



State Water Resources Control Board

January 22, 2024

RE: Hearing Officer's Rulings on Outstanding Evidentiary Objections 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.

The Hearing Officer issued letters ruling on evidentiary objections on October 18, October 27, November 3, November 30, and December 12, 2023, that deferred ruling on some of the objections raised by the parties. This ruling letter addresses those remaining evidentiary objections with the exception of hearsay objections and objections based on the application of collateral estoppel. The hearing officer's rulings on these remaining objections are in Attachment A. Please note that the hearing officer revised Attachment A to address outstanding objections to Cal Trout-37 after the hearing officer circulated an "unformatted" version of Attachment A to the service list by e-mail this morning.

Sincerely,

/s/ Nicole L. Kuenzi

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

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ATTACHMENT A

Outstanding Objections to CDFW Exhibits:

MATERIAL OBJECTED TO:	DEFERRAL OF OBJECTION:	RULING:
Objection 1: CDFW-3 (Kyle Evans Testimony)	2023-11-03 AHO Evidentiary Rulings on Remaining Case-in-Chief Objections-ID No. 1 & Alisal Guest Ranch MIL # 3 - Deferred (PDF pg. 7).	Admission subject to objection based on collateral estoppel.
Objection 2: CDFW-38 (NMFS 2016 Draft Cachuma Project Biological Opinion)	2023-10-27 Ruling on Solvang Evidentiary Objections - Solvang Objection 20. Ruling Deferred (PDF pg. 17).	Admission subject to objection based on collateral estoppel.
Objection 3: CDFW-67 (Photos of LBVI Habitat at Proposed Well Site B)	2023-10-27 Rulings on Solvang Evidentiary Objections (Solvang Objection 11) Deferred (PDF pg. 12).	Overruled. Mr. Hans Sin testified during the hearing on December 6, 2023, that on "May 18, 2023, CDFW staff took photos (CDFW-67) between well site A and B immediately below the rock quarry." (2023-12-06 Video Recording, morning, 00:23:17.) Mr. Sin's testimony about the date and location of the photos, and identity of the photographer, is sufficient to establish relevance and authenticity for admission into the evidentiary record. Solvang also had an opportunity to cross-examine Mr. Sin about his knowledge about the photographs and the circumstances under which they were taken.
Objection 4: CDFW-101 (Bryan DeMucha Testimony)	2023-10-18 Ruling on Solvang's Motions in Limine # 2 - Deferred to conclusion of hearing.	Overruled. As stated in overruling CDFW's challenge to testimony by Mr. Nicely responding to and challenging Mr. DeMucha's analysis, "[t]hese 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." (2023-12-01 Ruling on CDFW's Objections, p. 3.)

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		<p>Mr. DeMucha explained during cross-examination that he had performed a Theis analysis but had not reported the results of that analysis in his testimony because he was not able to validate the drawdown values in the Stetson analysis. (2023-12-04 Video Recording, morning, 00:1:08-00:1:09.) Mr. DeMucha's inability to reproduce portions of the Stetson analysis for purposes of conducting a Theis analysis does not necessarily undermine the utility of his alternative approach of adjusting the results of the Stetson analysis.</p> <p>CDFW later admitted to errors in Mr. DeMucha's original written testimony and calculations and submitted a corrected version as CDFW-101 B. DeMucha Written Testimony 2nd ERRATA. I conclude that these errors and Solvang's criticism of Mr. DeMucha's methodology go to the credibility of Mr. DeMucha's testimony and the weight it should be afforded but does not bar its admissibility. Solvang had adequate opportunity on cross-examination to investigate the bases for Mr. DeMucha's opinions and has had the opportunity to respond to those opinions through Mr. Nicely's rebuttal testimony.</p>
<p>Objection 5: Exhibit CDFW-103, paragraph 16, lines 2-23 (in their entirety).</p>	<p>2023-11-30 Rulings on Solvang's MIL and Other Objections. Objection 1 - Deferred (PDF pg. 12) - paragraph 16, lines 2-23.</p>	<p>Admission subject to objection based on collateral estoppel.</p>
<p>Objection 6: CDFW-108 (Kit Custis Written Rebuttal Testimony)</p>	<p>2023-11-30 Rulings on Solvang's MIL and Other Objections. Objection 9 - Deferred (PDF pg. 19) - paragraph 22. 2023-11-30 Rulings on Solvang's MIL and Other Objections. Objection 12 -</p>	<p>Sustained with respect to ¶ 22, lines 13-21. Mr. Custis's testimony and other evidence presented by CDFW does not support Mr. Custis's assumption that oscillations in the groundwater levels can be attributed solely to increased evapotranspiration from growth of channel vegetation (as opposed to being caused, at least in part, to changes in pumping by groundwater users in the area). Mr. Custis testified that the oscillations were "a lot ... for the vegetation," that he could not testify to how much increased evapotranspiration had</p>

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	<p>Deferred (PDF pg. 21) - paragraph 40, lines 2-13.</p>	<p>actually contributed to the changes in drawdown, and that he “[does not] really think it does.” (2023-12-06 Video Recording, morning, 02:36:00; 2023-12-06 Video Recording, afternoon, 00:56:36-00:57:00; 2023-12-06 Video Recording, afternoon, 00:59:05-00:59:10.) I conclude that his analysis based on the premise that evapotranspiration was the sole cause of the oscillations is speculative and, therefore, the analysis lacks relevance.</p> <p>Overruled with respect to the remaining objections. Mr. Custis’s testimony about the underflow boundary of the Santa Ynez River responds to the assumptions underlying Mr. Nicely’s Theis analysis, and therefore, the validity of his conclusions. An expert may opine as to potential limitations on an opposing expert’s analyses. I will, however, consider Solvang’s objection when determining the weight to be afforded Mr. Custis’s testimony.</p>
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Outstanding Objections to NMFS Exhibits:

MATERIAL OBJECTED TO:	RULING ON THE OBJECTION:	RULING:
<p>Objection 1: NMFS-1 (Testimony of Rick Bush)</p>	<p>2023-10-27 Rulings on Solvang's Evidentiary Objections - Solvang Objection 1 - Deferred (PDF pg. 21). Solvang Objections 2 - Deferred (PDF pg. 22). Solvang Objection 3 - Deferred (PDF pg. 24). Solvang Objection 4 - Deferred (PDF pg. 25).</p> <p>2023-11-03 AHO Evidentiary Rulings on Remaining Case-in-Chief Objections-ID No. 1 & Alisal Guest Ranch MIL # 1. Deferred (evidence lacks</p>	<p>Objection 1: Overruled. Mr. Bush explained the basis for analyzing a 1:1 ratio of well withdrawals to surface water impacts as based on Solvang’s analysis in the Final EIR. Mr. Bush’s assumption regarding the impacts goes to the weight to be afforded his testimony rather than its admissibility because there is a rational basis for assuming a 1:1 ratio of impacts as a maximum potential impact scenario as assumed by Solvang in its EIR. Solvang had the opportunity, and did, present evidence that assuming a 1:1 ratio of withdrawals to surface flow impacts would overestimate those impacts.</p> <p>Objection 2: Admission subject to objection based on collateral estoppel.</p> <p>Objection 3: Sustained. Paragraph 14 of Mr. Bush’s testimony is excluded as outside of the area of his expertise with respect to the connection between Solvang’s pumping operations and impacts to surface flows. The letters cited by Mr. Bush were offered into evidence and, if accepted, will be considered as part of the evidentiary record.</p>

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	<p>support and collateral estoppel) (PDF pg. 6).</p>	<p>Objection 4: Overruled. Mr. Bush’s general testimony that the proposed permit terms should be included to avoid and minimize significant effects on endangered species is founded upon the prior 14 paragraphs of his testimony and is within the area of his expertise, with the limitation that Mr. Bush’s expertise is in biology and not hydrogeology. I will consider this limitation when determining the weight to be afforded Mr. Bush’s testimony.</p> <p>Objections by Alisal Guest Ranch and I.D. No. 1: Admission subject to objection based on collateral estoppel.</p> <p>Sustained in part. The second sentence of paragraph 13, page 7, of Mr. Bush’s testimony is excluded. Mr. Bush has no personal knowledge of the incident and Mr. Bush does not have expertise in the hydrologic connection between underflow and surface flow of the Santa Ynez River. The remaining objections are overruled, see above.</p>
<p>Objection 2: NMFS-9</p>	<p>2023-10-27 Rulings on Solvang's Evidentiary Objections -Solvang Objection 5 - Deferred (PDF pg. 25)</p>	<p>Admission subject to objection based on collateral estoppel.</p>
<p>Objection 3: NMFS-10</p>	<p>2023-10-27 Rulings on Solvang's Evidentiary Objections -Solvang Objection 6 - Deferred (PDF pg. 27)</p>	<p>Admission subject to objection based on collateral estoppel.</p>
<p>Objection 4: NMFS-16</p>	<p>2023-11-03 AHO Evidentiary Rulings on Remaining Case-in-Chief Objections-ID No. 1 and Alisal Guest Ranch MIL # 1. - Deferred (evidence lacks support and collateral estoppel) (PDF pg. 6).</p>	<p>Overruled. Stetson Memorandum No. 6 concludes that relocation of Solvang’s diversions downstream of Alisal Bridge would result in an increase in mean annual flow of 52 afy at Alisal Bridge as compared to current conditions. (See Solvang-4, p. 17, ¶ 34; Solvang-74, p. 17.) This analysis demonstrates a relationship between Solvang’s current well operations and flows at Alisal Bridge in the general location where the incident occurred that is documented in NMFS-16 (and NMFS-22 which appears to be the same document). This evidence is sufficient to establish relevance of NMFS-16 to hearing issue 1.d and 3, because Solvang proposes to continue some pumping from Well 3. I</p>

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		<p>will, however, consider all of the relevant evidence and the parties' briefs when determining whether the document is ultimately relevant to the issues in this proceeding and has evidentiary weight.</p> <p>Admission subject to objection based on collateral estoppel.</p>
<p>Objection 5: NMFS-22</p>	<p>2023-11-03 AHO Evidentiary Rulings on Remaining Case-in-Chief Objections-ID No. 1 and Alisal Guest Ranch MIL # 1. - Deferred (evidence lacks support and collateral estoppel) (PDF pg. 6).</p>	<p>See ruling on NMFS-16, above.</p>
<p>Objection 6: NMFS-23 (Rebuttal Testimony of Richard Bush)</p>	<p>2023-11-30 Rulings on Solvang's MIL and Other Objections. Objection 4 - Deferred: paragraph 8-9 (PDF pg. 34). 2023-11-30 Rulings on Solvang's MIL and Other Objections. Objection 6 - Deferred: paragraph 11 (PDF pg. 36). 2023-11-30 Rulings on Solvang's MIL and Other Objections. Objection 8 - Deferred: paragraph 14-16 (PDF pg. 38). 2023-11-30 Rulings on Solvang's MIL and Other Objections. Objection 10 - Deferred: paragraph 20 (PDF pg. 39). 2023-11-30 Rulings on Solvang's MIL and Other Objections. Objection 14 - Deferred: paragraph 23 (PDF pg. 42).</p>	<p>Admission subject to objection based on collateral estoppel.</p>

Outstanding Objections to CalTrout Exhibits:

MATERIAL OBJECTED TO:	RULING ON THE OBJECTION:	RULING:
<p>Objection 1: CalTrout-3 (Dr. Bill Trush Written Expert Testimony)</p>	<p>2023-10-27 Rulings on Solvang Evidentiary Objections. Objection 1 - Deferred (PDF pg. 36). Objection 2 - Deferred (PDF pg. 37). Objection 3 - Deferred (PDF pg. 37). Objection 4 - Deferred (PDF pg. 39). Objection 5 - Deferred (PDF pg. 40).</p>	<p>Objection 1: Sustained. Dr. Trush does not explain the bases for his conclusion that the “channel dimensions” of the South Fork Eel River and Santa Ynez River are “reasonably similar,” sufficient to justify application of RCT depths applicable to the South Fork Eel River to the Santa Ynez River. Therefore, his conclusions about RCT depths on the Santa Ynez River based on RCT depths for the South Fork Eel River lack adequate foundation to constitute admissible expert opinion.</p> <p>Objection 2: Sustained. See above.</p> <p>Objection 3: Overruled. Dr. Trush’s reliance on information in the 2016 Draft Biological Opinion, other evidence, and his own expertise provides adequate basis for his opinion to meet the standard of admissibility. Admission subject to objection based on collateral estoppel.</p> <p>Objection 4: Overruled. Dr. Trush’s reliance on information in the 2016 Draft Biological Opinion, other evidence, and his own expertise provides adequate basis for his opinion to meet the standard of admissibility.</p> <p>Objection 5: Overruled. Dr. Trush’s provides adequate bases for his opinions to meet the standard of admissibility.</p>
<p>Objection 2: CalTrout-4</p>	<p>2023-10-27 Rulings on Solvang Evidentiary Objections. Objection 6 - Deferred (PDF pg. 41)</p>	<p>Overruled. Solvang’s objection is unclear. Dr. Trush assisted in preparing the assessment which is specific to the Santa Ynez River, and Dr. Trush was available for cross-examination about the methodologies and conclusions in the report.</p> <p>Admission subject to objection based on collateral estoppel.</p>

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<p>Objection 3: CalTrout-37</p>	<p>2023-11-30 Rulings on Solvang's MIL and Other Objections. Objection 10 - Deferred: paragraph 14, lines 11-13 (PDF pg. 49). 2023-11-30 Rulings on Solvang's MIL and Other Objections. Objection 11 - Deferred: paragraph 14, lines 14-17 (PDF pg. 49).</p>	<p>Objections 10: Overruled. Solvang's objection appears to be a substantive disagreement with Dr. Trush's conclusions. Evidence offered into the record about steelhead numbers in the Santa Ynez River provide some evidentiary bases for Dr. Trush's statement about the 2000 Biological Opinion. Solvang also had the opportunity to explore the bases for Dr. Trush's opinion on cross-examination.</p> <p>Objection 11: Overruled. Solvang's objections go to the weight to be afforded Dr. Trush's testimony. Dr. Trush's conclusions are based on contested issues of fact as to the potential impact of Solvang's proposed diversions on flow conditions in the Santa Ynez River, the presence of steelhead in different locations along the river, and the flows necessary to support steelhead habitat and passage at various life stages. Although the underlying facts are contested, and there is competing evidence and testimony offered into the record on these issues, the evidence is sufficient to support the admissibility of Dr. Trush's testimony for further consideration in light of the whole record.</p>
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Outstanding Objections to CCRB Exhibits:

<p>MATERIAL OBJECTED TO:</p>	<p>RULING ON THE OBJECTION:</p>	<p>RULING:</p>
<p>Objection 1: CCRB-1 (Written Rebuttal Testimony of Joel Mulder)</p>	<p>2023-12-12 Rulings on Objections to CCRB Testimony and Exhibits - CDFW Objections: Deferred (PDF pg. 3).</p>	<p>Overruled. CDFW's objection that Mr. Mulder does not rely on the best available science goes to the weight to be afforded Mr. Mulder's testimony and not its admissibility. The purpose of this proceeding is for the State Water Board to weigh the evidence presented by the parties and determine the relative probative value. The preparation by NMFS of a Draft Biological Opinion in 2016 that differs in its conclusions from the 2000 Biological Opinion does not necessarily render the information in the 2000 Biological Opinion speculative and lacking foundation.</p>
<p>Objection 2: CCRB-14 (PowerPoint Presentation of Joel Mulder)</p>	<p>2023-12-12 Rulings on Objections to CCRB Testimony and Exhibits - CDFW Objections: Deferred (PDF pg. 3).</p>	<p>Overruled. See above.</p>