

State Water Resources Control Board

May 2, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING GRANTING IN PART AND DENYING IN PART THE DEPARTMENT OF WATER RESOURCES’ MOTION FOR PROTECTIVE ORDER

On March 28, 2017, North Delta Water Agency (NDWA) served a notice on the Department of Water Resources (DWR) requesting Dr. Parviz Nader-Tehrani, a DWR employee, to appear as a witness for NDWA in the rebuttal phase of Part 1 of the hearing on the water right change petition for the California WaterFix Project. In the alternative, NDWA requested the appearance of the DWR employee or agent most knowledgeable about modeling performed by DWR of water quality and water level impacts associated with the operation of the WaterFix Project at the monitoring station locations identified in a 1981 agreement between DWR and NDWA. NDWA also requested Dr. Nader-Tehrani or the person most knowledgeable to bring specified documents or other evidence to the hearing. On April 12, 2017, DWR submitted a motion for a protective order, seeking to vacate NDWA’s notice. On April 21, 2017, NDWA submitted a response opposing DWR’s motion.

For the reasons given below, DWR’s motion to vacate NDWA’s notice in its entirety is denied, but DWR’s motion is granted to the extent that NDWA seeks to compel Dr. Nader-Tehrani (or the person most knowledgeable) to appear on behalf of NDWA in addition to having the opportunity to cross-examine Dr. Nader-Tehrani when he appears as a rebuttal witness for DWR. A DWR employee will not be required to appear separately on behalf of NDWA, provided that Dr. Nader-Tehrani appears as a rebuttal witness for DWR as proposed, and is subject to cross-examination on the modeling identified in NDWA’s notice. In addition, DWR’s motion is granted to the extent that NDWA seeks to compel Dr. Nader-Tehrani to bring to the hearing any documents or other evidence that DWR has already provided to NDWA or made publically available.

Factual and Procedural Background

Dr. Nader-Tehrani appeared as an expert witness on behalf of DWR in Part 1A of the hearing. Maureen Sergent also appeared as an expert witness on behalf of DWR in Part 1A of the hearing. Ms. Sergent testified that the water right changes proposed for the WaterFix Project would not result in injury to legal users of water, including NDWA. Ms. Sergent’s opinion was based in part on Dr. Nader-Tehrani’s testimony that DSM2 modeling results demonstrated that water quality objectives in the Delta could be met under the various operational scenarios for the WaterFix Project. (DWR-53, pp. 12-13 [written testimony of Ms. Sergent]; DWR-66, p. 11 [written testimony of Dr. Nader-Tehrani].)

Ms. Sergent’s opinion also was based on DWR’s assurance that it would continue to comply with a 1981 agreement between DWR and NDWA. (DWR-53, pp. 20-21; R.T. (Sept. 23, 2016)

p. 8:1-4.) One of DWR's primary obligations under the agreement is the requirement to operate the State Water Project to meet the better of standards adopted by the State Water Resources Control Board (State Water Board) or water quality criteria specified in the agreement. (DWR-306, p. 2, para. 2(a)(i).) The water quality criteria specified in the 1981 agreement are different in some respects than the water quality objectives for agricultural beneficial uses that DWR and the U.S. Bureau of Reclamation are currently required to meet pursuant to State Water Board Decision 1641. Among other things, the 1981 agreement establishes additional compliance locations. (Compare DWR-306, Attachment B [NDWA agreement] to SWRCB-21, p. 182, Table 2 [Decision 1641]; see also NDWA-3, pp. 7-10 [written testimony of Gary Kienlen].)

In their case-in-chief, DWR and the U.S. Department of Interior did not include modeling results for all of the compliance locations specified in the 1981 agreement. In addition, DWR's modeling experts, including Dr. Nader-Tehrani, testified during cross-examination by NDWA that, unlike Decision 1641 requirements, meeting the water quality criteria specified in the 1981 agreement was not an operational rule that had been incorporated into the modeling that had been conducted for the WaterFix Project. (R.T. (Aug. 24, 2016) pp. 22:23-24:7.) When questioned by NDWA, however, Ms. Sergent testified that she had reviewed graphical representations of modeling results for each of the compliance locations identified in the 1981 agreement, and the modeling results supported her conclusion that WaterFix Project operations would not cause an increase in exceedances of water quality criteria under the agreement. (R.T. (Sept. 23, 2016) pp. 3:24 – 5:1.)

DWR's rebuttal witnesses for Part 1 of the hearing include Ms. Sergent and Dr. Nader-Tehrani. Dr. Nader-Tehrani's written rebuttal testimony, submitted on March 23, 2017, addresses concerns about water level impacts during low flow periods. (DWR-79, pp. 17-19.) Dr. Nader-Tehrani's testimony also includes a discussion of water quality modeling results at the compliance locations specified in the 1981 agreement. (*Id.*, pp. 19-21.)

Notwithstanding the written rebuttal testimony submitted by DWR, on March 28, 2017, NDWA served on DWR the notice described above, seeking to compel the appearance as a NDWA rebuttal witness either Dr. Nader-Tehrani "and/or" the person most knowledgeable regarding modeling performed by DWR of water quality and water level impacts associated with the operation of the WaterFix Project at the monitoring station locations identified in the 1981 agreement. NDWA also requested Dr. Nader-Tehrani (or the person most knowledgeable) to bring to the hearing the following documents, electronically stored information, or evidence in DWR's possession or control: (1) modeling results relating to water quality and water levels associated with the WaterFix project at the seven monitoring station locations identified in the 1981 agreement, (2) graphical representations of the modeling results described in item (1), (3) the modeling results, graphical representations, or other materials that Ms. Sergent relied upon in reaching her conclusion that there would be no increase in exceedance of the water quality criteria in the 1981 agreement, and (4) any modeling results or analyses related to future compliance with the 1981 agreement.

Subsequently, as stated above, DWR submitted a motion for a protective order, seeking to vacate NDWA's notice in its entirety, and NDWA submitted a response to DWR's motion.

Legal Background

Article 11 of chapter 4.5 of the Administrative Procedure Act (APA) and chapter 3 of division 2 of the Water Code govern subpoenas in adjudicative proceedings before the State Water Board.

(Gov. Code, §§ 11450.05-11450.50; Wat. Code, §§ 1075-1106.) A subpoena may be issued to compel a witness to attend a hearing. (Gov. Code, § 11450.10; Wat. Code, § 1080.) A subpoena may also require a witness to bring documents, electronically stored information, or other evidence to the hearing. (Gov. Code, § 11450.20, subd. (a); Code Civ. Proc., § 1985, subd. (a).) In the case of the production of a party, a subpoena is not required 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. (Gov. Code, § 11450.50.) A person served with a subpoena, or, as in this case, a written notice requesting a witness to appear and bring documents and other evidence, may object to the terms of the subpoena or notice by a motion for a protective order. (*Id.*, § 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).)

Discussion

As a preliminary matter, NDWA argued in its response to DWR's motion for a protective order that DWR's motion is not timely because it was not submitted within the time period for written objections prescribed by section 1987 of the Code of Civil Procedure. This argument lacks merit because this requirement does not apply in adjudicative proceedings. The APA does not establish a deadline for objections to subpoenas or notices requesting the appearance of a party's witness. (See Gov. Code, § 11450.30.) The APA incorporates by reference the service requirements of section 1987, but the APA does not provide that the other provisions of section 1987 are applicable in adjudicative proceedings, including the deadline for objections to a notice requesting a witness to appear and bring documents. (Gov. Code, § 11450.50, subd. (b) ["Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in Section 1987 of the Code of Civil Procedure for service of written notice to attend in a civil action or proceeding."]; see also *id.*, § 11450.20 [providing that subpoenas or subpoenas duces tecum issued in adjudicative proceedings must be served in accordance with section 1987].) Of course, a motion for a protective order must be submitted in time for the hearing officers to give it meaningful consideration. In this case, DWR satisfied that requirement by submitting its motion 13 days before the rebuttal phase of the hearing was scheduled to begin.

In its motion, DWR argued that NDWA's notice is unreasonable and oppressive because the information that NDWA seeks to obtain is or was available from more convenient, less burdensome sources, including NDWA's own expert witnesses, publically available documents, and through cross-examination of DWR's witnesses during both Part 1A of the hearing and rebuttal.

We agree with DWR that it would be unreasonable to require Dr. Nader-Tehrani (or the person most knowledgeable) to appear as a rebuttal witness for NDWA, provided that Dr. Nader-Tehrani appears on behalf of DWR as proposed and is subject to cross-examination. Dr. Nader-Tehrani is qualified to answer NDWA's questions, and NDWA has not given any indication that it seeks to explore issues outside the scope of Dr. Nader-Tehrani's written, rebuttal testimony, which addresses the issues that are the subject of NDWA's notice.

We also agree with DWR that it would be unreasonable to require Dr. Nader-Tehrani to bring to the hearing any documents or other evidence described in NDWA's notice that already have been provided to NDWA or otherwise been made publically available. In addition to the

modeling data contained in DWR Exhibit 500, which was posted on the State Water Board's website on May 25, 2016, DWR stated that it has provided modeling data directly to NDWA's consultants. In response to this particular statement, NDWA asserted that DWR had not provided the graphical representations of modeling results that Ms. Sergent relied upon in reaching her conclusion regarding compliance with water quality criteria under the 1981 agreement. Since NDWA filed its response to DWR's motion, however, this issue appears to have been resolved.

During the rebuttal phase of the hearing, which began on April 25, 2017, we summarized this ruling orally, and explained that a written ruling would follow, in order to give DWR adequate time to prepare its hearing participation accordingly. Consistent with our direction, DWR brought to the hearing last week and provided to NDWA at least some of the graphical representations of modeling results that Ms. Sergent had relied upon. It is uncertain whether DWR still has in its possession any additional documents that are responsive to NDWA's request that have not yet been provided to NDWA. To the extent that such documents exist, we disagree with DWR that it would be unreasonable or oppressive to require Dr. Nader-Tehrani to bring them to the hearing. DWR has given no indication that providing these materials would be unduly burdensome. In addition, NDWA has a strong interest in being allowed to examine all of the materials that Ms. Sergent relied upon in reaching her conclusion regarding injury to NDWA, to the extent that those materials have not already been provided to NDWA. NDWA's opportunity to cross-examine Ms. Sergent concerning the basis for her conclusion is not the same as the ability to examine the materials themselves.

For the foregoing reasons, DWR's motion for a protective order is granted in part and denied in part. With the following exceptions, DWR is directed to comply with NDWA's notice:
(1) Dr. Nader-Tehrani or the person most knowledgeable about the matters described in NDWA's notice is not required to appear on behalf of NDWA, provided that Dr. Nader-Tehrani appears as a rebuttal witness on behalf of DWR and is subject to cross-examination, and
(2) Dr. Nader-Tehrani is not required to bring to the hearing any documents or other evidence described in NDWA's notice that DWR has already provided to NDWA or made publically available.

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 or (916) 319-0960.

Sincerely,

ORIGINAL SIGNED BY

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

ORIGINAL SIGNED BY

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