

June 26, 2017

VIA E-Mail CWFhearing@waterboards.ca.gov

Tam Doduc, WaterFix Project Co-Hearing Officer
Felicia Marcus, WaterFix Project Co-Hearing Officer
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

RE: California WaterFix Change Petition – Offer of Proof and Request to Admit into Record Progress Reports of Permittee for Water Rights Permits Subject to Change Petition (SJC Exhibits 84 through 189)

Dear Hearing Officers Dudoc and Marcus:

Protestants San Joaquin County, et al. (SJC) respectfully request that exhibits SJC-84 through SJC-189 be admitted into the evidentiary record for the California WaterFix (“CWF”) Hearing during sur-rebuttal. These exhibits contain the 2010-2016 Progress Report of Permittee for each of the water rights permits that are subject to the change petition that is currently pending at the State Water Resources Control Board. We submit this offer of proof regarding the relevance of the exhibits, and their timeliness, in response to the oral order of the Hearing Officers on June 22, 2017.

1. The Progress Reports are appropriate sur-rebuttal evidence.

The Hearing Officers’ April 13, 2017 Procedural Ruling defined the proper scope of sur-rebuttal testimony and exhibits as follows:

Sur-rebuttal testimony must be responsive to evidence submitted during rebuttal. Sur-rebuttal does not include evidence that should have been presented during the case-in-chief or rebuttal of the party submitting sur-rebuttal evidence. It also does not include repetitive evidence.

The Progress Reports of Permittee respond to rebuttal testimony of DWR’s witnesses, John Leahigh and Maureen Sergent, and the Bureau’s witness, Ron Milligan. As the hearing officers may have noticed, there is some disconnect between the water rights testimony and the operational testimony. We believe the reports of permittee are helpful to illuminate this disconnect and aid the hearing team in determining whether to grant the Petition, and if so, under what conditions.

Mr. Leahigh testified:

In fact, the source of winter exports, even in the driest years, is predominantly from surplus [unstored] flows that would end up as excess Delta outflow if not exported and put to beneficial use by the projects.

(California WaterFix Hearing Transcript (“Transcript”), May 4, 2017, Leahigh Direct Examination, Pg. 54:12-15.) Mr. Leahigh’s testimony was based on graphs of operational data in DWR-10. San Joaquin Parties requested, and DWR produced, the excel spreadsheets supporting those graphs. The spreadsheets were examined at the hearing with DWR witness Aaron Miller on June 22, 2017. Mr. Miller was not able to explain whether or not the “unstored water” that was exported and reflected in the graphs and spreadsheets was water that DWR diverted under its direct diversion rights, nor was Mr. Miller able to explain whether the source of water reflected in the spreadsheets of operational data was from the Feather River or from the Delta Channels (the two primary sources in the DWR permits subject to this proceeding).

A few weeks prior, DWR’s water rights witness, Maureen Sergent, provided rebuttal testimony. In response to Protestant’s claims that the project will initiate a new water right by changing the quantity or source of water diverted under each permit, Ms. Sergent asserted that “DWR continues to operate consistent with the terms and conditions of those permits.” (April 28 Transcript, Sergent Direct Examination, Pg. 115:19-21.) While several parties objected to the generalized nature of Ms. Sergent’s testimony, which did not include any comparison of the actual amounts diverted from each source allowed under each permit, with the specific permit parameters, that testimony was admitted.

Mr. Milligan also provided rebuttal testimony that generally characterized the Bureau’s operational philosophy regarding the amount of water directly diverted and released from storage for the CVP in response to concerns raised by other parties about the impacts of the CWF on storage releases. See DOI-36.

The Progress Reports of Permittee in SJC-84 through SJC-188 contain Petitioner’s reports of SWP and CVP operational data for the water rights permits subject to the change petition, as submitted to the State Water Resources Control Board (“SWRCB”) in the normal course of business. (*See* SJC-189.) These reports are being submitted to show actual operations, as reported directly to the SWRCB, in response to Petitioners’ rebuttal testimony regarding operational data and philosophy.

The Reports of Permittee do not match the information presented by Petitioners, at least for some years. For example, DWR-10, DWR-905 and the DWR Spreadsheet (SJC 220) show exports of “unstored flow” of **565,000 acre-feet** during calendar year 2015. DWR’s Reports of Permittee for 2015 report total direct diversions of only **164,155 acre-feet** during the same time period:

Exhibit #:	SJC-089	SJC-095	SJC-101	SJC-107
Permit #:	P016478/A005630	P01679/A014443	P016481/A014445A	P016482/A017512
Reported Direct Diversion	657 AF	163,498 AF	0 AF	0 AF

Because Petitioners have been allowed to present generalized information about past operations and past compliance with permit terms during rebuttal, San Joaquin County parties should be allowed to present, as surrebuttal, Petitioner's own admissions regarding their past operations, in the form of their Reports of Permittee.

2. There is no prejudice to Petitioners

The primary reason for limiting surrebuttal evidence is to ensure a fair hearing by not allowing parties to present "surprise" evidence at the end of a proceeding that the opposing party has not seen. That concern is not present here. The reports of permittee that we seek to admit are Petitioners' own water right reports that are publicly available on the SWRCB website. Petitioners prepared and submitted these reports as part of the required conditions of the permits that are the subject of this hearing. Also, SWRCB staff have presumably already reviewed all of the reports contained in SJC-84-SJC-188 as part of their standard work in processing the change petition. We seek to formally make these reports part of the record in this hearing so that we can cite to and reference the reports in our closing briefs for the hearing.

3. The Reports of Permittee Provide Useful Context for the Hearing Team

At the conclusion of this proceeding, the hearing team will need to decide whether to grant the petition, and if so, on what terms. The two issues for Part One included (1) does the petition initiate a new water right; and (2) would the changes injure legal users of water. These two issues cannot be decided without looking at the diversion limits specific to each water source and the actual diversions from each source before and after the requested changes.

The water rights at issue are very specific about the amount of water that can be diverted to storage and directly diverted from each source. Yet, Petitioners have yet to present evidence of precisely how much water they have been diverting from each source of water allowed under their permits in the past, and precisely how much water they plan to divert from each source after the requested change. Rather, as the recently produced operational data from DWR confirms, DWR appears to conflate the different sources of water available under its permits. (*See* DWR-905.)

From a review of the submitted reports of permittee, it appears that the SWRCB has not required that Petitioners specifically report how much they have diverted from each source for the permits that have multiple sources. (*See, e.g.*, SJC-95 (this report is for Permit 016479, which allows diversion from two different sources - the Feather River and the Sacramento and San Joaquin Delta Channels).) The direct diversion limits in each permit are specific to each source. Permit 16479 provides for up to 1,360 cfs direct diversion of Feather River water "provided the quantity of water appropriated by direct diversion shall be limited to such quantity as would be available for appropriation at Oroville dam." The direct diversion limit for water from the Delta Channels is 6,185 cfs. (*See* SWRCB-7 (Amended Permit -16479 Conditions 1 and 5).) Yet, the submitted reports do not separate out the amount directly diverted from each source. (*See* SJC-182 (the Bureau's 2014 report for Permit P012723 with direct diversion from Sacramento River and Old River).) This helps explain why it often appears that Petitioners and the other parties in this hearing are "ships passing in the night" when discussing operations.


Including the reports of permittee in the evidentiary record in this proceeding will assist the parties and the hearing team in parsing out the issue of how much water can be diverted from each source, how much has been diverted from each source in the past, and how the proposed CWF project will change those diversion amounts by source. Petitioners are likely to argue in response that because their past reports fail to distinguish diversions by source, they are unhelpful. However, the lack of clear reporting in the past is still useful information for the hearing team in determining how it should act on the pending petitions. Further, for some of the permits which authorize diversion from only one source, the reported information is clear as to source. (*See, e.g.*, SJC-101 (the 2015 Report of Permittee for Permit 016481 authorizing direct diversion only from the Italian Slough and the Delta Channels).) Finally, as explained above, the numbers that are included in the reports do not match the operational data that DWR presented in rebuttal, even on an aggregated basis. The parties should be able to utilize these reports to explain in their briefs any anomalies in Petitioners' submitted evidence.

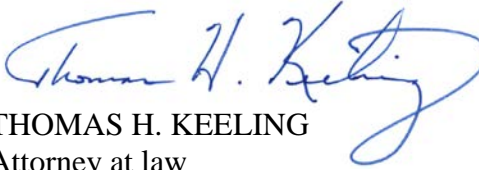
4. There is no dispute regarding the authenticity of the exhibits and thus they can be admitted without the need for oral testimony.

Petitioners agree that SJC Exhibits 84 through 188 are authentic copies of Petitioners' reports of permittee available on the SWRCB website. SJC-189 is the declaration of Russell Frink that establishes this authenticity. Mr. Frink's testimony was not offered for any other purpose. Thus, if the hearing team agrees that Exhibits SJC 84-189 are relevant, we respectfully request that they be admitted into the record pursuant to this written request without the need for Mr. Frink to appear at the hearing and provide oral testimony.

Thank you for considering this request.

Very truly yours,


JENNIFER L. SPALETTA
Attorney at law


THOMAS H. KEELING
Attorney at law

Cc: Hearing Officers; Service List

STATEMENT OF SERVICE

**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

1. Offer of Proof and Request to Admit into Record Progress Reports of Permittee for Water Rights Permits Subject to Change Petition (SJC Exhibits 84 through 189)

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated 6/14/2017, posted by the State Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml:

Note: In the event that any emails to any parties on the Current Service List are undeliverable, you must attempt to effectuate service using another method of service, if necessary, and submit another statement of service that describes any changes to the date and method of service for those parties.

For Petitioners Only:

	I caused a true and correct hard copy of the document(s) to be served by the following method of service to Suzanne Womack & Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818:
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	Method of Service: _____
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I certify that the foregoing is true and correct and that this document was executed on _____

6/26/2017

Signature: 

Name: Russell Frink

Title: Attorney

Party/Affiliation: NSJWCD/SJC, et al.

Address: PO Box 2660, Lodi, CA 95241