
State Water Resources Control Board

August 31, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING REGARDING SCHEDULING OF PART 2 AND OTHER PROCEDURAL MATTERS

This ruling grants the Department of Water Resources' (DWR) August 3, 2017 request to establish a schedule for Part 2 of the hearing before the State Water Resources Control Board (State Water Board) on the water right change petition for the California WaterFix Project. A number of protestants have called for the indefinite delay of Part 2 pending the issuance of a Record of Decision (ROD) by the U.S. Bureau of Reclamation (Reclamation) pursuant to the National Environmental Policy Act (NEPA), and further consultation between Reclamation and the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) pursuant to section 7 of the federal Endangered Species Act (ESA). As discussed below, we conclude that a continuation of the hearing is not legally required, and that the public interest weighs in favor of proceeding with the hearing, taking into consideration: (1) the substantial information available concerning the potential effects of the project, (2) DWR and Reclamation (collectively petitioners) have the burden of demonstrating that each element necessary for approval of their petition has been met, (3) the risks and costs of postponing for an indefinite period the conclusion of the evidentiary hearing, and (4) either the hearing or the State Water Board's decision on the petition can be re-opened if necessary and appropriate to consider new information. We also conclude that the project description is adequate to allow the parties to participate meaningfully in Part 2, but petitioners are directed to clarify whether any proposed operating criteria have changed through the section 7 consultation process.

Although we have concluded that it is in the public interest to proceed with the hearing, we shared protestants' expectation that the NEPA and ESA processes would be complete at this juncture, and we did not anticipate that USFWS and NMFS would defer a more detailed level of review of certain elements of the project to a future consultation process. As a consequence, petitioners may need to supply more information than anticipated through the hearing process in order to meet their burden of proof without the benefit of a ROD and complete consultation under section 7 of the ESA. Similarly, protestants may need additional time to develop their cases-in-chief. We have taken this into consideration in establishing an appropriate schedule for Part 2.

The schedule for Part 2, including a tentative pre-hearing conference date, is set forth below. This ruling also establishes important deadlines for participation in Part 2, including deadlines for the submission of supplemental Notices of Intent to Appear and the submission of written testimony and exhibits. The parties are advised to read this ruling carefully, especially those parties who did not participate in Part 1 and may not be familiar with the State Water Board hearing procedures. In addition, all of the parties are expected to have read the

During Part 1 of the hearing, some parties, including the petitioners, requested to make policy statements and present cases-in-chief. In our June 10, 2016 ruling, we permitted petitioners and other parties to make policy statements in order to provide some flexibility for hearing party representatives to make policy comments. However, in order to maintain an efficient hearing, we still limited policy statements by party representatives to three minutes per speaker, and the time a party spent on policy statements was deducted from the 20 minutes afforded to each party to present an opening statement. Parties were asked to track their time on the honor system and deduct the time used to present policy statements from any opening statement. We will allow the same flexibility for parties in Part 2. The order of speakers making policy statements will be determined at the beginning of Part 2 of the hearing depending on the elected officials present and any scheduling issues that the participants may have.

2. OTHER PROCEDURAL MATTERS

Scope of Part 2

Generally, Part 1 of the hearing focused on the potential effects of the petition on agricultural, municipal and industrial uses of water and associated legal users of water and conditions that should be placed on any approval of the petition to protect those uses. Part 2 of the hearing will focus on the potential effects of the petition on fish and wildlife and recreational uses and conditions that should be placed on any approval of the petition to protect those uses, including consideration of appropriate Delta flow criteria for the WaterFix Project as required by the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act). Detailed key hearing issues for Part 2 are provided below. The parties should review our previous rulings concerning the scope of Parts 1 and 2 of the hearing, including our rulings dated February 11, 2016, and October 7, 2016. In particular, we would like to remind the parties that, consistent with the State Water Board's more limited role as a responsible agency under CEQA, the issue of whether the FEIR/EIS for the WaterFix Project satisfies CEQA or NEPA requirements is not a key hearing issue, and testimony on that issue will not be admitted.

The State Water Board's order following this proceeding must be based upon evidence in the record developed at the hearing. Only one record will be developed in this proceeding, comprised of evidence submitted and accepted during both Parts 1 and 2 of the hearing. Therefore, evidence accepted during Part 1 of the hearing should not be resubmitted in Part 2. Please review the existing record carefully and avoid any duplication of exhibits or exhibit numbers.

Parties to Part 2 of the hearing should submit exhibits and testimony responsive to the following issues that will be considered during this portion of the hearing:

3. Will the changes proposed in the petition unreasonably affect fish and wildlife or recreational uses of water, or other public trust resources?
 - a. Will the proposed changes in points of diversion alter water flows in a manner that unreasonably affects fish, wildlife, or recreational uses of water?
 - b. Will the proposed changes in points of diversion alter water quality in a manner that unreasonably affects fish, wildlife, or recreational uses of water?