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## State Water Resources Control Board

August 24, 2016

**[Via Email]**

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### **CALIFORNIA WATERFIX HEARING – RULING ON SAVE THE CALIFORNIA DELTA ALLIANCE ET AL.’S RENEWED MOTION TO AMEND PROTEST**

Dear Mr. Brodsky:

On July 19, 2016, Save the California Delta Alliance, Janet McCleary, Michael McCleary, and Captain Morgan’s Delta Adventures, LLC (Delta Alliance et al.) “renewed” their motion to amend their protest to add the allegation that the water right change petition for the California WaterFix Project would cause injury to legal users of water. For the reasons set forth below, we reaffirm our previous ruling denying this motion.

Delta Alliance et al.’s existing protest alleges that the WaterFix petition would not be in the public interest, would be contrary to law, and would have an adverse environmental impact. While filing a protest was not necessary to participate in the hearing, the Notice of Petition and Public Hearing required that parties protesting the petition must also submit a Notice of Intent to Appear (NOI) indicating intent to present evidence in support of any protest. (Notice at p. 14.) Delta Alliance et al.’s original NOI indicated their intent to participate in Part 1 by presenting a policy statement only, and to participate in Part 2 by calling witnesses.

We have allowed parties participating in Part 2 to make limited revisions to their NOIs to present testimony on impacts to human uses, such as flood control issues, during Part 1 instead of Part 2. Since Delta Alliance et al. timely submitted a revised NOI, they may present testimony and exhibits on human use impacts in Part 1. In our ruling dated June 10, 2016, however, we denied Delta Alliance et al.’s request to amend their protest to allege injury to legal users of water and to expand the scope of their proposed testimony to address that issue. As explained in our June 10, 2016 ruling, Delta Alliance et al. have not shown adequate justification for their failure to indicate on their original NOI that they planned to call witnesses to testify on the issue of injury to legal users.

In their renewed motion, Delta Alliance et al. characterize the proposed amendment to their protest as the addition of an alternative cause of action under Water Code section 1702.<sup>1</sup> Delta Alliance et al. argue that the State Water Resources Control Board (State Water Board) should allow Delta Alliance et al. to amend their protest consistent with the policy favoring amendments to pleadings in civil cases. Delta Alliance et al. also argue that granting their request will not result in delay or prejudice to any party because they do not seek to add witnesses or prolong their testimony. They assert that their proposed testimony concerning water quality and other impacts to human uses also will support the allegation of injury to legal users.

The case law cited by Delta Alliance et al. governing amendments to pleadings in civil cases does not apply to adjudicative proceedings before the State Water Board. Moreover, the allegations contained in Delta Alliance et al.'s protest do not constrain their participation in this proceeding. As stated above, it was not necessary to file a protest in order to participate in this proceeding, and therefore the scope of a party's protest does not limit the party's hearing participation. Instead, the scope of a party's hearing participation is limited by the party's NOI.

Consistent with their NOI, Delta Alliance et al. may present evidence of impacts to human uses in Part 1 of the hearing, and they may argue based on any evidence that is admitted into evidence that the WaterFix petition will cause injury to legal users of water. At this late stage in the hearing, however, Delta Alliance et al. may not expand the scope of their participation in Part 1 to present evidence relevant to issues other than potential impacts to human uses. In particular, Delta Alliance et al. may not present testimony or evidence in support of their claim, set forth in their proposed protest amendment, that Michael and Janet McCleery, Frank Morgan, and other members of Delta Alliance hold valid riparian rights. As indicated in the Department of Water Resources' response to Delta Alliance et al.'s renewed motion, whether these parties and other property owners in Discovery Bay have valid riparian rights is a contested issue of fact. Resolving issues concerning the validity of claimed riparian rights can be complex and time-consuming. Accordingly, allowing Delta Alliance et al. to present testimony concerning this issue could add a significant amount of time to Part 1B of the hearing, especially if other parties were to seek to expand their participation in Part 1B in a similar manner.

In their renewed motion, Delta Alliance et al. argue that petitioners have changed their project description and added a boundary analysis, so now Delta Alliance et al. should be allowed to add the allegation of injury to legal users to their protest. As explained above, the scope of Delta Alliance et al.'s participation in the hearing is limited by their NOI, not their protest. In addition, to the extent that Delta Alliance et al. seek to expand the scope of their participation in Part 1 of the hearing on the grounds that the project description has changed, this argument lacks merit. The additional details concerning proposed project operations and the boundary analysis contained in petitioners' case in chief do not excuse Delta Alliance et al.'s failure to indicate their intent to present testimony on injury to legal users in their NOI by the deadline. The Notice sufficiently described the project's potential for changes in flows and water quality in the Sacramento-San Joaquin Delta to alert Delta Alliance et al. to possible injury to legal users

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<sup>1</sup> Water Code section 1702 provides that before approving a change to a water right permit or license the State Water Board must find that the change will not injure any legal user of the water involved.

and plan their participation in the hearing accordingly. Although the potential changes to flows and water quality vary under different operational scenarios, we are not persuaded that the additional details in petitioners' case in chief alter the scope of the project so significantly that the original notice is rendered defective. The scope and complexity of this hearing require us to adhere to the procedural rules in order to facilitate an orderly and efficient proceeding. For this reason, and for the reasons set forth above, Delta Alliance et al.'s renewed motion to amend their protest is denied.

**Ex Parte Communications**

Please remember that ex parte communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Parties must provide a copy of any correspondence to the hearing team concerning substantive or controversial procedural issues to all of the parties listed in Table 1 of the service list located here:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml). Any such correspondence must also be accompanied by a Statement of Service form.

If you have questions regarding this letter, please contact the hearing team at [CWFhearing@waterboards.ca.gov](mailto: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

cc: **[Via Email Only]**  
[CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov)  
Electronic Service List