DDJ-326 are beyond the scope of Part 2 rebuttal and will not be entered into evidence at this time.

[3] On August 9, 2018, Clifton Court, L.P., moved for reconsideration of our ruling striking portions of its Part 2 rebuttal testimony related to foregone seepage benefits due to project changes described in the EIR supplement. For the same reason, that motion for reconsideration is denied.

DWR's Objection to Admission of Snug Harbor Resorts' Exhibits

On August 29, 2018, DWR objected to the admission of SHR-717, SHR-718, and SHR-719. Snug Harbor Resorts, LLC (SHR) submitted written opposition on August 30, 2018. For the reasons provided below, we sustain DWR's objection as to SHR-717 and SHR-718, but overrule its objection as to SHR-719.

SHR-717 is a graphic that Nicole Suard created using screen shots of unidentified websites, various graphs, and overlaid graphics. It purports to show formulas used in CalSim 3 to convert flows measured in cubic feet per second to volumes measured in gallons or acre-feet. Although it may be possible to articulate a connection between this exhibit and certain Part 2 case-in-chief evidence, SHR has not done so. Additionally, we find that the exhibit is not the sort of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. (Gov't. Code, § 11513.) SHR-717 will not be entered into evidence.

SHR-718 is a report about the feasibility of expanding the network of salinity water quality monitoring stations throughout the San Francisco Bay Estuary. SHR similarly has not explained how this report relates to the evidence that we have said defines the scope of Part 2 rebuttal. Therefore, SHR-718 will not be entered into evidence.

SHR-719 is the State Water Board's 2018 framework document for Phase II of the Bay-Delta Water Quality Control Plan update. Because this document summarizes and synthesizes information relevant to appropriate Delta flow criteria, on its face it is sufficiently responsive to Part 2 case-in-chief evidence on that topic to fall within the scope of Part 2 rebuttal. SHR-719 will be entered into evidence.

DWR Request for Data from Dr. Paulsen

On August 24, 2018, during cross-examination of Dr. Paulsen, the Department of Water Resources (DWR) requested that she provide a spreadsheet that would allow them to compare the differences between results generated by the two different equations she used to prepare her Part 2 case-in-chief testimony versus her Part 2 rebuttal testimony. We stated that, should we convene sur-rebuttal, we would direct Dr. Paulsen to produce that documentation. Now that we are ordering sur-rebuttal, we hereby direct Dr. Paulsen to provide the data and documentation that DWR requested on August 24, 2018, no later than **noon on September 17, 2018**, and to follow up with DWR's counsel directly to the extent any further clarification is needed regarding the information being requested.

Deirdre Des Jardins' Motion to Strike Dr. Greenwood's and Dr. Wilder's Testimony

On August 15, 2018, Ms. Des Jardins moved to strike portions of the Part 2 rebuttal testimony of Drs. Greenwood and Wilder – specifically, sections arguing that the WaterFix Project would reasonably protect certain aquatic resources. Ms. Des Jardins asserts that Dr. Greenwood's and Dr. Wilder's respective testimonies fail to recognize that "reasonable protection" is an "absolute standard" and that she was unable to effectively cross-examine those witnesses on the basis for their opinions. DWR submitted written opposition to the motion on August 17, 2018, observing that Ms. Des Jardins provides no support for her assertion that "reasonable protection" is an absolute standard.

Ms. Des Jardins' motion to strike is denied. Ms. Des Jardins is incorrect that she had no opportunity to cross-examine Drs. Greenwood and Wilder regarding the basis for their opinion that the WaterFix Project would reasonably protect fish resources. Indeed, other parties were able to probe the basis for those opinions on cross-examination. The only basis for Ms. Des Jardins' motion appears to be her disagreement that focusing only on the project's incremental effect on fish resources is appropriate; she has not alleged any procedural or evidentiary irregularity. The appropriate remedy for such disagreement is for Ms. Des Jardins to put on her own, competing evidence or to make her point in her closing brief, not to strike the testimony in its entirety.

DWR's Opposition to Admission of SVWU-406 Into Evidence

On August 15, 2018, the Sacramento Valley Water Users (SVWU) included SVWU-406 when moving their Part 2 rebuttal exhibits into evidence. SVWU-406 is a compilation of tabulated modeling results that DWR produced in compliance with our May 21, 2018 ruling requiring the submittal of that information. DWR contends that SVWU-406 is duplicative evidence because all the modeling results that anyone would need to evaluate the WaterFix Project are available through DWR-1077. SVWU disagree, arguing that there is a significant technological burden associated with properly extracting the tabulated results in SVWU-406 from the modeling that DWR already has submitted.

We will admit SVWU-406 into evidence. As our May 21, 2018 ruling indicates, these modeling results have distinct usefulness apart from what DWR prepared and submitted voluntarily such that we saw fit to require their production in the first instance. The cover letter in SVWU-406 that appears before the modeling results also puts them into the proper context such that no one reviewing the exhibit should mistake them for modeling that DWR believes supports its proposed project. To the extent any additional argument is needed to put the modeling results in SVWU-406 into the proper context so that we afford them the appropriate weight, we are confident in the parties' ability to make those arguments in their closing briefs.

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

Enclosure: Part 2 Sur-Rebuttal Schedule

Part 2 Sur-Rebuttal Schedule (September 10, 2018):

Hearing Dates and Room Schedule for Part 2 Sur-Rebuttal
of the California WaterFix Water Right Change Petition Hearing

The sur-rebuttal phase of PART 2 of the hearing will resume on **September 24, 2018 at 9:30 a.m.** and will continue according to the schedule below. Unless the hearing officers notify the parties of any additional changes to the hearing schedule, the hearing is scheduled to begin at 9:30 a.m. on each of the following dates at the Joe Serna Jr. CalEPA Building, 1001 I Street, Second Floor, Sacramento, CA in the hearing room specified below, unless an alternative location is specified. Start times may be earlier than 9:30 a.m. on subsequent hearing days if the hearing officers determine it is necessary. Any change in start times will be announced at the conclusion of the previous hearing day.

DATE	HEARING ROOM*
September 24, 2018	Coastal Hearing Room
September 25, 2018	Coastal Hearing Room
September 26, 2018	Coastal Hearing Room
September 27, 2018	Sierra Hearing Room
September 28, 2018	Coastal Hearing Room
October 1, 2018	Coastal Hearing Room
October 4, 2018	Byron Sher Auditorium
October 5, 2018	Byron Sher Auditorium
October 8, 2018	Byron Sher Auditorium
October 10, 2018	Byron Sher Auditorium
October 11, 2018	Byron Sher Auditorium

* Hearing room is subject to availability.

** Offsite locations may include the California Regional Water Quality Control Board Central Valley Region (5), Sacramento Office Hearing Room.

If the hearing must be moved from one hearing room to another location on a particular date, then the parties on the Current Service List will be notified and a revised schedule will be posted on the State Water Resources Control Board's California WaterFix hearing webpage at www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/ruling_notices/ prior to the hearing date. If the change is within the same building, the parties on the Current Service List will be notified and a sign will be posted on the door of the hearing room listed above directing attendees to the new hearing room.

The address of the hearing rooms in the table above is as follows:

HEARING ROOM	LOCATION/ADDRESS
Sierra Hearing Room, Coastal Hearing Room, and Byron Sher Auditorium	**Joe Serna Jr.-CalEPA Building 1001 I Street, Second Floor Sacramento, CA 95814 MAP**

Live Broadcasts of the hearing will be available via the internet and can be accessed at: https://video.calepa.ca.gov/.

For a map to the Joe Serna Jr. CalEPA Building, visit: www.calepa.ca.gov/headquarters-sacramento/location/. For security purposes, all visitors are required to sign in and receive a badge prior to entering the building. Valid picture identification may be required depending on the security level in effect on the day of the hearing. Individuals who require special accommodations are requested to contact the hearing team at CWFhearing@waterboards.ca.gov or (916) 319-0960.