
State Water Resources Control Board

November 13, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING ON ISSUES CONCERNING SUPPLEMENTAL NOTICES OF INTENT TO APPEAR

We required parties that previously submitted a notice of intent to appear (NOI) indicating their intent to call witnesses to testify during Part 2 of this hearing to submit a supplemental NOI by noon on October 13, 2017. This ruling addresses the supplemental NOIs filed by the San Joaquin River Exchange Contractors Water Authority (SJRECWA) and North Delta C.A.R.E.S., and the failure of several Part 2 parties to submit a supplemental NOI.

1. SJRECWA Supplemental Notice of Intent to Appear

San Joaquin River Exchange Contractors Water Authority (SJRECWA) filed a supplemental NOI indicating that it seeks to present testimony by staff of the Department of Water Resources (DWR) concerning funding for levee maintenance and repair. In an attachment to the supplemental NOI, SJRECWA stated that the purpose of the supplemental NOI was to remind the State Water Resources Control Board (State Water Board) that SJRECWA “continues to request . . . to take the deposition of [DWR’s] Most Knowledgeable Employees and Consultants, to subpoena and present the testimony of those [employees and consultants] as written testimony before the [State Water] Board, and to provide for brief cross-examination of those witnesses by the SJRECWA on direct as apparently hostile witnesses.” SJRECWA first served a written notice on DWR on August 31, 2016, requesting the appearance of witnesses during Part 1 of the hearing. On October 27, 2016, DWR filed a motion for protective order, seeking to vacate or limit the scope of SJRECWA’s notice. We determined that SJRECWA did not appear to be seeking to compel DWR’s witnesses to testify concerning any issues relevant to the key hearing issues for Part 1. Accordingly, we vacated SJRECWA’s notice on December 8, 2016. On December 23, 2016, SJRECWA filed a petition for reconsideration of our December 8 ruling.

On March 3, 2017, SJRECWA served a notice of deposition on DWR seeking to compel the deposition of a DWR employee about the financing needed to maintain and repair levees. DWR filed a motion for protective order on March 10, 2017. On March 16, 2017, we granted the motion on the basis that the depositions would place an undue burden and expense on DWR because they were not likely to result in testimony that was relevant to the key hearing issues, and the information SJRECWA sought to obtain is or was available from more convenient, less burdensome sources. In addition, we addressed the pending petition for reconsideration of the December 8, 2016 ruling, clarifying that the petition was improper because only final decisions or orders are subject to reconsideration by the State Water Board. We also declined to exercise our discretion to reconsider our own procedural ruling.

On October 12, 2017, DWR requested that the hearing officers reject SJRECWA's supplemental NOI. SJRECWA submitted a reply to DWR's request on November 2, 2017. In its reply, SJRECWA acknowledged that it has not served a deposition notice on DWR (nor, presumably, has SJRECWA served a notice to attend on DWR, requesting the appearance of DWR's witnesses at the hearing). SJRECWA argued that "it would be inefficient to notice and impossible to take such depositions" in light of DWR's objection to SJRECWA's supplemental NOI and DWR's refusal to cooperate with SJRECWA's past attempts to depose DWR's witnesses. Instead of serving a deposition notice, SJRECWA seeks to have the SWRCB "rule" on its supplemental NOI and DWR's objection to the supplemental NOI. SJRECWA also seeks to have the State Water Board grant to SJRECWA leave to take the deposition of DWR's witnesses after the November 30, 2017 deadline for written testimony to be presented in Part 2 of the hearing, and to grant to SJRECWA leave to present the testimony after that date.

SJRECWA's request is procedurally improper. Unless SJRECWA serves a deposition notice on DWR and DWR files a motion for protective order, the matter is not properly before us. Moreover, SJRECWA has overlooked the fact that we granted DWR's March 10, 2017 motion for a protective order in a ruling dated March 16, 2017. SJRECWA asserted in its supplemental NOI that the State Water Board never ruled on DWR's March 10, 2017 motion for protective order, which is incorrect. We hereby remind SJRECWA of our ruling. Although our March 16, 2017 ruling concerned SJRECWA's March 3, 2017 deposition notice, not SJRECWA's present request, SJRECWA is advised that if SJRECWA serves another deposition notice on DWR, and DWR files another motion for a protective order we are likely to reach a similar conclusion if presented with arguments that SJRECWA has already advanced in support of its prior attempts to compel the testimony of DWR witnesses.

SJRECWA also claimed in its supplemental NOI that the State Water Board has not responded to SJRECWA's suggested briefing topics filed January 31, 2017. To the contrary, topics for optional Part 1 Closing Briefs were addressed in our September 29, 2017 ruling. We specifically stated that the topics listed were of particular interest to us, we had taken into consideration the briefing topics suggested earlier by the parties, and parties may address other topics relevant to the key issues.

2. Patrick Porgans Part 2 Supplemental NOI

Patrick Porgans filed a supplemental NOI indicating that he personally intends to testify regarding a variety of issues, including levee integrity, "Dual Path," impacts on public trust resources, compliance issues, Endangered Species Act issues, and "CVPIA Fish Doubling." Mr. Porgans also indicated that he seeks to present testimony by the most knowledgeable DWR employees and consultants concerning funding for levee maintenance and repair and a Plan of Action in the event of levee failures, the absence of which is not in the public's interest. In an attachment to Mr. Porgans' supplemental NOI, he requests that the hearing officers require DWR's most knowledgeable employees and consultants to present testimony at the hearing and states that he supports the comments, concerns, and exhibits inclusive in SJRECWA's supplemental NOI.

On November 3, 2017, DWR filed an objection to Mr. Porgans' supplemental NOI, requesting that the hearing officers strike the portions of the Mr. Porgans' supplemental NOI that are based on SJRECWA's supplemental NOI, and those portions that indicate that Mr. Porgans will be calling DWR witnesses to testify at the hearing. Similar to SJRECWA's supplemental NOI, which is addressed above, Mr. Porgans' request that we require DWR witnesses to present testimony at the hearing is procedurally improper. Unless Mr. Porgans' serves on DWR a

deposition notice or a notice to attend, requesting the appearance of DWR witnesses at the hearing, and DWR files a motion for protective order or motion to quash, the matter is not properly before us.

3. North Delta C.A.R.E.S. Part 2 Supplemental NOI

As stated above, Supplemental NOI's were due by noon on October 13, 2017. North Delta C.A.R.E.S. submitted a supplemental NOI by the deadline and served this NOI on the service list. A few minutes after submitting the supplemental NOI, North Delta C.A.R.E.S. submitted an email correction adding John Beckman as a witness, but did not copy the entire Service List. State Water Board staff advised North Delta C.A.R.E.S. to submit a revised NOI, but did not specify whether the revised NOI needed to be submitted by the October 13, 2017 deadline. North Delta C.A.R.E.S. submitted a revised NOI on October 20, 2017, adding Diane Henderson as well as Mr. Beckman.

Although North Delta C.A.R.E.S. did not notify all parties of the correction to its Supplemental NOI until North Delta C.A.R.E.S. submitted a revised NOI on October 20, 2017, North Delta C.A.R.E.S. did notify about half of the Service List (including us) of its intention to add Mr. Beckman to its witness list before the October 13, 2017 deadline, and North Delta C.A.R.E.S. submitted a revised NOI as directed. Therefore we will add Mr. Beckman to North Delta C.A.R.E.S.'s Part 2 witness list. At the pre-hearing conference, we gave parties an opportunity to make any corrections to our staff's summary of their participation by October 20, 2017, not to add additional witnesses. Because North Delta C.A.R.E.S. proposed to add Ms. Henderson after the October 13, 2017 deadline, she will not be added to North Delta C.A.R.E.S.'s Part 2 witness list.

4. Parties That Did Not File a Part 2 Supplemental NOI as Directed

Five parties who previously submitted a NOI indicating their intent to call witnesses to testify during Part 2 of the hearing failed to file a supplemental NOI form by the October 13, 2017 deadline. In addition, those same parties did not speak up at the pre-hearing conference or contact the hearing team to explain the level of their participation in Part 2 or why they did not submit the supplemental NOI. In our August 31, 2017 ruling, we cautioned that a party's failure to submit a supplemental NOI may be construed as intent not to present witnesses in Part 2 of the hearing. The following parties, therefore, may not produce witnesses as part of their case-in-chief in Part 2 because they did not submit supplemental NOI's: American Rivers, INC, California Delta Chambers & Visitors Bureau, The Coalition for a Sustainable Delta, The County of Colusa, and Steamboat Resort. They may, however, participate in cross-examination and rebuttal.

5. Civility Guidelines

In closing, we would like to remind all hearing participants that we expect the parties and their representatives to comport themselves with civility, respect, and courtesy throughout this proceeding, whether in the hearing room, in communications with one another, or in filings submitted to the State Water Board. We have pledged to conduct this proceeding with fairness and integrity, and to be courteous, respectful, and civil to the parties, attorneys, and witnesses who appear before us. In return, we expect the hearing participants to comport themselves with a similar level of dignity. Generally, the hearing participants have adhered to this standard through the many hours that we have spent together. Unfortunately, there have been exceptions, including recent filings. Invective comments and disparaging innuendo about other

parties or this process only serve to detract from a party's arguments and have no place before the State Water Board. For the many members of the California State Bar who are appearing in this proceeding, if conduct or language would be inappropriate in a court of law, it is inappropriate here. If there is any uncertainty about that standard, we recommend the California Attorney Guidelines for Civility and Professionalism, adopted by the Board of Governors of the State Bar of California (July 20, 2007), as a helpful guidance document: http://www.calbar.ca.gov/Portals/0/documents/ethics/Civility/Atty-Civility-Guide-Revised_Sept-2014.pdf . Papers filed in this proceeding that fail to comport with the basic standards of civility may be summarily rejected, and discourteous or disrespectful behavior during the hearing will not be tolerated.

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