
State Water Resources Control Board

December 1, 2023

RE: Hearing Officer's Rulings on CDFW's Objections to Solvang's Rebuttal Testimony and Exhibits in the Matter of City of 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 began on November 6, 2023.

Solvang, California Trout (CalTrout), California Department of Fish and Wildlife (CDFW), National Marine Fisheries Service (NMFS), and Cachuma Conservation Release Board (CCRB) submitted rebuttal exhibits to the AHO by the October 16 deadline set in the Amended Notice of Public Hearing. On October 26, Solvang, Santa Ynez Water Conservation District (Parent District), and CDFW filed evidentiary motions objecting to or seeking to exclude rebuttal exhibits or portions of written rebuttal testimony filed by other parties. On October 31, Solvang, CCRB, CalTrout, CDFW, and NMFS filed responses to these motions.

This ruling letter addresses CDFW's objections to rebuttal testimony and exhibits submitted by Solvang. (2023-10-26 CDFW Objections to Rebuttal Testimony.) This ruling letter does not address CDFW's objections to rebuttal testimony and exhibits submitted by CCRB.

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 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).)

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

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).)

CDFW Objections to Mr. van der Linden’s Rebuttal Testimony (Solvang-170)

CDFW objects to the written rebuttal testimony of Solvang’s witness Matt van der Linden as inappropriate rebuttal testimony because it “consists either of raising unnecessary issues with conditions that Solvang alleges that it is already following, or restates [sic] the Nicely testimony ...” (2023-10-26 CDFW Objections to Rebuttal Testimony, p. 12.)

Mr. van der Linden’s rebuttal testimony (Solvang-170) responds to the proposed permit terms submitted by CDFW, Cal Trout, and NMFS with their case-in-chief exhibits. (See 2023-09-08 Proposed Permit Terms CDFW CalTrout NMFS.) Testimony that responds to these proposed permit terms is appropriate rebuttal testimony and CDFW will have the opportunity to cross-examine Mr. van der Linden about the bases for his testimony. Although some of Mr. van der Linden’s testimony summarizes other evidence, he does so in a point-by-point response to the fisheries agencies’ proposed permit terms. This format is useful to the hearing officer and is not unduly repetitive. As noted by CDFW, the State Water Board will ultimately determine whether to approve Solvang’s petition and, if so, what terms to include in the permit as conditions on that approval. Mr. van der Linden’s testimony about the potential impact of the fisheries entities’ proposed terms and the practicality of implementing certain of these proposed terms is admissible evidence that is relevant to the hearing issues and may inform the Board’s decision. Therefore, I overrule CDFW’s objections to Mr. van der Linden’s rebuttal testimony.

CDFW Objections to Mr. Nicely’s Rebuttal Testimony and Rebuttal Slides (Solvang-171 & -177)

CDFW first objects to portions of the written rebuttal testimony of Solvang’s witness Tim Nicely as unfounded and unreliable. In the testimony to which Solvang objects, Mr. Nicely addresses the hydrogeological analyses conducted by Mr. DeMucha, Mr. DeMucha’s understanding of the analyses conducted by Solvang in Stetson Memorandum No. 6, and Mr. DeMucha’s general understanding of hydrogeological analytical methods.

Mr. Nicely's testimony as to Mr. DeMucha's understanding of hydrogeological methods and elements of Solvang's project is appropriate rebuttal testimony and goes to the credibility of the witness and his expert opinions. Mr. Nicely's statements about Mr. DeMucha's understanding appear to be founded on alleged errors in Mr. DeMucha's analyses that Mr. Nicely addresses in his rebuttal testimony. CDFW will have the opportunity to cross-examine Mr. Nicely about the bases for his conclusions and the errors that he claims to have identified. These substantive disputes about the validity of Mr. DeMucha's analyses are best addressed through the hearing process and go to the persuasive value of Mr. DeMucha and Mr. Nicely's testimony, respectively, rather than its admissibility.

Further complicating this issue is CDFW's admission during the hearing on November 8 that there were errors in Mr. DeMucha's testimony that required correction, leading to CDFW's submission of CDFW-101 B. DeMucha Written Testimony 2nd ERRATA. Mr. DeMucha submitted his revised testimony after Mr. Nicely had submitted his rebuttal testimony (Solvang-171). Mr. DeMucha's revisions addressed some of Mr. Nicely's criticisms. When weighing the relevant evidence, I intend to disregard portions of Mr. Nicely's rebuttal testimony that are no longer relevant because of subsequent revisions to Mr. DeMucha's testimony. Mr. Nicely addresses the revisions to Mr. DeMucha's testimony in his surrebuttal testimony. (Solvang-187 Errata.)

CDFW also objects that Mr. Nicely's rebuttal testimony improperly introduces new evidence about the location of Solvang's proposed wells. Mr. Nicely's statements in his rebuttal testimony about the proposed well locations within Well Site B appear to be consistent with the information Solvang provided in its project descriptions with its case-in-chief. Although Mr. Nicely states in rebuttal that the wells will "likely" be greater than 200 feet from the river (Solvang-171, p. 8, ¶ 22.), the locations are within Well Site B as described in Solvang's petition for change. CDFW may challenge whether a stream depletion analysis relied upon by the Board to assess potential impacts should assume such a distance rather than a "worst case scenario" closer to the stream, but CDFW has been on fair notice since the beginning of this proceeding as to the area within which Solvang's proposed wells may be located.

CDFW's remaining objections to Mr. Nicely's testimony in rebuttal, including arguments that Mr. Nicely's analysis is new evidence because he does not rely on a 1:1 ratio of pumping to river depletion, is speculative, and lacks foundation, again appears to be a substantive dispute as to the validity, applicability, and utility of Mr. Nicely's testimony that goes to the weight of the evidence and not its admissibility. CDFW will have the opportunity to cross-examine Mr. Nicely and explore the bases for the opinions expressed in his rebuttal testimony.

Finally, as with Mr. van der Linden's testimony, Mr. Nicely's testimony about the potential impact of the fisheries entities' proposed permit terms on operation of Solvang's proposed project and practical impediments to implementation of the

proposed terms, is relevant and probative evidence that is not likely to require an undue consumption of time.

For these reasons, I overrule CDFW's objections to Mr. Nicely's rebuttal testimony and summary slides. (Solvang-171 & -177.)

Sincerely,

/s/ Nicole L. Kuenzi

Nicole L. Kuenzi
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