

State Water Resources Control Board

August 6, 2018

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RESPONSE TO SAN JOAQUIN TRIBUTARIES AUTHORITY’S LETTER REGARDING JULY 27, 2018 RULING

This letter responds to the San Joaquin Tributaries Authority’s (SJTA) [August 1, 2018 letter](#) regarding our [July 27, 2018 ruling](#) on rebuttal testimony and subpoenas. In that ruling, we determined that SJTA’s rebuttal testimony concerning the merits of the Vernalis flow criteria contained in the 2010 Delta Flow Criteria Report ([SWRCB-25](#)) was not proper rebuttal. We reasoned that, although some witnesses for other parties had endorsed the 2010 Flow Criteria Report during their cases-in-chief, none of the witnesses had endorsed or discussed the Vernalis flow criteria in particular. We also pointed out that the report itself had been admitted into evidence in Part 1 of the hearing, and we concluded on that basis that the report was not the proper subject of rebuttal in Part 2. Even assuming the testimony in question was proper rebuttal, we determined that it should be excluded because the issue of whether to require increased flows at Vernalis is not a contested issue in this hearing on the change petition for the WaterFix Project. Accordingly, we found that the probative value of the testimony was substantially outweighed by the probability that allowing SJTA to present the testimony would necessitate undue consumption of time. For the same reasons given for striking SJTA’s rebuttal testimony, we ruled that SJTA would not be permitted to cross-examine subpoenaed employees of the State Water Resources Control Board (State Water Board) or the California Department of Fish and Wildlife concerning the Vernalis flow criteria contained in the 2010 Delta Flow Criteria Report.

In its August 1 letter, SJTA contends that the July 27 ruling is predicated on factual inaccuracies and is prejudicial to SJTA. In support of this contention, SJTA argues that the 2010 Flow Criteria Report was offered into evidence during Part 2 of the hearing, and therefore is the proper subject of rebuttal. SJTA also argues that all of the flow criteria contained in the report are relevant because the State Water Board is required by the Delta Reform Act of 2009 to consider the report in determining what flow criteria are appropriate conditions of any approval of the change petition, a key hearing issue in Part 2. SJTA’s letter is not styled as a motion or request for reconsideration, but SJTA states that it will withdraw the portions of its rebuttal testimony that were not stricken “[i]n the absence of any decision by the Board to reconsider the July 27 Ruling on its own motion”

SJTA appears to be correct that the 2010 Flow Criteria Report was inadvertently admitted into evidence during Part 2. Contrary to our direction to the parties not to resubmit in Part 2 evidence that already had been accepted during Part 1, the California Sportfishing Protection Alliance (CSPA) listed SWRCB-25, the 2010 Delta Flow Criteria report, on CSPA’s Exhibit Identification Index for Part 2. No party objected to this exhibit when CSPA offered its exhibits into evidence, and our staff did not notice the mistake, so the exhibit appears to have been accepted during Part 2 as well as Part 1. (See [R.T. \(April 25, 2018\)](#) 65:18-66:20.) As a consequence, the 2010 Delta Flow Criteria Report does appear to be the proper subject of rebuttal in Part 2 of the hearing,

FELICIA MARCUS, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

contrary to our earlier determination. We also acknowledge, as we have repeatedly, that the Board must consider the 2010 Delta Flow Criteria Report in determining what Delta flow criteria would be appropriate conditions of any approval of the change petition.

It does not follow, however, that all aspects of the 2010 Delta Flow Criteria Report are relevant to the WaterFix Project. To the contrary, the relevance to the project of the Vernalis flow criteria in particular is marginal at best, as explained in our July 27 ruling. Accordingly, we stand by our determination that the probative value of SJTA's proposed extensive and detailed testimony concerning the merits of the Vernalis flow criteria is substantially outweighed by the probability that its presentation would necessitate undue consumption of time, and we decline to reconsider our July 27 ruling on our own motion.

SJTA asserts that it has been treated unfairly because we did not strike the testimony of other witnesses who propose to present rebuttal testimony that is critical of the 2010 Delta Flow Criteria Report. Inconsistently, SJTA also asserts that the real reason for our July 27 ruling was to insulate the report from criticism and shield the State Water Board staff who authored the report from cross-examination. Both of these assertions stem from an overly broad interpretation of our ruling. SJTA describes our ruling as having stricken "written testimony that is relevant to the reliability and usefulness of the 2010 [Delta Flow Criteria Report]" and having precluded "any questioning of the individuals who drafted that report or provided the scientific analysis for the conclusions therein." This description is overbroad. It bears emphasis that we have *only* excluded testimony and precluded cross-examination concerning the *merits of the Vernalis flow criteria* contained in the report. We have not excluded testimony or precluded cross-examination concerning other aspects of the report that are relevant to the WaterFix Project, such as the Delta outflow criteria. Nor have we excluded testimony concerning other aspects of San Joaquin River flows that may have a bearing on the project, such as the relationship between San Joaquin River inflows and State Water Project and Central Valley Project exports.

Consistent with our July 27 ruling, SJTA still may call and question any properly subpoenaed witnesses, including State Water Board employees, concerning the "assumptions, limitations, analyses, findings and conclusions" in the 2010 Delta Flow Criteria Report, provided that SJTA's line of questioning is relevant to the Part 2 key hearing issues, and SJTA does not question any witnesses concerning the merits of the Vernalis flow criteria. Per our July 27 ruling, any questions for subpoenaed witnesses must be submitted in writing and served on the other parties by **5:00 p.m. on August 10, 2018.**

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