
State Water Resources Control Board

October 18, 2023

RE: Evidentiary Ruling on City of Solvang's Motions in Limine 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 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), 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 Solvang's three motions 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

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

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).)

Solvang's Motions in Limine

Solvang filed three motions in limine. The first motion in limine seeks to exclude “all unauthenticated or referenced exhibits filed by protesting parties” (NMFS-21; CalTrout-6 through -32; CalTrout-34 through -36; CDFW-17 through -32; CDFW-35 through -39; CDFW-41 through -47; and CDFW-49) (Solvang's MIL #1). The second motion in limine seeks to exclude the written testimony of Bryan DeMucha (CDFW-101) (Solvang's MIL #2). The third motion in limine seeks to exclude the written testimony of Kyle Evans (CDFW-3) (Solvang's MIL #3).

1. Solvang's MIL #1

Solvang's MIL #1 seeks to exclude exhibits filed by opposing parties that are not referenced in any declaration or direct testimony submitted by the opposing parties.

Solvang first argues that these exhibits should be excluded because no witness relies on the exhibits in their testimony and, therefore, the exhibits have no probative value with respect to the hearing issues. I find Solvang's argument to be unpersuasive. A document, standing alone, is often highly probative, and may be the type of evidence upon which a responsible person would rely in the conduct of serious affairs. Many types of documents may be relevant to the hearing issues in a water rights proceeding without testimony explaining their relevance. For example, statements of diversion and use of water relevant to the water right at issue, the underlying water right permit or license, a Draft or Final Environmental Impact Report for the proposed project, or a water rights order adopted by the Board that governs diversion or use of water under the permit or license, only to name a few, are all documents that are quite likely to be relevant to hearing issues and provide a basis on which the Board may reach factual and legal conclusions, even if no testimony in the evidentiary record references these documents.

Solvang also objects to the admission of exhibits submitted by the opposing parties that are not referenced in any declaration or direct testimony as lacking foundation and authenticity. Solvang is correct that to be admitted into the evidentiary record, evidence offered by a party must be supported by sufficient indicia of reliability and authenticity to meet the standard of being the type of evidence on which a “responsible person” would rely. (Gov. Code, § 11513, subd. (c); see e.g. *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 350 [unauthenticated video tapes improperly admitted into

the evidentiary record in administrative proceeding[.]) But 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. Sufficient information to meet the standard for admission into the evidentiary record may be self-evident from the document, may be provided by a witnesses' testimony, or may be evident from other properly admitted evidence.

Therefore, I overrule Solvang's wholesale objection to the admission of exhibits that are not referenced in any declaration or direct testimony submitted by the opposing parties. I will, however, allow Solvang to raise specific objections to specific exhibits for lack of relevance or authenticity if the objection is based on information or argument in addition to the lack of testimony referencing the exhibit. Any such objections must be submitted by Solvang by **October 26, 2023, at 12:00 p.m.** Any party may file a response to any such objection by Solvang by **October 31, 2023, at 12:00 p.m.**

2. Solvang's MIL #2

Solvang seeks to exclude the written testimony of Bryan DeMucha (CDFW-101) on the grounds that (1) Mr. DeMucha is not qualified to offer expert opinion on hydrogeology, (2) the testimony is based on unreasonable, improper, and speculative matters and therefore lacks foundation, and (3) the testimony challenging the hydrology and hydrogeology analysis in Solvang's final environmental impact report is time-barred and is an impermissible collateral attack. (2023-09-22 City of Solvang's MIL No. 2, p. 2.)

Solvang asserts that Mr. DeMucha is not qualified to offer expert opinion on hydrogeology because he is a geologist and not a certified hydrogeologist. As described in his CV and in his written testimony, Mr. DeMucha holds a master's degree in geology, is a registered professional geologist in the state of California, and is currently employed as an Engineering Geologist at CDFW. Mr. DeMucha's experience includes several significant projects in which he personally conducted or participated on a team that conducted hydrogeologic investigations, characterizations, and evaluations. Although Mr. DeMucha may not hold a specialty certification in hydrogeology, as a professional geologist, Mr. DeMucha can practice hydrogeology under California's Professional Geologist practice authority license without a specialty certification provided that he is otherwise competent to do so. (California Board for Professional Engineers, Land Surveyors, and Geologists, "Frequently Asked Questions (FAQs) Regarding Geology and Geophysics Licensure Requirements (October 2019, revised April 2023) p. 18 [cited in 2023-09-29 CDFW Response to Motions in Limine, p. 14, fn. 4].) Mr. DeMucha's education, certifications, and professional experience demonstrate the "special knowledge, skill, [and] experience" that qualifies him as an expert with respect to groundwater and surface water connections and potential impacts from well pumping on surface flows. (Evid. Code, § 720.)

Although I deny Solvang's motion to exclude Mr. DeMucha's written testimony on the basis that he is unqualified to offer the testimony, I will consider Mr. DeMucha's qualifications in determining the relative weight to be afforded each portion of his testimony. Solvang will have the opportunity during the hearing to cross-examine Mr. DeMucha about his knowledge and qualifications, his methodologies and analyses in forming his opinions, and the substance of his opinions and conclusions; and Solvang will also have the opportunity to present testimony challenging Mr. DeMucha's opinions and conclusions.

Solvang also objects to portions of Mr. DeMucha's testimony as speculative and lacking foundation because he allegedly "does not rely upon hydrological industry standards in providing his testimony." (Solvang's MIL #2, p. 8.) Solvang's objection appears to be a substantive attack on Mr. DeMucha's methodology and conclusions: "Mr. DeMucha ... incorrectly adjusted the results of the Stetson analysis." (Solvang's MIL #2, Declaration of Tim Nicely, p. 14.) Solvang asserts that this alleged error (or errors) renders Mr. DeMucha's testimony inadmissible under Evidence Code 801 and 803.

I conclude that Solvang's arguments about the alleged errors in Mr. DeMucha's analyses are most appropriately assessed after the parties have had the opportunity for cross-examination and presentation of rebuttal evidence, rather than as a threshold matter. In judicial proceedings, the rules governing the admissibility of expert testimony serve a gatekeeping function to ensure that speculative or irrelevant expert opinion is not presented to the jury. (See *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 753; *People ex rel. Dept. of Transportation v. Dry Canyon Enterprises, LLC* (2012) 211 Cal.App.4th 486, 493.) In proceedings in which there is no jury, "[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." (*United States v. Brown* (11th Cir. 2005) 415 F.3d 1257, 1269.) To avoid the need for a *Daubert*-type hearing in advance of the substantive administrative hearing, I will rule on this portion of Solvang's MIL #2 after the conclusion of the hearing.

Finally, Solvang objects that Mr. DeMucha's testimony challenging the hydrology and hydrogeology analysis in Solvang's final environmental impact report for the project (FEIR) is time-barred and is an impermissible collateral attack. As described in Solvang's MIL #2, CEQA sets a statute of limitations of 30 days after a public agency files a notice of determination for any person to file a court action challenging whether the environmental documentation for the project complied with requirements under CEQA. Absent such a challenge, an environmental impact report "shall be conclusively presumed to comply with" the requirements of CEQA "for purposes of its use by responsible agencies," unless there are changes to the project that trigger the need for a supplemental or subsequent EIR. (Pub. Res. Code, § 21167.2.)

CEQA does not limit the State Water Board's independent authority or responsibility under the Water Code and the public trust doctrine to consider impacts to fisheries, public trust resources, and other instream beneficial uses and the potential impact of

approval of a petition for change of a water right on other legal users of water. Public Resources Code section 21174 explicitly states that CEQA does not undermine a public agency's independent sources of authority or waive an agency's responsibilities under other provisions of law. The court addressed this issue in *Santa Clara Valley Water District v. San Francisco Bay Regional Water Quality Control Board* (2020) 59 Cal.App.5th 199, and concluded that CEQA did not "limit[] or restrict[] the [Regional Water] Board's power to administer and enforce the Porter-Cologne Act" even though the Regional Water Quality Control Board had not filed a challenge to the lead agency's EIR. "CEQA's savings clause in Public Resources Code section 21174 makes clear that CEQA does not prevent the Board from discharging its [other statutory] responsibilities." (*Id.* at 213.) "[T]he Board has independent authority – and indeed the obligation – to administer and enforce the Porter-Cologne Act." (*Ibid.*) "No matter how final and unassailable the EIR might be under CEQA, because the Board's [order] rests on the Porter-Cologne Act and not CEQA, section 21174 dictates that the EIR's finality cannot prevent the Board from exercising its independent Porter-Cologne Act authority" (*Id.* at 214.)

The court's decision in *Santa Clara Valley* controls here. Although Solvang's EIR and Addendum to the EIR for the River Wells Project are final because no party filed a challenge to the adequacy of those documents under CEQA, the State Water Board must make its own determination under its independent authorities and obligations under the Water Code and the public trust doctrine as to whether Solvang's petition meets the legal requirements for approval. Therefore, I will not exclude Mr. DeMucha's testimony on this basis.

3. Solvang's MIL #3

Solvang seeks to exclude the written testimony of Kyle Evans (CDFW-3) on the grounds that his "testimony is irrelevant and its probative value is substantially outweighed by the probability that its admission will necessitate an undue consumption of time" because his testimony does not address any of the hearing issues, does not provide expert opinions related to the proposed project, and does not provide expert opinions that support any of the remaining protestants' proposed permit terms. (Solvang's MIL #3, pp. 3-4.)

Mr. Evans provides background information and testimony about the steelhead species and the history of their presence in the Santa Ynez River. This information is relevant to the hearing issues as background even though Mr. Evans does not offer expert opinions that directly address the potential impact of approval of Solvang's petition for change on steelhead in the Santa Ynez River. I do, however, want to avoid revisiting in this proceeding those factual issues that the Board already addressed, very recently, in Order WR 2019-0148.

I will not exclude Mr. Evans' testimony based on the arguments raised by Solvang, but as a matter of efficiency, I direct Mr. Evans to limit his oral summary of his written testimony to matters not directly addressed by the Board in Order WR 2019-0148.

Sincerely,

/s/ Nicole L. Kuenzi

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