

State Water Resources Control Board

June 14, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING DENYING IN PART THE DEPARTMENT OF WATER RESOURCE’S MOTION FOR PROTECTIVE ORDER

San Joaquin County and the North San Joaquin Water Conservation District (San Joaquin Parties) served a notice and subpoena duces tecum (San Joaquin Parties’ notice) on the Department of Water Resources (DWR) requesting production of the electronic Excel version of Exhibits DWR-903, -904, -905, and -906 and the source of that data. The notice also requests appearance of DWR at the hearing to be held in this matter to testify as to the authenticity and contents of the documents. For the reasons given below, DWR’s motion for protective order is denied in part. DWR will produce the information required in this ruling, by 9:30 am on June 16, 2017, and produce a witness to testify as to the authenticity and contents of the documents. Such testimony will be limited to the scope of sur-rebuttal.

Factual and Procedural Background

DWR served its rebuttal testimony and exhibits on March 23, 2017, including DWR-10 and written rebuttal testimony of John Leahigh. DWR-10 is a PowerPoint presentation that was presented by Mr. Leahigh during his rebuttal testimony on May 4, 2017. DWR-10 includes charts that identify the sources of water for State Water Project exports. On May 5, 2017, the San Joaquin Parties requested copies of the data used to generate the charts in DWR-10, also identified as DWR-850, DWR-851, DWR-852, DWR-853, DWR-854, and DWR-855. On May 8, 2017, DWR produced copies of tables of data depicted in the charts in portable document format (.pdf). These .pdf documents are identified as DWR-903, -904, -905, and -906.

During cross-examination on May 9, 2017, Mr. Leahigh testified that the data used to create DWR-903 through DWR-906 were obtained from a spreadsheet maintained by DWR. San Joaquin Parties requested that DWR produce the spreadsheet referenced by Mr. Leahigh, as well as exhibits DWR-903 through DWR-906 in their original electronic format, presumably Excel. DWR objected to San Joaquin Parties’ request and we took the issue under advisement. (RT Vol. 41 pp. 250-255.) On June 2, 2017, San Joaquin Parties served a notice and subpoena on DWR, and on June 6, 2017, DWR submitted a motion for protective order seeking to vacate the notice. On June 7, 2017, San Joaquin Parties submitted a response opposing 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

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

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

There are two related, but distinct, issues raised by San Joaquin Parties' notice and DWR's motion for protective order. The first is whether DWR must produce the requested documents and an authenticating witness. The second is whether the documents or testimony about their contents is admissible as evidence.

DWR has not asserted any privilege either in its motion or during the hearing that would protect the requested documents from disclosure. Nor has DWR asserted that production of the requested documents and supporting witness would be particularly burdensome. DWR only asserts that that the request is duplicative and seeks information outside of the scope of sur-rebuttal. We conclude that these objections are more accurately assessed after the requested information has been provided and the parties have an opportunity to ask a few narrowly-focused questions. However, to be consistent with the scope of sur-rebuttal, the additional information to be provided will be limited to data and calculations used in producing DWR-903, -904, -905, and -906.

Therefore, we deny in part DWR's motion for protective order. DWR shall produce the electronic Excel version of Exhibits DWR-903, -904, -905, and -906 and all portions of the spreadsheet referred to in oral testimony by Mr. Leahigh used in the creation of the aforementioned exhibits. These spreadsheets must be produced by 9:30 a.m. on June 16, 2017, and a witness who can testify regarding their authenticity and contents must be available at the hearing. DWR shall not redact or alter any data or formulas in the spreadsheets used in the development of exhibits DWR-903, -904, -905, and -906. Questions about the documents that stray beyond the scope of sur-rebuttal will not be allowed. We will determine whether to limit lines of questioning concerning the documents as such questions are presented during the hearing, and we will assess the admissibility of the requested documents if they are offered into evidence.

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