



November 23, 2016

**Sent Via Email**

Hearing Officers Marcus and Doduc  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814  
Email: CWFhearing@waterboards.ca.gov

**Re: California Waterfix Hearing – Proposal for Presentation of Rebuttal Evidence in Part 1; Submission of Closing Briefs; Response to Proposals of San Luis & Delta-Mendota Water Authority and Westlands Water District**

Dear Hearing Officers Marcus and Doduc:

Please accept this letter on behalf of the San Joaquin Tributaries Authority (“SJTA”) setting forth (1) a proposal for the presentation of rebuttal evidence during Part 1 of the California Waterfix hearing; (2) a proposal for the submission of closing briefs, and (3) a response to the letters submitted on behalf of San Luis & Delta-Mendota Water Authority (“SLDMWA”) and Westlands Water District (“WWD”), both dated November 22, 2016.<sup>1</sup>

**Presentation of Rebuttal Evidence**

The SJTA requests that the State Water Resources Control Board (“State Water Board” or “Board”) require the submission of written rebuttal testimony and exhibits in advance of the oral presentation of such evidence. The SJTA joins the request of the Sacramento Valley Water Users (SVWU)<sup>2</sup> that the deadline for the submission of written rebuttal testimony and exhibits be the same for all parties, including Petitioners. The SJTA proposes that the deadline be set at least 30 days after the conclusion of Part 1B. Because rebuttal evidence is intended to be responsive to the cases in chief, staggered deadlines are unnecessary if all cases in chief have been completed.

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<sup>1</sup> Letters of San Luis & Delta-Mendota Water Authority and Westlands Water District, both dated November 22, 2016, re: Response to SVWU Proposal Regarding Part 1 Rebuttal Evidence and Submission of Closing Briefs

<sup>2</sup> Sacramento Valley Water Users’ Proposal Regarding Part 1 Rebuttal Evidence and Submission of Closing Briefs, dated November 15, 2016, available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/docs/20161115\\_svwu\\_proposal.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/20161115_svwu_proposal.pdf)

The proposals from SLDMWA and WWD, dated November 22, 2016, only contemplate the submission of rebuttal evidence by Petitioners and parties who presented cases-in-chief during Part 1B. This approach is too narrow. All interested parties, including those who elected not to present a case in chief, such as the SJTA, are entitled to submit rebuttal evidence in response to Petitioners' case in chief. Any order from the Board addressing the procedure for the submission of rebuttal evidence should be drafted in such a way as to include all parties, not just those who presented a case in chief.

### Closing Briefs

The SJTA joins the request of the SVWU that closing statements and briefs be reserved until the end of Part 2 of this proceeding.

SLDMWA and WWD have requested that the Board allow closing briefs to be submitted at the conclusion of Part 1. The justification for this request is that parties who submitted cases in chief during Part 1B failed to present evidence demonstrating injury to legal users of water. According to their letters, SLDMWA and WWD intend to argue this point in their closing briefs and request that certain protests be dismissed. The proposed argument would flip the burden of proof in this proceeding. Water Code section 1702 clearly states that the burden is on the Department of Water Resources and the U.S. Bureau of Reclamation (collectively "Petitioners") to "establish . . . that the [requested] change will not operate to the injury of any legal users of the water involved." Even if no party had submitted a case in chief during Part 1B, the Petitioners would still need to satisfy this burden. With respect to the proposed argument by SLDMWA and WWD that certain protestants cannot be injured by the project because they do not hold water rights, the burden of proving that a protestant does not have a water right is on the Petitioners. To date, Petitioners have not submitted any evidence that a particular protestant does not hold a water right. Accordingly, the proposed argument by SLDMWA and WWD should not serve as a basis for granting their application to submit closing briefs at the end of Part 1. In any event, the Board has previously stated, "we do not intend to cancel the petition **or any protests** while the hearing is pending . . ." (*California Waterfix Project Pre-hearing Conference Ruling*, February 11, 2016, p. 7 [emphasis supplied].)

Furthermore, the request by SLDMWA and WWD resurrects an important issue that has received little attention since the early days of this proceeding, namely the requirement that any order approving the petition contain "appropriate Delta flow criteria" in accordance with Water Code section 85086(c)(2). As stated in the hearing notice, the issue of "[w]hat Delta flow criteria are appropriate" will be addressed in Part 2. (*Notice of Public Hearing*, October 30, 2016, p. 12.) The hearing officers will recall that the SJTA moved to dismiss the entire Waterfix petition on the basis that Petitioners failed to include a proposal for appropriate Delta flow criteria. (*SJTA Application to Dismiss the Joint Petition*, April 20, 2016.) The SJTA requested that the Board dismiss the petition due to this deficiency, or alternatively order a preliminary hearing to address the topic. The Board declined to dismiss the petition or order a preliminary hearing, but observed that "SJTA is correct that . . . Delta flow criteria could affect water flows or quality in a manner that causes impacts to other legal users of water." (*Hearing Officers' Ruling on Revised Hearing Schedule, Revised Notices of Intent to Appear, and Motion to Disqualify Hearing Officers*, April 25, 2016, p. 3.) To address this matter, the Board stated, "it may be necessary to revisit Part 1 issues at the close of the hearing based on the information presented during Part 2 concerning appropriate Delta flow criteria." (*Id.*) In other words, no argument can be made that Petitioners carried their burden of showing no injury to other legal users of water

until after the issue of appropriate Delta flow criteria is addressed in Part 2. This is the consequence of Petitioners' decision not to propose appropriate Delta flow criteria in their petition.

For these reasons, the SJTA requests that closing briefs be reserved until the conclusion of Part 2, or, if appropriate, until the conclusion of a revisited Part 1.

Very truly yours,

**O'LAUGHLIN & PARIS LLP**



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TIMOTHY J. WASIEWSKI

cc: [Waterfix 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):

**California Waterfix Hearing - Proposal for Presentation of Rebuttal Evidence in Part 1;  
Submission of Closing Briefs; Response to Proposals of San Luis & Delta-Mendota Water  
Authority and Westlands Water District**

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 November 15, 2016, posted by the State Water Resources Control Board at

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/docs/111516revsrvlist.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/111516revsrvlist.pdf)

I certify that the foregoing is true and correct and that this document was executed on November 23, 2016.

Signature:

A handwritten signature in blue ink, appearing to read 'T Wasiewski', is written over a horizontal line.

Name: Timothy Wasiewski

Title: Attorney

Party/Affiliation: San Joaquin Tributaries Authority

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