
State Water Resources Control Board

December 12, 2023

RE: Hearing Officer's Rulings on Evidentiary Objections to CCRB's Rebuttal Testimony and Exhibits and CDFW's Motion in Limine to Solvang's Surrebuttal Testimony 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.

As documented in my procedural ruling of November 22, 2023, I allowed Solvang to submit surrebuttal testimony in response to the revised testimony of Bryan DeMucha submitted by CDFW on November 9 (CDFW-101 – B. DeMucha Written Testimony 2nd ERRATA). Solvang submitted surrebuttal testimony by Tim Nicely (Solvang-187) on November 27. CDFW submitted a motion in limine seeking to exclude portions of Mr. Nicely's surrebuttal testimony on December 1. (2023-12-01 CDFW First Motion in Limine.) Solvang responded to CDFW's motion on December 6. (2023-12-06 Solvang Opposition to CDFW First MIL re Solvang-187.)

This ruling letter addresses CDFW's and the Parent District's objections to rebuttal testimony and exhibits submitted by CCRB (2023-10-26 CDFW Objections to Rebuttal Testimony; 2023-10-26 SYRWCD Motion in Limine re Rebuttal); Solvang's objections to rebuttal testimony and exhibits submitted by CCRB (2023-10-26 Solvang's Evidentiary Objections to Rebuttal Testimonies and Certain Exhibits Submitted by CCRB) (see

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

Attachment A); and CDFW's motion in limine to surrebuttal testimony by Solvang's witness Mr. Nicely (2023-12-01 CDFW First Motion in Limine).

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).)

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. Mulder's Rebuttal Testimony and Slides (CCRB-1 & -14)

CDFW objects to the written rebuttal testimony and summary slides of CCRB's witness Joel Mulder as "speculative and unfounded, and therefore unreliable." (2023-10-26 CDFW Objections to Rebuttal Testimony, p. 3.)

CDFW objects to Mr. Mulder's reliance on USGS gage data and a report by Leo Shapovalov dated September 13, 1944, to support his opinion that "[t]he mainstem Santa Ynez River downstream of Bradbury Dam has long been recognized as generally lacking adequate flow to support successful steelhead spawning and rearing." (CCRB-1, p. 4, ¶ 9, lines 5-7.) CDFW's objections go to the weight to be afforded Mr. Mulder's testimony, not its admissibility. These two sources of information appear to be the type of information on which an expert in the field would reasonably rely, particularly because CDFW suggests no other sources of information on which to base an assessment of historical conditions before construction of Bradbury Dam. CDFW may ask Mr. Mulder during cross-examination whether he considered the factors that CDFW raises when reaching his conclusions, and CDFW may present arguments about the validity of Mr. Mulder's conclusions in its closing brief.

CDFW also objects to Mr. Mulder's reliance on reports of steelhead rescue efforts and stocking conducted by the Department of Fish and Game from 1930 to 1946. Based on the frequency of summer rescue efforts, Mr. Mulder concludes that steelhead "could not be supported by the available over-summering habitat." (CCRB-1, p. 8, ¶ 11, lines 6-7.) Again, CDFW's objections raise questions about the persuasive value of the opinions given the limited information about the fish rescue operations, including the timing and precise locations of those operations. I conclude that Mr. Mulder's testimony reaches the threshold for admissibility, however. CDFW may ask Mr. Mulder during cross-examination whether he considered the factors that CDFW raises when reaching his conclusions, and CDFW may present arguments about the validity of Mr. Mulder's conclusions in its closing brief.

CDFW objects that Mr. Mulder's opinions that rely on the 2000 Biological Opinion, opinions that State Water Board Order WR 2019-0148 prescribes appropriate target flows at Alisal Bridge, and opinions about the suitability and value of habitat for steelhead rearing and spawning in the mainstem Santa Ynez River downstream of Alisal Bridge lack a reasonable basis because "they disregard the best available science." (2023-10-26 CDFW Objections to Rebuttal Testimony, p. 9.) CDFW's objections appear to go to the weight to be afforded Mr. Mulder's testimony, and not its admissibility, but I will defer ruling on this issue until after CDFW has had the opportunity to cross-examine Mr. Mulder about the bases for his opinions.

Finally, CDFW objects to Mr. Mulder's reliance on Cachuma Operations Maintenance Board (COMB) snorkel surveys to reach conclusions about limited fish presence downstream of Alisal Bridge. Again, CDFW's objection appears to go to the weight to be afforded Mr. Mulder's testimony, and not its admissibility. The COMB's snorkel surveys are one available source of information about the presence of steelhead and seem to be the type of information upon which an expert in the field would reasonably rely, with acknowledgement of the limitations. I will, however, defer ruling on this issue until after CDFW has had the opportunity to cross-examine Mr. Mulder about the bases for his opinions.

Santa Ynez River Water Conservation District's Motion in Limine (CCRB-15)

Santa Ynez River Water Conservation District (Parent District) filed a motion in limine that seeks to exclude the written rebuttal testimony of Brian Van Lienden (CCRB-15). The Parent District asserts that Mr. Van Lienden's testimony is based on an incorrect legal theory about the definition of "injury," which renders his testimony irrelevant. Solvang raised a similar objection to Mr. Van Lienden's testimony, which I address in Attachment A.

The legal question of whether, and under what conditions, a reduction in water available for use by the Cachuma Project Member Units would constitute injury is at issue in this proceeding. Although resolution of this legal question may affect the relevance of Mr. Van Lienden's testimony, I conclude that the issue would be most appropriately addressed after the close of the evidentiary hearing and written briefing by the parties,

not through a ruling on an evidentiary motion. Therefore, I overrule the Parent District's motion without prejudice to the Parent District's right to present argument about the underlying legal question of injury.

CDFW's Motion in Limine to Mr. Nicely's Surrebuttal Testimony (Solvang-187-Errata)

CDFW objects to portions of Mr. Nicely's surrebuttal testimony as untimely response to Mr. DeMucha's case-in-chief testimony, improper response to testimony by Hans Sin and other witnesses, and improper surprise surrebuttal to the rebuttal testimony of Kit Custis.

Although Mr. Nicely refers in his surrebuttal testimony to Mr. DeMucha's case-in-chief testimony as it was originally submitted, and not merely to the changes reflected in the errata version, he does so to provide context to his opinions about the revisions to the testimony. Mr. Nicely does not identify new objections to or criticism of Mr. DeMucha's case-in-chief testimony that Mr. Nicely had not already identified in his rebuttal testimony. Therefore, I deny CDFW's motion to exclude portions of Mr. Nicely's surrebuttal testimony as untimely rebuttal testimony.

Mr. Nicely notes in his surrebuttal testimony that Mr. Sin relied on Mr. DeMucha's uncorrected testimony and opines that Mr. Sin's testimony and the testimony of "any other witnesses [who] directly or implicitly rely on Mr. DeMucha's analysis," is now unfounded. (Solvang-187-Errata, p. 6, ¶ 17, lines 9-10.) CDFW objects that this testimony is outside the scope of allowable surrebuttal because I permitted surrebuttal only in response to the revisions to Mr. DeMucha's testimony. CDFW further objects that admission of Mr. Nicely's opinions on this issue would require submission of additional testimony by "Hans Sin and other witnesses to clarify their interpretation of how Mr. DeMucha's math error may or may not affect their testimony." (2023-12-01 CDFW First Motion in Limine, p. 7.)

Mr. Nicely's testimony about the reliance by other witnesses on Mr. DeMucha's uncorrected testimony is responsive to the revisions to Mr. DeMucha's testimony. Mr. DeMucha significantly revised his calculation of expected subsurface drawdown, and Mr. Sin had relied on the original calculation in his opinion about potential impacts to riparian ecosystems. Mr. Nicely's testimony merely points out this potential problem with the foundation for Mr. Sin's testimony due to the revisions. Excluding Mr. Nicely's testimony does not resolve the underlying question as to whether the revisions to Mr. DeMucha's testimony would change any of Mr. Sin's conclusions. To address this issue, I asked Mr. Sin during the hearing on November 6 whether the revisions to Mr. DeMucha's testimony would change his opinions. Ms. Germinario also had the opportunity to ask further questions of Mr. Sin during redirect about the effect of Mr. DeMucha's revised testimony on Mr. Sin's opinions. Therefore, I deny CDFW's motion to exclude this portion of Mr. Nicely's testimony.

Finally, CDFW objects to portions of Mr. Nicely's surrebuttal that responds to Mr. Custis's rebuttal. Solvang filed a motion in limine seeking to exclude portions of Mr. Custis's testimony as untimely case-in-chief evidence that did not rebut the case-in-chief testimony of any other witness. I denied Solvang's motion in a written ruling on November 30, but stated that I would "consider, after cross-examination of Mr. Custis, whether Solvang and other parties should have the opportunity to submit surrebuttal evidence in response to Mr. Custis's testimony." (2023-11-30 Ruling on Solvang's MIL and Objections, p. 3.) Solvang proactively submitted surrebuttal testimony by Mr. Nicely that responds to Mr. Custis's rebuttal testimony with Mr. Nicely's surrebuttal response to Mr. DeMucha.

I will allow parties to submit surrebuttal testimony in response to Mr. Custis's rebuttal testimony. Mr. Custis's rebuttal testimony addresses possible impacts to subsurface water levels and surface flow in the Santa Ynez River, which are central factual issues in this proceeding, and his testimony includes analyses to which Solvang has not had the opportunity to present evidence in response. Although CDFW characterizes Mr. Nicely's written surrebuttal response to Mr. Custis as "surprise" testimony, CDFW has the testimony in writing, in advance of the hearing date on which CDFW will have the opportunity to cross-examine Mr. Nicely about the testimony. I intend to schedule an additional hearing day to allow cross-examination of surrebuttal witnesses.

I am also considering whether to allow surrebuttal testimony in response to CDFW-125, which was utilized by Mr. Bivins while conducting cross-examination of Mr. Custis. And finally, I am considering whether to allow surrebuttal testimony on the concept of the subsurface capillary zone and applicability to the Santa Ynez River and its underflow, and the depth of subsurface water levels at which the underflow is disconnected from surface flow in the Santa Ynez River in relevant reaches of the river.

I intend to discuss with the parties during the hearing on December 13, the scope of surrebuttal, associated deadlines for submission of surrebuttal testimony, and scheduling an additional hearing day.

Sincerely,

/s/ Nicole L. Kuenzi

Nicole L. Kuenzi
Presiding Hearing Officer
Administrative Hearings Office
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10 **STATE WATER RESOURCES CONTROL BOARD**
 11 **OFFICE OF ADMINISTRATIVE HEARINGS**

12
 13 In the matter of the Petition for Change of the
 14 City of Solvang for Water-Right Permit 15878
 (Application A022423), which authorizes
 15 diversion of water from the Santa Ynez River
 16 (underflow) in Santa Barbara County

**CITY OF SOLVANG'S EVIDENTIARY
 OBJECTIONS TO REBUTTAL
 TESTIMONIES OF JOEL MULDER AND
 BRIAN VAN LIENDEN SUBMITTED BY
 CACHUMA CONSERVATION RELEASE
 BOARD**

Hearing Dates and Time:

Dates: November 6, 8-9, 29-30, 2023; and
 December 6-7, 2023 (subject to change)
 Time: 9:00 a.m.
 Hearing Officer: Nicole Kuenzi_

1 TO THE STATE WATER RESOURCES CONTROL BOARD, OFFICE OF
 2 ADMINISTRATIVE HEARINGS, AND ADMINISTRATIVE HEARING OFFICER NICOLE
 3 KUENZI, AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

4 PLEASE TAKE NOTICE that Petitioner City of Solvang (hereinafter “Petitioner”) hereby
 5 submits the following Evidentiary Objections to the Rebuttal Testimony of Joel Mulder (hereinafter
 6 “Mulder”), and the Rebuttal Testimony of Brian Van Lieden (hereinafter “Van Lieden”) filed by
 7 the Cachuma Conservation Release Board (hereinafter “CCRB”):

8 **CITY’S OBJECTIONS TO REBUTTAL TESTIMONY OF JOEL MULDER**

<u>MATERIAL OBJECTED TO:</u>	<u>GROUND FOR OBJECTION:</u>	<u>RULING ON THE OBJECTION</u>
<p>9 Objection 1: CCRB-1, paragraph 10 7, lines 20-25: “For example, one 11 option could be to limit 12 diversions under Permit 15878 so 13 that the sum of the actual flows at 14 Alisal Bridge and the surface 15 flow reduction due to diversion is 16 not less than the flows at Alisal 17 Bridge under Tables 1 and 2 of 18 State Water Board Order WR 19 2019-0148, if <i>O. mykiss</i> are 20 present in the Avenue of Flags 21 and Cadwell reaches. Such a 22 condition would require fish 23 surveys to be conducted once 24 flows at Alisal Bridge reach 25 specific thresholds tied to Order</p>	<p>Lack of Foundation Evid. Code § 403; Improper Expert Opinion, Calls for Speculation. Evid. Code §§ 801(b), 802; <i>Sargon Enterprises, Inc.</i> <i>v. University of Southern California</i> (2012) 55 Cal.4th 747, 770: “...the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.”; <i>California Law Revision Commission</i> <i>Comments on Evidence Code Section</i> 801: “...under existing law, irrelevant or speculative matters are not a proper basis for an expert’s opinion.” Suggested condition</p>	<p>Sustained: _____ Overruled: <u> x </u> Overruled without prejudice because the bases for the objection unclear. Solvang's objection may be a challenge to the assumption underlying Mr. Mulder's testimony that Solvang's pumping will result in surface flow reductions. That issue is one of the contested questions of fact in this proceeding and substantial evidence has been submitted by the parties about this issue. Mr. Mulder's opinion expressed here based on an assumption that Solvang's operations would have some impact on surface flows has reasonable evidentiary support.</p>



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<p>WR 2019-0148’s flow criteria.”</p>	<p>unsupported by evidence.</p>	
<p>Objection 2: CCRB-1, paragraph 23 (in its entirety, including statements not reproduced here in the interest of brevity and inclusive of figure): “An example of proportionate condition would be to ensure that Solvang’s proposed diversions under Permit 15878 do not lessen the effect of the flows prescribed at Alisal Bridge under State Water Board Order WR 2019-0148 under Tables 1 and 2 when <i>O. mykiss</i> are present in the Avenue of Flags and Cadwell reaches. Such an approach could require fish surveys to be conducted when flows prior to Alisal Bridge flow becoming less than or equal to the sum of the applicable flow target from Order WR 2019-0148 and Solvang’s rate of diversion. Figure 3 provides a conceptual</p>	<p>Lack of Foundation Evid. Code § 403; Improper Expert Opinion, Calls for Speculation. Evid. Code §§ 801(b), 802; <i>Sargon Enterprises, Inc. v. University of Southern California</i> (2012) 55 Cal.4th 747, 770: “...the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.”; <i>California Law Revision Commission Comments</i> on Evidence Code Section 801: “...under existing law, irrelevant or speculative matters are not a proper basis for an expert’s opinion.” Suggested condition unsupported by evidence.</p>	<p>Sustained: _____ Overruled: <u> x </u> See ruling on Objection 1.</p>

1	decision tree as an example of		
2	how this recommendation could		
3	be implemented at a particular		
4	point in time...”		

CITY’S OBJECTION TO REBUTTAL TESTIMONY OF BRIAN VAN LIENDEN

<u>MATERIAL OBJECTED TO:</u>	<u>GROUND FOR OBJECTION:</u>	<u>RULING ON THE OBJECTION</u>
<p>Objection 1: CCRB-15, line 21-24: “I assume that the term ‘injury’ as used in the Amended Hearing Notice encompasses reductions in water available for use by Cachuma Project Member Units caused by Solvang’s proposed changes to its water rights.”</p>	<p>Lack of Foundation Evid. Code § 403; Improper Expert Opinion, Calls for Speculation. Evid. Code §§ 801(b), 802; <i>Sargon Enterprises, Inc. v. University of Southern California</i> (2012) 55 Cal.4th 747, 770: “...the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.”; <i>California Law Revision Commission Comments on Evidence Code Section 801</i>: “...under existing law, irrelevant or speculative matters are not a proper basis for an expert’s opinion.” There is no support provided for the assumption of what constitutes “injury.”</p>	<p>Sustained: _____</p> <p>Overruled: <u> x </u></p> <p>I understand Mr. Van Lienden's testimony to which Solvang objects to be a statement of his understanding as to how the opinions that he expresses are relevant to the hearing issue addressing injury. Mr. Van Lienden later explains that he does not intend to offer a legal opinion that reductions in water available for use by Cachuma Project Member Units is necessary or sufficient to cause injury. (See CCRB-15, p. 3, para. 3, lines 1-2.)</p> <p>The legal question of whether a reduction in water available for use by Cachuma Project Members would constitute injury is also at issue in this proceeding. Resolution of this issue may affect the relevancy of Mr. Van Lienden's testimony but the legal issue is most appropriately addressed after the close of the evidentiary record and briefing by the parties (not as an evidentiary ruling by the hearing officer).</p>

1 DATED: October 26, 2023

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