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## State Water Resources Control Board

December 8, 2016

### VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

### **CALIFORNIA WATERFIX HEARING – RULING VACATING SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY’S NOTICE REQUESTING ATTENDANCE OF WITNESSES**

On August 31, 2016, the San Joaquin River Exchange Contractors Water Authority (SJRECWA) served written notice on the Department of Water Resources (DWR), requesting the appearance of certain DWR witnesses during Part 1B of this hearing. On October 27, 2016, DWR filed a motion for protective order, seeking to vacate or limit the scope of SJRECWA’s notice. Based on our review of DWR’s motion and SJRECWA’s reply, it does not appear that SJRECWA seeks to compel DWR’s witnesses to testify concerning any issues that are relevant to the key hearing issues for Part 1 of this hearing. Accordingly, SJRECWA’s notice requesting the appearance of DWR’s witnesses is hereby vacated in its entirety.

### **Procedural Background**

The Notice of Intent to Appear (NOI) that SJRECWA originally filed in this proceeding listed four expert witnesses, including Christopher H. Neudeck. The subject of Mr. Neudeck’s proposed testimony was the need for agreements and funding for the maintenance, repair, and improvement of Delta levees and channels “for conveyance and control of water across and through the Delta to CVP and SWP pumps . . . .” On August 31, 2016, SJRECWA notified the State Water Resources Control Board (State Water Board) and the other parties that Mr. Neudeck was no longer available, and SJRECWA proposed to call DWR employees or consultants to testify instead of Mr. Neudeck.

In order to effectuate the substitution of DWR witnesses for Mr. Neudeck, SJRECWA served a notice on DWR pursuant to Government Code section 11450.50, requesting the appearance of: (1) David Mraz, Chief of the Delta Levees and Environmental Engineering Branch within DWR, (2) other DWR employees or consultants most knowledgeable concerning the modeling assumption that preferential pumping of up to 3,000 cubic feet per second (cfs) at the South Delta intakes would occur during July through September “as well as the financial contributions . . . that would provide reasonable assurance that this dual pathway for water to reach CVP and SWP pumps would exist . . . ,” and (3) individuals with knowledge of why the California WaterFix

Project does not provide a means for DWR, the U.S. Bureau of Reclamation, and local reclamation districts to implement various levee improvement projects and levee protection programs to ensure that water can continue to be conveyed through the Delta.

Originally, DWR opposed SJRECWA's request on the grounds that SJRECWA was impermissibly seeking to expand the scope of SJRECWA's NOI. In a ruling dated October 7, 2016, this objection was overruled because the scope of the proposed testimony from DWR witnesses was within the scope of Mr. Neudeck's proposed testimony. We also affirmed that SJRECWA had followed the proper procedures to compel a party to appear in an adjudicative proceeding before the State Water Board, and directed DWR to coordinate with SJRECWA to arrange for the appearance of the appropriate witness at the appropriate time.

Following the October 7 ruling, representatives for DWR and SJRECWA met and discussed SJRECWA's request, but were unable to reach agreement. As part of these discussions, SJRECWA provided DWR with a list of possible questions for a prospective DWR witness. DWR submitted a copy of the draft questions as an exhibit to its motion for protective order. The questions concern: (1) the modeling assumption that up to 3,000 cfs would continue to be pumped from the South Delta intakes during July through September, (2) the content of two Delta Risk Management Study (DRMS) reports that addressed the risk of levee failure, and (3) the need to fund levee improvements and repairs in order to maintain the ability to convey up to 3,000 cfs through the Delta.

### **Discussion**

SJRECWA's written notice requesting the appearance of DWR witnesses had the same legal effect as a subpoena. (See Gov. Code, §§ 11450.10, 11450.50 [providing that a subpoena is not required in the case of the production of a party if written notice requesting attendance of the witness is served on the party's attorney in accordance with section 1987 of the Code of Civil Procedure].) A person served with a subpoena, or, as in this case, a written notice requesting attendance of a witness, may object to the terms of the subpoena or notice by a motion for a protective order, including a motion to quash. (Gov. Code, § 11450.30, subd. (a).) The hearing officer has discretion to resolve any objection subject to any appropriate terms and conditions. In addition, the hearing officer may issue any order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands. (*Id.*, § 11450.30, subd. (b).)

In its motion for protective order, DWR argues that SJRECWA's notice requesting the appearance of DWR witnesses is unreasonable and oppressive because: (1) SJRECWA could have asked its prospective questions during cross-examination of DWR's expert witnesses in Part 1A of the hearing, (2) the DRMS reports can be submitted as exhibits, and do not require testimony about their content, and (3) questions concerning long-term efforts to fund levee maintenance and repair are outside the scope of the hearing. In its reply, SJRECWA argues that DWR's motion should be denied because: (1) DWR did not address long-term levee maintenance and repair in its direct testimony, (2) a witness from DWR is needed to explain the level of funding needed to ensure that through-Delta conveyance can be maintained, and (3) the potential for levee failure to disrupt through-Delta conveyance is relevant to the issue of harm to legal users of water.

Having reviewed SJRECWA's prospective questions for DWR's witnesses and reply to DWR's motion for protective order, we have determined that it would be unreasonable to require DWR to provide witnesses to testify as requested by SJRECWA because SJRECWA does not seek to elicit testimony that is relevant to the key hearing issues for Part 1 of the hearing. The key hearing issues for Part 1 are whether the water right changes proposed by DWR and the U.S. Bureau of Reclamation (petitioners) constitute the initiation of a new right or will cause injury to legal users of water or otherwise impact human uses. Based on the limited description of proposed testimony contained in SJRECWA's NOI and written notice to DWR, it was unclear whether SJRECWA sought to present relevant testimony from Mr. Neudeck or DWR witnesses. Based on the more detailed prospective questions provided to DWR, however, it has become clear that the issues that SJRECWA seeks to explore do not concern the potential impacts of the proposed changes. Instead, SJRECWA seeks to present testimony concerning the need for funding for levee maintenance and repair in order to maintain the petitioners' existing ability to convey water through the Delta. This is an issue that will exist regardless of whether the WaterFix change petition is approved. Other than the fact that petitioners propose to continue to convey water through the Delta, SJRECWA has not sought to explore any connection between the WaterFix change petition and the need for funding for levee maintenance and repair. Accordingly, requiring DWR to provide a witness to testify on this issue would not be reasonable or an efficient use of time.

For the foregoing reasons, SJRECWA's written notice requesting attendance of DWR witnesses is vacated. Because the notice is vacated in its entirety, a protective order limiting the scope of SJRECWA's proposed questions is not necessary.

If you have any non-controversial, procedural questions about this ruling or other matters related to the California WaterFix Hearing, please contact the hearing team at [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov) or (916) 319-0960.

Sincerely,

*ORIGINAL SIGNED BY:*

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Felicia Marcus, State Water Board Chair  
WaterFix Project Co-Hearing Officer

*ORIGINAL SIGNED BY:*

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Tam M. Doduc, State Water Board Member  
WaterFix Project Co-Hearing Officer