
State Water Resources Control Board

November 3, 2023

RE: Evidentiary Ruling on Remaining Written Objections to Case-in-Chief Exhibits in the Public Hearing on Solvang’s Petition for Change of Water Right Permit 15878.

TO ALL PARTIES:

On August 15, 2023, the State Water Resources Control Board’s (State Water Board or Board) Administrative Hearings Office (AHO) issued an Amended Notice of Public Hearing on the petition for change filed by the City of Solvang (Solvang) for water-right Permit 15878 (Application A022423) which authorizes diversions of water from the Santa Ynez River in Santa Barbara County. The hearing in this proceeding will begin on November 6, 2023.

Solvang, California Trout (CalTrout), California Department of Fish and Wildlife (CDFW), and National Marine Fisheries Service (NMFS) submitted case-in-chief exhibits to the AHO by the September 8 deadline set in the Amended Notice of Public Hearing. On September 22, Solvang, Cachuma Conservation Release Board (CCRB), Santa Ynez Water Conservation District (Parent District), Santa Ynez Water Conservation District, Improvement District No. 1 (ID No. 1), Alisal Guest Ranch, CDFW, and NMFS filed or joined evidentiary motions objecting to or seeking to exclude case-in-chief exhibits or portions of written testimony filed by other parties. On September 29, Solvang, CalTrout, CDFW, and NMFS filed responses to these motions.

This ruling letter addresses the Parent District’s motion in limine (2023-09-22 Parent District Motion in Limine), CCRB’s evidentiary objections (2023-09-22 CCRB Objections), CDFW’s evidentiary objections (2023-09-22 CDFW’s Objections to Case-in-Chief Testimony) in which NMFS joined, and ID No. 1 and Alisal Guest Ranch’s motions in limine (2023-09-22 MIL 1 (Bush Testimony); 2023-09-22 MIL 2 (Trush Testimony); 2023-09-22 MIL 3 (Evans Testimony)).

Legal Background

This hearing is being conducted in accordance with State Water Board regulations applicable to adjudicative proceedings. (Cal. Code Regs., tit. 23, § 648, subd. (a).) The rules governing the admission of evidence in adjudicative proceedings before the Board are found in California Code of Regulations, title 23, section 648 et seq.; chapter 4.5 of

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

the Administrative Procedure Act (commencing with section 11400 of the Government Code); sections 801 to 805 of the Evidence Code; and section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648, subd. (b).)

The State Water Board is not bound in its proceedings by many of the technical rules relating to evidence and witnesses that would apply in a court of law. (See Gov. Code, § 11513, subd. (c); Cal. Code Regs., tit. 23, § 648.) “Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.” (Gov. Code, § 11513, subd. (c).) Hearsay evidence is admissible in State Water Board proceedings to supplement or explain other evidence, but, over timely objection, is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code, § 11513, subd. (d).) In conducting the hearing, “[t]he [hearing officer] has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission would necessitate undue consumption of time.” (Id. at subd. (f).)

Parent District’s Motion in Limine

The Parent District filed a motion in limine to exclude evidence “offered to support flow requirements in the Santa Ynez River that are different from or contrary to the permit conditions set forth in the terms of Order WR 2019-0148.” (2023-09-22 ID 1 Motion in Limine, p. 2.) The Parent District argues that Term 28 of the United States Bureau of Reclamation’s water right Permits 11308 and 11310, as amended in Order WR 2019-0148, prohibits reopening the issue of minimum flow requirements for the protection of public trust resources or downstream water rights on the Santa Ynez River until further studies provided for in Terms 19 and 24 of the amended permits are completed. The Parent District also argues that reopening the issue of minimum flow requirements on the Santa Ynez River would be “grossly inefficient.” (Id. at p. 7.)

Without more detailed briefing on the issue, I am not convinced that collateral estoppel applies to prohibit consideration by the Board in this proceeding of flow requirements to protect instream beneficial uses and public trust resources. First, this proceeding involves diversions under a different water right, from different locations in the watershed, and in different volumes than the diversions at issue in Order WR 2019-0148. Second, the duty of the Board to consider potential impacts to public trust resources when administering water rights is an ongoing fiduciary obligation. “[T]he public trust imposes a duty of continuing supervision over the taking and use of [] appropriated water ... the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.” (*Nat’l Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 447.) This duty is owed to the people of the state and not only to the parties to a particular proceeding. Therefore, I am not persuaded that the Board could be prohibited (or relieved from its duty) by operation of collateral estoppel from considering the potential impacts of a Board action or inaction on public trust resources. I do intend, however, to allow further briefing on this issue if requested by the parties.

I also recognize the Parent District's argument that consideration in this proceeding of the issue of minimum flows necessary to protect fish and other public trust resources, only four years after the Board issued Order WR 2019-0148, is inefficient, unnecessary, and would confound the existing process for future reconsideration of the issue after the Bureau of Reclamation has completed certain studies. Given the Board's public trust responsibilities, however, I will not exclude the evidence to which the Parent District objects. I intend to consider that evidence in the context of Order WR 2019-0148 and the framework for managing flows in the Santa Ynez River that the Board established in that order. I deny the Parent District's motion without prejudice.

Cachuma Conservation Release Board's Evidentiary Objections

The Cachuma Conservation Release Board (CCRB) objects to admission of the 2016 Draft Biological Opinion for the Operation and Maintenance of the Cachuma Project (2016 Draft Biological Opinion) and written testimony that relies on it. (2023-09-22 CCRB Objections.) CCRB also objects to testimony by Joseph Gibson (Solvang-4) and Tim Nicely (Solvang-5) as improper expert opinion.

CCRB objects to admission of the 2016 Draft Biological Opinion as irrelevant to whether Solvang's change petition would have an effect on southern California steelhead. CCRB describes the 2016 Draft Biological Opinion as "[a]t best ... present[ing] unduly cumulative background information about the general condition of Southern California steelhead that has been or can be submitted from other sources." (2023-09-22 CCRB Objections, p. 2.) CCRB also argues that the 2016 Draft Biological Opinion is not the "sort of evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs," because it is a draft document, the proposed action for which it was prepared was withdrawn by the Bureau of Reclamation, and the document contains hearsay. (Gov. Code, § 11513, subd. (c).)

The 2016 Draft Biological Opinion contains information about the steelhead population and minimum flows to protect steelhead habitat and passage in the Santa Ynez River. The 2016 Draft Biological Opinion includes recommendations for minimum releases from Bradbury Dam as a reasonably prudent alternative to the Bureau's proposed continued operation of the Cachuma Project to avoid jeopardizing the continued existence of steelhead or resulting in the destruction or adverse modification of critical habitat. NMFS argues in response to the various motions to exclude the 2016 Draft Biological Opinion that although the opinion was never finalized, the opinion is not "scientifically or technically deficient in any way" and is "based on the best scientific and commercial data available." (2023-09-29 NMFS's Combined Response to Evidentiary Objections, p. 3.) Therefore, I will not exclude the 2016 Draft Biological Opinion as either irrelevant or unreliable, although I am mindful that the authors of the opinions expressed in the document are not available for cross-examination in this proceeding. I will consider CCRB's and other parties' objections to admission of the 2016 Draft Biological Opinion when determining the weight to be afforded to it and its relative evidentiary value in the context of the entire record.

CCRB argues that the testimony of Solvang's witness Joseph Gibson should be excluded because he lacks the qualifications to testify as an expert about potential impacts to fisheries and other biological resources. Mr. Gibson testifies about the contents, conclusions, and bases for the conclusions reached in the environmental documents prepared under CEQA for Solvang's River Wells Project. According to Mr. Gibson's testimony and expert qualifications (Solvang-6), he was retained by Solvang as the project manager and technical lead to complete environmental review under CEQA for Solvang's 2011 Water System Master Plan Update and to prepare the 2022 Addendum for Solvang's current River Wells Project. Much of Mr. Gibson's testimony does not seem to be expert opinion but testimony based on his personal knowledge of how the environmental documents were developed and the bases for the conclusions in those documents. Although the environmental documents should be considered the primary source as to the information contained in them, to the extent that Mr. Gibson summarizes relevant information, this testimony is likely to assist the hearing officer. Furthermore, Mr. Gibson's appearance as a witness allows other parties and the AHO hearing officer and staff to ask questions of Mr. Gibson about the environmental documents and the conclusions contained in those documents. Therefore, I overrule CCRB's objections to Mr. Gibson's testimony as improper expert opinion but do so without prejudice to CCRB to object to specific statements as beyond the scope of Mr. Gibson's personal knowledge and outside of the area of his expertise.

Finally, CCRB argues that Solvang's witness Tim Nicely offers improper expert opinion that reaches a legal conclusion about injury to other water right holders from approval of Solvang's petition. The rule against admission of testimony containing legal conclusions is primarily intended to protect a jury from improper influence and preserve the judge's role in instructing the jury on the appropriate legal standard. (See *Torres v. County of Oakland* (6th Cir. 1985) 758 F.2d 147; *Hygh v. Jacob* (2nd Cir. 1992) 961 F.2d 359 (cited in *People v. Brown* (2016) 245 Cal.App.4th 140, 162); *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178-1182.) The rule serves little purpose when the decisionmaker has legal expertise and makes findings of both law and fact. Hearing officers in the State Water Board's AHO are required to have "knowledge and experience in water law" and the hearing officers make both the legal and factual determinations when drafting a proposed order to submit to the Board. (Wat. Code, § 1111, subd. (a).) AHO hearing officers are capable of distinguishing, and discounting or disregarding as appropriate, portions of testimony that is essentially legal opinion. Therefore, I deny CCRB's objection to Mr. Nicely's testimony on this basis.

California Department of Fish and Wildlife's Evidentiary Objections

California Department of Fish and Wildlife (CDFW) objects to the written testimony of Joseph Gibson (Solvang-4), Tim Nicely (Solvang-5), Randolph Murphy (Solvang-1), and Mike Mathews (Solvang-3), and exhibit Solvang-120. (2023-09-22 CDFW Objections to Case-in-Chief Testimony.) The National Marine Fisheries Service (NMFS) joins CDFW's objections. (2023-09-22 National Marine Fisheries Service's Joinder to CDFW's Objections.)

CDFW and NMFS object to Mr. Gibson's testimony and associated slides as including improper expert and legal opinion; as speculative and unfounded, and therefore unreliable; and cumulative, requiring undue consumption of the AHO's time. For the same reasons for which I deny CCRB's objection to portions of Mr. Nicely's testimony, I deny CDFW's objection to portions of Mr. Gibson's testimony as improper legal opinion. Similarly, for the reasons that I denied CCRB's objections to Mr. Gibson's testimony, I deny CDFW's objections that Mr. Gibson's testimony is outside of the area of his expertise and is unduly cumulative, but do so without prejudice to objections to specific statements. Because Mr. Gibson was the project manager for the development of the environmental review documents at issue, he may testify as to the conclusions in those documents and the bases for those conclusions from his personal knowledge. I will not consider Mr. Gibson's testimony outside of his areas of expertise as expert opinion on the topics but as testimony based on his personal knowledge of the development of the documents. To the extent that CDFW objects to portions of Mr. Gibson's testimony as unfounded under Evidence Code sections 801 and 802, I defer ruling on that portion of the objection until the evidentiary record has been more fully developed through the hearing process.

CDFW and NMFS object to Mr. Nicely's testimony and associated slides as containing opinions outside of the area of his scientific expertise and based on evidence that is unreliable and speculative. I defer ruling on these objections until the evidentiary record has been more fully developed through the hearing process.

Finally, CDFW and NMFS object to Solvang-120 as hearsay, and object to the written testimony of Mr. Murphy and Mr. Mathews that relies on Solvang-120. Hearsay evidence is admissible in State Water Board and AHO proceedings to supplement or explain other evidence, but, over timely objection, is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code, § 11513, subd. (d).) Therefore, I will not exclude Solvang-120 based on a hearsay objection. Solvang asserts in response to CDFW's objection that Solvang-120 is a business record of which the hearing officer can take official notice and therefore is excepted from the limitation on the use of hearsay evidence under Government Code section 11513, subdivision (d). I will determine whether Solvang-120 falls within this hearsay exception if any proposed order in this proceeding purports to rely on Solvang-120 to make a finding without additional supporting evidence.

Santa Ynez River Conservation District, Improvement District No. 1 and Alisal Guest Ranch's Motions in Limine No. 1, 2, and 3

Santa Ynez River Conservation District, Improvement District No. 1 (ID No. 1) and Alisal Guest Ranch filed motions in limine to exclude: testimony by NMFS's expert witness Richard Bush and other exhibits submitted by NMFS (ID No. 1 MIL #1); testimony by CalTrout's expert witness Dr. William Trush and other exhibits submitted by CalTrout (ID No. 1 MIL #2); and testimony by CDFW's witness Kyle Evans and other exhibits submitted by CDFW (ID No. 1 MIL #3).

ID No. 1 and Alisal Guest Ranch seek to exclude a 2007 document titled “Incident Report, steelhead/rainbow trout mortalities as Alisal Road Bridge,” authored by “Cachuma Project Biology Staff” (NMFS-16 and NMFS-22), and a statement in Mr. Bush’s testimony about the 2007 report. I defer ruling on whether the report is relevant to the issues in this proceeding. Although the report appears relevant to the relationship between low flows measured at Alisal Bridge and adequate pool depth to avoid deaths of steelhead and rainbow trout in the vicinity of the bridge, there must also be evidence of a connection between Solvang’s pumping and the conditions described in the report for the report to be relevant to the hearing issues. I similarly defer ruling on whether Mr. Bush’s testimony lacks appropriate support and therefore should be excluded, until after the parties have had the opportunity to cross-examine Mr. Bush.

ID No. 1 and Alisal Guest Ranch also argue that Mr. Bush’s testimony about the 2007 report should be excluded based on operation of collateral estoppel and the Board’s findings in Order WR 2019-0148. It is not clear to me that the factual question about the cause of the 2007 steelhead mortalities described in the report was necessarily decided in Order WR 2019-0148. In addition, the statement in the order about the 2007 steelhead mortalities seems to be a recitation of testimony by one of NMFS’s witnesses and not a finding by the Board, and the statement in the order does not foreclose the possibility that well operations contributed to dewatering of the Santa Ynez River in addition to the amount of Reclamation’s releases from Bradbury Dam. But I defer ruling on this objection and will accept later briefing on the potential application of collateral estoppel (or equitable estoppel) to issues raised in this proceeding. I do agree, however, that the issue of whether additional releases from Bradbury Dam should be required by the State Water Board to protect steelhead is not presented in this proceeding. (See ID No. 1 MIL #1, p. 11.)

ID No. 1 and Alisal Guest Ranch object to admission of the 2016 Draft Biological Opinion and testimony by Mr. Bush, Dr. Trush, and Mr. Evans that rely on the opinion. As discussed above in response to CCRB’s objection, I deny the motions to exclude the 2016 Draft Biological Opinion. Although the 2016 Draft Biological Opinion may not have any legal effect insofar as it is a draft document, it may still have evidentiary value relevant to the issues in this proceeding.

ID No. 1 and Alisal Guest Ranch object to portions of Mr. Bush’s and Dr. Trush’s testimony about proposed permit terms governing minimum flows as lacking foundation and probative value. These objections appear to go to the weight to be afforded Mr. Bush’s and Dr. Trush’s testimony on these topics rather than its admissibility and I will consider these objections accordingly. As discussed elsewhere, I will accept separate briefing on the question of whether collateral estoppel applies to any issue in this proceeding.

ID No. 1 and Alisal Guest Ranch object to Mr. Evans’ testimony as irrelevant and lacking foundation. I addressed similar objections to Mr. Evans’ testimony by Solvang in the AHO’s October 18 Evidentiary Ruling on Solvang’s MIL #3. For the same

reasons, I deny ID No. 1 and Alisal Guest Ranch's objections to Mr. Evans' testimony. As discussed elsewhere, I will accept separate briefing on the question of whether collateral estoppel applies to any issue in this proceeding.

Finally, ID No. 1 and Alisal Guest Ranch object to NMFS-21, CalTrout-7 through -36, and CDFW-17 through -39 and CDFW-41 through -49, because the exhibits are not cited in any testimony and therefore lack foundation. As I have ruled previously, neither State Water Board regulations nor Chapter 4.5 of the Administrative Procedure Act strictly require a party to authenticate or lay a formal foundation for the admission of exhibits or testimony. In an administrative proceeding before the AHO, not every exhibit requires sponsoring testimony to demonstrate authenticity and relevance. (See AHO's Evidentiary Ruling on Solvang's MIL #1, p. 3.) Therefore, I overrule these objections.

Sincerely,

/s/ Nicole L. Kuenzi

Nicole L. Kuenzi
Presiding Hearing Officer
Administrative Hearings Office
State Water Resources Control Board

SERVICE LIST

B. Tilden Kim
Richards Watson Gershon
350 South Grand Ave., 37th Floor
Los Angeles, CA 90071
tkim@rwglaw.com
Attorney for City of Solvang

Chelsea O'Sullivan
847 Monterey Street, Suite 206
San Luis Obispo, CA 93401
cosullivan@rwglaw.com
Attorney for the City of Solvang

Stephanie Osler Hastings
Jessica L. Diaz
Brownstein Hyatt Farber Schreck, LLP
1021 Anacapa Street, 2nd Floor
Santa Barbara, CA 93101
SHastings@bhfs.com
jdiaz@bhfs.com
Attorneys for Alisal Guest Ranch

Gary M. Kvistad
Brownstein Hyatt Farber Schreck, LLP
1021 Anacapa Street, 2nd Floor
Santa Barbara, CA 93101
Gkvistad@bhfs.com
Attorney for Santa Ynez River Water
Conservation District, ID No. 1

Elisabeth L. Esposito
Brownstein Hyatt Farber Schreck, LLP
1415 L Street, Suite 800
Sacramento, CA 95814
Eesposito@bhfs.com
Attorney for Santa Ynez River Water
Conservation District, ID No. 1

Laurie K. Beale
NOAA Office of General Counsel
GCNW, 7600 Sand Point Way NE
Seattle, WA 98115
laurie.beale@noaa.gov
Attorney-Advisor for NOAA Fisheries

Rick Bush
NOAA Fisheries
501 West Ocean Blvd., Suite 4200
Long Beach, CA 90802
Rick.Bush@noaa.gov

Mary Capdeville
Deputy Chief, Southwest Section
NOAA Office of General Counsel
U.S. Department of Commerce
501 W. Ocean Blvd., Suite 4470
Long Beach, CA 90802
mary.capdeville@noaa.gov

Maggie Hall
Linda Krop
Alicia Roessler
California Trout
Environmental Defense Center
906 Garden Street
Santa Barbara, CA 93101
mhall@environmentaldefensecenter.org
lkrop@environmentaldefensecenter.org
aroessler@environmentaldefensecenter.org
Attorneys for California Trout

Steven M. Torigiani
Brett A. Stroud
Young Wooldridge, LLP
1800 30th St., 4th Floor
Bakersfield, CA 93314
storigiani@youngwooldridge.com
bstroud@youngwooldridge.com
kmoen@youngwooldridge.com
wgerl@youngwooldridge.com
cobrien@youngwooldridge.com
Attorneys for Santa Ynez River Water
Conservation District

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

Paeter Garcia, General Manager
Santa Ynez River Water Conservation
District, ID No. 1
P.O. Box 157
Santa Ynez, CA 93460
pgarcia@syrwd.org

Randy Murphy
City Manager, City of Solvang
1644 Oak Street
Solvang, CA 93463
randym@cityofsolvang.com

Lena Germinario
Stephen Puccini
Office of General Counsel
California Department of Fish and Wildlife
P.O. Box 944209
Sacramento, CA 94244-2090
lena.germinario@wildlife.ca.gov
stephen.puccini@wildlife.ca.gov
Attorneys for California Department of Fish and Wildlife

Sam Bivins
Downey Brand LLP
621 Capitol Mall, Fl. 18,
Sacramento, CA 95814
sbivins@downeybrand.com
nchapman@downeybrand.com
pcantle@ccrb-board.org
Attorney for Cachuma Conservation Release Board

Administrative Hearings Office
adminhrгоffice@waterboards.ca.gov