

## CWFhearing

---

**From:** German, Valentina@DWR  
**Sent:** Friday, January 22, 2016 12:08 PM  
**To:** CWFhearing  
**Cc:** Mizell, James@DWR; amy.aufdemberge@sol.doi.gov; Laufer, Michael@Waterboards; Howard, Tom@Waterboards; Doduc, Tam@Waterboards; Marcus, Felicia@Waterboards; abl@bkslawfirm.com; aferguson@somachlaw.com; ahitchings@somachlaw.com; amy.aufdemberge@sol.doi.gov; apeltzer@prlawcorp.com; barbara@restoredhethdelta.org; barbarav@aqualliance.net; barry@solagra.com; bdalymns@citilink.net; blancapaloma@msn.com; brettgbaker@gmail.com; caroleekreiger7@gmail.com; colin@ejcw.org; daladjem@downeybrand.com; daniel@kaydix.com; dcooper@miniasianlaw.com; ddj@cah2oresearch.com; dean@hprlaw.net; deltaactioncommittee@gmail.com; deltakeep@me.com; dkelly@somachlaw.com; dorth@davidorthconsulting.com; empappa@gmail.com; Femlen, William@solanocounty.com; fetherid@ebmud.com; fmorrissey@orangecoveid.org; gadams@fclaw.com; Herrick, John @aol.com; info@californiadelta.org; jbuckman@friantwater.org; jennifer@spallettalaw.com; john.luebberke@stocktonca.gov; jph@tulareid.org; jrobinson@cityofsacramento.org; jsalmon@ebmud.com; kelweg1@aol.com; kharrigfeld@herumcrabtree.com; kkeller@neumiller.com; kobrien@downeybrand.com; lcaster@fclaw.com; matlas@jmatlaslaw.com; Meserve, Osha@semlawyers.com; mhagman@lindmoreid.com; michael@brodskylaw.net; mjatty@sbcglobal.net; mkropf@countyofcolusa.com; mlarsen@kdwcd.com; mlennihan@lennihan.net; mnikkel@downeybrand.com; pminasian@minasianlaw.com; Pogledich, Philip@yolocounty; porgansinc@sbcglobal.net; psimmons@somachlaw.com; pweiland@nossaman.com; pwilliams@westlandswater.org; rbernal@ci.antioch.ca.us; roland@ssjmud.org; rsb@bkslawfirm.com; Rubin, Jon@sldmwa.org; ryan.hernandez@dcd.cccounty.us; sae16@lsid.org; sdalke@kern-tulare.com; sgeivet@ocsnet.net; Shapiro, Scott @downeybrand.com; smorris@swc.org; ssaxton@downeybrand.com; stephen.siptroth@cc.cccounty.us; sunshine@snugharbor.net; svolker@volkerlaw.com; tara.mazzanti@stocktonca.gov; tgohring@waterforum.org; thomas.esqueda@fresno.gov; torr@earthjustice.org; towater@olaughlinparis.com; Van Zandt, Michael@hansonbridgett.com; vkincaid@olaughlinparis.com  
**Subject:** California WaterFix Hearing  
**Attachments:** DWR Reclamatoin Pre-hearing Conference Comment Letter.pdf

Department of Water Resources and Bureau of Reclamation jointly submit the following comments regarding the agenda for the CA WaterFix water rights change petition pre-hearing conference. Additionally, as requested in the January 15, 2016 letter to parties, DWR and Reclamation are providing a written “update on their current NEPA/CEQA and ESA/CESA compliance schedules.”

Respectfully,

**Tina German**

Legal Secretary

Office of the Chief Counsel

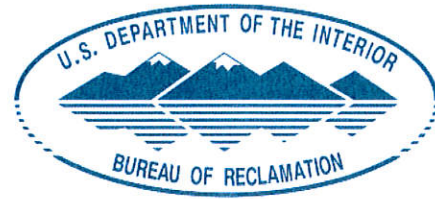
Department of Water Resources

1416 Ninth Street, Suite 1118

Sacramento, CA 95814

(916) 653-5966

[Valentina.German@water.ca.gov](mailto:Valentina.German@water.ca.gov)



January 22, 2016

[CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov) via Email

Chair Felicia Marcus  
Board Member Tam Doduc  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, California 95812-0100

Re: Addition of Procedural Issues to the Pre-hearing Conference Agenda

Dear Chair Marcus and Board Member Doduc:

The California Department of Water Resources (DWR) and U.S. Department of the Interior, Bureau of Reclamation (Reclamation) (joint Petitioners) submit the following comments regarding the agenda for the CA WaterFix water rights change petition pre-hearing conference. Additionally, as requested in the January 15, 2016 letter to parties, DWR and Reclamation are providing a written "update on their current NEPA/CEQA and ESA/CESA compliance schedules."

#### Additional Agenda Item – Procedural Motions and Briefing

The Petitioners request that the hearing officers accept procedural motions and legal briefs prior to the commencement of the hearing. This motion and briefing schedule should not impact the circulated hearing schedule if motions are filed by March 21, 2016, and responsive motions filed by April 4, 2016. Similarly, Petitioners request the hearing officers present any relevant rulings on motions prior to the Policy Statements or Testimony portions of the hearing. The expectation is that resolution of the legal issues prior to the hearing will facilitate an efficient and focused hearing.

#### Additional Agenda Item – Hearing Efficiency

The Petitioners appreciate the intent of the hearing officers to conduct the hearing as efficiently as possible, and agree that time limits and coordination/consolidation of party presentations will increase the efficiency of the hearing and build a more cohesive and organized record of the hearing. These efforts are critical given the number of parties engaged in this hearing. Requiring the grouping

of parties by common interest in order to avoid redundant testimony is a common strategy used in court and should be employed here. Allowing for an initial attempt by parties to self-organize is acceptable but should not preclude the hearing officers from exercising organizational tools for the benefit of the hearing. Towards that goal, Petitioners support the State Water Contractors, Inc. proposal that a second pre-hearing conference limited to status of coordination/consolidation be held roughly one week after submittal of testimony and exhibits.

Time limits should be set forth for those issuing policy statements without a case-in-chief. Petitioners suggest that these parties should generally be limited to 3 minutes. Such a limit would allow for a timely beginning to testimony.

#### Additional Agenda Item – Hearing Structure

Similar to the January 15 letter, Petitioners suggest a hearing structure that generally proceeds in the follow manner:

1. Opening of the hearing with introductory remarks by hearing officers and hearing team and reading of the notice
2. Procedural motion rulings
3. Policy statements<sup>1</sup>
4. Petitioners' presentation, cross-examination, re-direct and re-cross
5. Interested parties' presentations, cross-examination, re-direct and re-cross
6. Rebuttal of opposition followed by Petitioners
7. Closing of Part 1 with closing briefs

#### Additional Agenda Item – Testimony of the Petitioners

As indicated in the January 15 letter on page 5, Petitioners appreciate the inclination of the hearing officers to grant Petitioners more time to present their cases-in-chief. Accordingly, Petitioners request confirmation that their cases-in-chief will be given the substantial time necessary to fully present this important and complex project in a manner consistent with the burden of proof carried by the Petitioners. Petitioners specifically request a combined 13 hours to summarize their cases-in-chief. Petitioners' testimony will be coordinated and presented in a panel format to facilitate efficiency. These requests have been tailored to respect the time of the hearing officers, staff and other parties, and are proportionate to the significant scope and timeframe of this hearing.

///

///

///

---

<sup>1</sup> Exceptions may be requested to accommodate schedules for U.S. Department of the Interior personnel who may be traveling from out of state.

Schedule Update of NEPA/CEQA and ESA/CESA

**Schedule for Compliance with NEPA and CEQA** - In July 2015, DWR and Reclamation issued the BDCP/California WaterFix Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS). The BDCP Draft EIR/EIS was issued December 2013. DWR and Reclamation expect to complete preparation of a Final EIR/EIS by June 2016 and Reclamation would issue the Record of Decision (ROD) to complete the NEPA process after receipt of a Biological Opinion. DWR expects to certify the EIR and make a decision on the project and file a Notice of Determination (NOD) completing the CEQA process at approximately the same time as Reclamation issues the ROD.

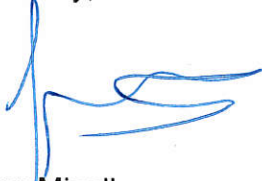
**Schedule for Compliance with Federal and California Endangered Species Acts** - As we have previously identified, the California WaterFix project involves the request for federal approvals related to construction (USACE) and coordinated operations with the federal Central Valley Project. As a requirement of the federal Endangered Species Acts (ESA), prior to making a final decision on the action, a lead agency must, in consultation with the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS), ensure that the proposed action does not jeopardize the continued existence of a listed species or adversely modify or destroy critical habitat. An element of the process for the California WaterFix project involves the preparation of a biological assessment. DWR and Reclamation have made progress in preparing a biological assessment for the project, in collaboration with USFWS and NMFS, and continue to coordinate on a path forward to the issuance of a biological opinion. The working draft version of the biological assessment has been posted on the California WaterFix website at [https://s3.amazonaws.com/californiawater/pdfs/g8o6c\\_FIX\\_BA\\_TOC.pdf](https://s3.amazonaws.com/californiawater/pdfs/g8o6c_FIX_BA_TOC.pdf). Once a final biological assessment is completed and submitted by Reclamation with a request for formal consultation, it is our understanding that the Services will begin formal consultation, which will include a peer review process through the Delta Science Program, and will conclude with issuance of a biological opinion. DWR will ensure that the final documents associated with the ESA compliance are available to the State Water Board and, as the consultation process continues, Petitioners will continue to update the State Water Board on the schedule for document releases.

The California WaterFix project, if approved by all permitting and reviewing authorities including the State Water Resources Control Board, would involve activities that may cause the take of species listed under the California Endangered Species Acts (CESA). DWR intends to obtain incidental take authorization for the California WaterFix project through Section 2081(b) of the California Fish & Game Code. DWR expects to submit an application for an incidental take permit to the California Department of Fish & Wildlife (CDFW) in April 2016, and expects CDFW to make a decision on whether to issue the permit in a parallel timeframe as the biological opinion issued under Section 7 of the ESA (with the caveat that it would come after DWR completes the process for CEQA compliance and decision on project approval).

Ms. Felicia Marcus, et al  
January 22, 2016  
Page 4

Petitioners appreciate the opportunity to present these comments and requests. DWR staff will be available and prepared to answer questions or provide additional clarity on these issues at the pre-hearing conference.

Sincerely,



Tripp Mizell  
Senior Attorney  
Office of the Chief Counsel  
CA Department of Water Resources



Amy L. Aufdemberge  
Assistant Regional Solicitor  
Office of the Solicitor General  
U.S. Department of the Interior

cc: *Electronic service*

Felicia Marcus, Chair & hearing officer, State Water Resources Control Board  
Tam Doduc, Board Member & hearing officer, State Water Resources Control Board

Tom Howard, Executive Director, State Water Resources Control Board

Michael Lauffer, Chief Counsel, State Water Resources Control Board

Electronic service list as provided by the State Water Resources Control Board on January 15, 2016, Table 1, rev.3

*Personal service via U.S. Postal Service*

Suzanne Womack and Sheldon Moore,  
Clifton Court, L.P.,  
3619 Land Park Drive,  
Sacramento, CA 95818