
State Water Resources Control Board

January 23, 2018

VIA ELECTRONIC MAIL

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CALIFORNIA WATERFIX HEARING – RULING ON ORDER OF PRESENTATION FOR PART 2 AND OTHER PROCEDURAL MATTERS

This ruling addresses (1) a request by the Sacramento Valley Water Users (SVWU) regarding the grouping of the Department of Water Resources' (DWR) and the Department of Interior's (collectively, Petitioners) witnesses into panels during the case-in-chief phase of Part 2; (2) a request by East Bay Municipal Utility District (EBMUD) for additional time to cross-examine Petitioners' Panel 2 witnesses; (3) a request on behalf of Save the California Delta Alliance, et al., (Delta Alliance), North Delta C.A.R.E.S., Patrick Porgans, and Snug Harbor Resorts, LLC (Snug Harbor), to revise the Part 2 Order of Presentation as to those parties; and (4) Petitioners' opposition to a policy statement submitted by Partnership for Sound Science in Environmental Policy (PSSEP). A revised Order of Presentation is attached to this ruling.

We acknowledge that multiple parties have submitted or joined motions to stay this water right hearing for 90 days or longer, and those motions are still under consideration. This ruling should not be interpreted as having any bearing on the merits of those motions. Until we rule on the pending motions for a stay, the parties should assume that Part 2 will begin in accordance with our January 17, 2018 Hearing Notice of Schedule Change—with policy statements only on February 2, 2018, followed by the evidentiary portion of the hearing starting February 5, 2018.

SVWU Request to Reorganize Petitioners' Witness Panels

As reflected in our original draft Order of Presentation, the Petitioners proposed to have their project operations witnesses appear on a separate panel from their modeling witnesses. In comments joined by EBMUD and Deirdre Des Jardins, SVWU alleges that cross-examining parties may be prejudiced by these groups of witnesses presenting on separate panels. We agree.

Given the interrelated nature of the written testimonies of the Petitioners' project operations witnesses and their modeling witnesses, it is conceivable that a witness may rely on or defer to the testimony of another witness who presented earlier and is no longer available for cross-examination. Such a scenario would put us in the position of either recalling witnesses or denying the cross-examining party's right to seek clarification. More generally, presenting related testimony on separate panels is confusing to hearing participants and can lead to inefficient use of hearing days.

DWR objected to moving project operations witnesses to Panel 2 on the grounds that "[u]nderstanding of the operations witnesses' testimonies do [sic] not require a discussion of the modeling assumptions." Although this may be the case for these witnesses' direct testimony during the hearing,

the quoted statement is incorrect as to their written testimony and may prove incorrect during cross-examination. SVWU's request provided multiple examples from that written testimony illustrating that the analysis and conclusions of Petitioners' project operations witnesses are likely to implicate the testimony of Petitioners' modeling witnesses, and vice versa.

We disagree with SVWU's proposed grouping of Petitioners' Panel 2 witnesses, however. Petitioners' proposed Panel 2 included not only modeling witnesses, but also fish biology witnesses. The reasoning that SVWU applied to Petitioners' project operations witnesses also extends to Petitioners' fish biology witnesses, whose testimony also relies on, opines on, or is otherwise interrelated with the testimony of one or more of Petitioners' modeling witnesses. For example, at several points Dr. Marin Greenwood's written testimony (DWR-1012) expressly references and relies on the written testimony of Erik Reyes (DWR-1016), a modeling witness. Moreover, conclusions in Dr. Greenwood's written testimony rely on the Petitioners' proposal to operate the projects based on real-time management decisions, a concept discussed in-depth in the written testimony of Aaron Miller (DWR-1011), a project operations witness. Dr. Rick Wilder's written testimony (DWR-1013) also references the written testimony of Erik Reyes and similarly opines that real-time operations would avoid at least some effects indicated by model outputs. These examples illustrate that allowing Petitioners' project operations witnesses, fish biology witnesses, or modeling witnesses to present on different panels from each other would present the same risks identified in SVWU's request.

The written testimonies for John Bednarski, Praba Pirabarooban, and Dr. Chris Earle contain analysis and conclusions that are sufficiently removed from those of Petitioners' modeling, project operations, and fish biologist witnesses that they could present outside of Panel 2 without risking the prejudice described above. Therefore, the grouping of Petitioners' witnesses during the case-in-chief phase of Part 2 shall be as follows:

Panel 1	Gwen Buchholz John Bednarski ¹ Praba Pirabarooban
Panel 2	Aaron Miller Kristin White Dr. Marin Greenwood Dr. Rick Wilder Tara Smith Erik Reyes Dr. Mike Bryan Dr. Ellen Preece Dr. Harry Ohlendorf Dr. Marianne Guerin Dr. En Ching Hsu Nancy Parker

¹ Mr. Bednarski's participation on Panel 1 would relate to the design and feasibility of constructing fish screened intakes, whereas his Panel 3 participation would relate to potential impacts to navigation from the construction of intake structures on the Sacramento River, Head of Old River Gate, barge unloading facilities, and barge traffic.

Panel 3

Dr. Chris Earle
Doug Rischbieter
John Bednarski

Though we acknowledge that this configuration of Petitioners' witness panels results in a large and potentially complex Panel 2, any difficulties will be outweighed by giving cross-examining parties the flexibility they would need to follow up when Panel 2 witnesses reference or defer to the testimony of other witnesses on the same panel.

EBMUD's Request for Additional Time to Cross-Examine Panel 2

EBMUD has requested that we modify our ordinary rule limiting cross-examination to one hour to allow an additional 20 minutes per witness for panels composed of more than three witnesses. EBMUD observes that, under our draft Order of Presentation, Petitioners' Panel 2 would comprise 13 witnesses testifying on a broad range of topics, limiting the depth of cross-examination that could occur during just one hour.

Although we agree that parties should be allowed more than one hour to cross-examine Petitioners' Panel 2, EBMUD's proposed one hour plus 20 minutes per witness would allow each party up to 4 hours to cross-examine that panel. Given the need to facilitate efficient use of hearing days and our discretion to allow a party more time if they show good cause, a default of 4 hours per party to cross-examine Panel 2 is excessive. For Petitioners' Panel 2 only, we will allow each party up to 2 hours for productive cross-examination, with the possibility of additional time granted upon a showing of good cause. However, as in Part 1 of the hearing, we reiterate that duplicative cross-examination will not be permitted; parties should limit their cross-examination to questions that have not already been asked by another party. Parties should efficiently move to the substance of their line of questioning without spending time on foundational issues already addressed in the testimony or by questions previously asked and answered. We further encourage parties with similar interests to coordinate where possible to avoid duplicative cross-examination.

Delta Alliance's Requested Change to Order of Presentation

Our draft Order of Presentation had Delta Alliance presenting 12th, North Delta C.A.R.E.S. presenting 20th, Patrick Porgans presenting 21st, and Snug Harbor presenting 22nd. On these parties' behalf, Mr. Michael Brodsky has requested that the Order of Presentation be revised to switch Delta Alliance's position with the latter three parties. As we understand Mr. Brodsky's request, it would result in North Delta C.A.R.E.S. presenting 12th, Patrick Porgans presenting 13th, Snug Harbor presenting 14th, and Delta Alliance presenting 22nd (between Pacific Coast Federation of Fishermen's Associations, et al. [PCFFA], and Clifton Court, L.P.).

The only reason given for this request is the parties' belief that the change would better match the availability of their witnesses. At this point in time, however, it is difficult to predict when the parties will present their cases-in-chief, thus it is uncertain whether any scheduling conflicts actually exist. That said, we will grant Delta Alliance's request to present later in the Order of Proceeding, before North Delta C.A.R.E.S., Patrick Porgans, and Snug Harbor. These changes are reflected in the revised Order of Presentation attached to this ruling.

PSSEP's Policy Statement

PSSEP submitted a policy statement that incorporates a proposed selenium monitoring plan by reference. In brief, the policy statement points to portions of the Final Environmental Impact Report/ Environmental Impact Statement and a draft basin plan amendment from the San Francisco Regional Water Quality Control Board as cause for concern regarding selenium impacts from WaterFix and urges us to include the proposed selenium monitoring plan as a condition of any order approving the project. DWR objected to the policy statement as improperly submitted evidence that does not comply with our hearing procedures and deprives designated parties of due process protections that this hearing ordinarily affords for evidentiary submissions. PSSEP submitted a response reiterating several of the contentions in its policy statement and adding a request that the policy statement be accepted as a public comment on the Clean Water Act Section 401 water quality certification.

We will accept PSSEP's policy statement for this water right hearing, but it will not be accepted as evidence and we will afford it no evidentiary weight. The policy statement and the proposed selenium monitoring plan both contain assertions relating to contested issues of fact upon which we could not rely absent support in the evidentiary record. Pursuant to PSSEP's request, we will ensure that a copy of PSSEP's submittal is provided to the State Water Board staff processing the Section 401 water quality certification associated with WaterFix for consideration as part of that process.

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

Attachment

Revised Attachment 1

Revised Order of Presentation for Part 2

California WaterFix Petition Hearing

Scheduled to Continue on February 2, 2018

Order of Direct Testimony	Group	Party	Witness Panels
1 st	1 & 2	California Department of Water Resources (DWR) and U.S. Department of the Interior (DOI)	<ul style="list-style-type: none"> ▪ Gwen Buchholz (DWR) ▪ John Bednarski¹ (DWR) ▪ Praba Pirabarooban (DWR) ▪ Aaron Miller (DWR) ▪ Kristin White (DOI)
			<ul style="list-style-type: none"> ▪ Aaron Miller (DWR) ▪ Kristin White (DOI) ▪ Dr. Marin Greenwood (DWR) ▪ Dr. Rick Wilder (DWR) ▪ Dr. Chris Earle (DWR) ▪ Tara Smith (DWR) ▪ Erik Reyes (DWR) ▪ Dr. Mike Bryan (DWR) ▪ Dr. Ellen Preece (DWR) ▪ Dr. Harry Ohlendorf (DWR) ▪ Dr. Marianne Guerin (DWR) ▪ Dr. En Ching Hsu (DWR) ▪ John Bednarski (DWR) ▪ Praba Pirabarooban (DWR) ▪ Nancy Parker (DOI)
			<ul style="list-style-type: none"> ▪ Dr. Chris Earle(DWR) ▪ Doug Rischbieter (DWR) ▪ John Bednarski (DWR)

¹ Mr. Bednarski's participation on Panel 1 will relate to the design and feasibility of constructing fish screened intakes, whereas his Panel 3 participation will relate to potential impacts to navigation from the construction of intake structures on the Sacramento River, Head of Old River Gate, barge unloading facilities, and barge traffic.

Revised Attachment 1

Order of Direct Testimony	Group	Party	Witness Panels
2 nd	4, 5, & 44	San Luis & Delta-Mendota Water Authority (SLDMWA), Westlands Water District (WWD), and Grassland Water District (GWD)	<ul style="list-style-type: none"> ▪ Jason Peltier (SLDMWA) ▪ Cindy Kao (SLDMWA) ▪ Jose Gutierrez (WWD) ▪ Dr. Michael Shires (WWD)
			<ul style="list-style-type: none"> ▪ Ricardo Ortega (GWD) ▪ Eric Hansen (GWD) ▪ Dr. Mark Petrie (GWD)
3 rd	7, 19, 20, 21, & 24	Sacramento County Water Agency (SCWA), Local Agencies of the North Delta, et al. (LAND), Daniel Wilson (DW), South Delta Water Agency, et al. (SDWA), and County of San Joaquin, et al. (COSJ)	<ul style="list-style-type: none"> ▪ David Robinson (LAND) ▪ Dr. Fraser Shilling (LAND) ▪ David Stirling (LAND) ▪ Sara Hemly (LAND) ▪ Daniel Wilson (DW)
			<ul style="list-style-type: none"> ▪ Dante John Nomellini (SDWA) ▪ Christopher Neudeck (COSJ) ▪ Tom Burke (SDWA)
			<ul style="list-style-type: none"> ▪ Dr. Jeffrey Michael (SDWA)
			<ul style="list-style-type: none"> ▪ John Lambie (COSJ) ▪ Josef Tootle (COSJ) ▪ Dr. Steffen Mehl (SCWA) ▪ Dr. Laura Foglia (SCWA) ▪ Kerry Schmitz (SCWA)
4 th	11	Water Forum (WF)	<ul style="list-style-type: none"> ▪ Tom Gohring (WF) ▪ Paul Bratovich (WF)
			<ul style="list-style-type: none"> ▪ Tom Gohring (WF) ▪ Paul Bratovich (WF) ▪ Dr. Craig Addley (WF) ▪ Dr. Chris Hammersmark (WF) ▪ Jeff Weaver (WF)

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Order of Direct Testimony	Group	Party	Witness Panels
5 th	13	Sacramento Regional County Sanitation District (SRCSD)	<ul style="list-style-type: none"> ▪ Michael Melady (SRCSD) ▪ Prabhakar Somavarapu (SRCSD) ▪ Ruben Robles (SRCSD) ▪ Dr. Susan Paulsen (SRCSD) ▪ Tom Grovhoug (SRCSD)
6 th	14, 19, 24, & 45	County of Yolo (YOLO), Local Agencies of the North Delta, et al. (LAND), County of San Joaquin, et al. (COSJ), and County of Sacramento (CoSac)	<ul style="list-style-type: none"> ▪ Kris Balaji (COSJ) ▪ Panos Kokkas (YOLO) ▪ Reza Moghissi (CoSac)
			<ul style="list-style-type: none"> ▪ Don Nottoli (CoSac) ▪ Dr. Robert Benedetti (CoSac) ▪ Jeff Letherman (CoSac) ▪ Juli Jensen (CoSac) ▪ Russell Van Loben Sels (LAND) ▪ Virginia Hemly Chhabra (CoSac) ▪ Paul Philley (CoSac) ▪ Karen Huss (CoSac)
			<ul style="list-style-type: none"> ▪ Mark Wilson (YOLO) ▪ Steve Heringer (YOLO) ▪ Tom Slater (YOLO)
7 th	15	East Bay Municipal Utility District (EBMUD)	<ul style="list-style-type: none"> ▪ Dr. Benjamin Bray (EBMUD) ▪ Jose Setka (EBMUD) ▪ Michelle Workman (EBMUD)
8 th	18	The San Joaquin Tributaries Authority, et al. (SJTA)	<ul style="list-style-type: none"> ▪ Daniel Steiner (SJTA) ▪ Dr. Susan Paulsen (SJTA)
9 th	22	City of Stockton (STKN)	<ul style="list-style-type: none"> ▪ Dr. Mel Lytle (STKN) ▪ Robert Granberg (STKN)
10 th	25	Contra Costa County and Contra Costa County Water Agency (CCC) and County of Solano (SOL)	<ul style="list-style-type: none"> ▪ Dr. Richard Denton (CCC-SOL)

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Order of Direct Testimony	Group	Party	Witness Panels
11 th	27	City of Antioch (ANTIOCH)	<ul style="list-style-type: none"> ▪ Dr. Susan Paulsen (ANTIOCH)
12 th	30	Save the California Delta Alliance, et al. (SCDA)	<ul style="list-style-type: none"> ▪ Dr. Brent Haddad (SCDA) ▪ Bill Wells (SCDA) ▪ Charles Salter (SCDA) ▪ Chris Kinzel (SCDA) ▪ Frank Morgan (SCDA) ▪ Dr. Rune Storesund (SCDA) ▪ Russel Ooms (SCDA)
13 th 12 th	31	California Sportfishing Protection Alliance, (CSPA), California Water Impact Network (CWIN), and AquAlliance (AQUA)	<ul style="list-style-type: none"> ▪ Bill Jennings (CSPA) ▪ Tom Cannon (CSPA) ▪ Chris Shutes (CSPA) ▪ Dr. G. Fred Lee (CSPA) ▪ Tom Stokely (CSPA) <hr/> <ul style="list-style-type: none"> ▪ Gerald Neuberger (CSPA) ▪ Dan Bacher (CSPA) ▪ David Hurley (CSPA) ▪ Dr. Dave Fries (CSPA) ▪ Arve Sjevold (CWIN) <hr/> <ul style="list-style-type: none"> ▪ Dr. Kit Custis (AQUA) ▪ Barbara Vlamis (AQUA) ▪ James Brobeck (AQUA) ▪ Dr. Don Hankins (AQUA) ▪ Trina Cunningham (AQUA) <hr/> <ul style="list-style-type: none"> ▪ Marc Del Piero (CSPA) ▪ Dr. Ed Whitelaw (CWIN) ▪ Felix Smith (CSPA)
14 th 13 th	32	Restore the Delta (RTD)	<ul style="list-style-type: none"> ▪ Barbara Barrigan-Parrilla (RTD) ▪ Gary Mulcahy (RTD) ▪ Roger Mammon (RTD) ▪ Tim Stroshane (RTD)

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Order of Direct Testimony	Group	Party	Witness Panels
15 th 14 th	33	Friends of the River and Sierra Club California (FOR)	<ul style="list-style-type: none"> ▪ Deirdre Des Jardins (FOR) ▪ Jonas Minton (FOR) ▪ Dr. Lawrence Kolb (FOR) ▪ Ron Stork (FOR)
16 th 15 th	34	The Environmental Justice Coalition for Water (EJCW)	<ul style="list-style-type: none"> ▪ Colin Bailey (EJCW) <ul style="list-style-type: none"> ▪ Daniel Heagerty (EJCW) ▪ Allegra Schunemann (EJCW) ▪ Milo Wetherall (EJCW) ▪ Lucia Paczkowski (EJCW) ▪ Caroline Schurz (EJCW) <ul style="list-style-type: none"> ▪ Andria Ventura (EJCW) ▪ Dr. Fraser Shilling (EJCW) ▪ Sherri Norris (EJCW)
17 th 16 th	35	Natural Resources Defense Council, The Bay Institute and Defenders of Wildlife (NRDC)	<ul style="list-style-type: none"> ▪ Doug Obegi (NRDC)
18 th 17 th	37	Deirdre Des Jardins (DDJ)	<ul style="list-style-type: none"> ▪ Dr. David S. Fries (DDJ) ▪ Randal Baxter, other DFW witnesses (DFW)
19 th 18 th	38	Pacific Coast Federation of Fishermen's Associations, et al. (PCFFA)	<ul style="list-style-type: none"> ▪ David Bitts (PCFFA) ▪ Deirdre Des Jardins (PCFFA) ▪ Noah Oppenheim (PCFFA) <ul style="list-style-type: none"> ▪ Thomas Stokely (PCFFA) ▪ Greg Kamman (PCFFA) ▪ Dr. Joshua Strange (PCFFA) ▪ Michael Belchik (PCFFA) <ul style="list-style-type: none"> ▪ Amy Cordalis (PCFFA) ▪ Thomas O'Rourke Sr. (PCFFA) ▪ Dr. Cutcha Risling Baldy (PCFFA) ▪ Brittani Orona (PCFFA)

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Order of Direct Testimony	Group	Party	Witness Panels
20th 19 th	39	North Delta C.A.R.E.S. (NDC)	<ul style="list-style-type: none"> ▪ James Motlow (NDC) ▪ Barbara Daly (NDC) ▪ Mark Pruner (NDC) ▪ Nicole Suard (NDC)
21st 20 th	40	Patrick Porgans (PORGANS)	<ul style="list-style-type: none"> ▪ Patrick Porgans (PORGANS)
22nd 21 st	41	Snug Harbor Resorts, LLC. (SHR)	<ul style="list-style-type: none"> ▪ Nicole Suard (SHR)
22 nd	30	Save the California Delta Alliance, et al. (SCDA)	<ul style="list-style-type: none"> ▪ Dr. Brent Haddad (SCDA) ▪ Bill Wells (SCDA) ▪ Charles Salter (SCDA) ▪ Chris Kinzel (SCDA) ▪ Frank Morgan (SCDA) ▪ Dr. Rune Storesund (SCDA) ▪ Russel Ooms (SCDA)
23 rd	43	Clifton Court, L.P. (CCLP)	<ul style="list-style-type: none"> ▪ Suzanne Womack (CCLP) ▪ Sheldon Moore (CCLP)
24 th	46, 47, & 48	Environmental Council of Sacramento (ECOS), Friends of Stone Lakes National Wildlife Refuge (FSL), and Save Our Sandhill Cranes (SOSC)	<ul style="list-style-type: none"> ▪ Scott Finley (FSL) ▪ Michael Savino (SOSC) ▪ Dr. Gary Ivey (FSL) ▪ Dr. Ed Pandolfino (SOSC) ▪ James Pachi (ECOS)
			<ul style="list-style-type: none"> ▪ Robert Burness (ECOS) ▪ Sean Wirth (SOSC) ▪ Dr. Judith Lamare (ECOS) ▪ David Yee (SOSC)
25 th	35	Natural Resources Defense Council, The Bay Institute and Defenders of Wildlife (NRDC)	<ul style="list-style-type: none"> ▪ Dr. Jon Rosenfield (NRDC)