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## State Water Resources Control Board

September 29, 2023

### **Ruling on Request by Cachuma Conservation Release Board to Participate as a Party in the Hearing on the Petition for Change Filed by the City of Solvang for Water Right Permit 15878.**

#### **TO ALL PARTIES:**

The State Water Resources Control Board's Administrative Hearings Office (AHO) issues this procedural ruling in response to Cachuma Conservation Release Board's August 31, 2023 Notice of Intent to Appear (NOI) as a party in this proceeding. On September 6, the City of Solvang (Solvang) filed an objection to the Cachuma Conservation Release Board's (CCRB) NOI; on September 8, CCRB filed a response to Solvang's objection; on September 15, the Santa Ynez River Water Conservation District (Parent District) filed an opposition to CCRB's NOI; and on September 19, CCRB filed a response to the Parent District's opposition.

As described in its August 31 letter in support of its NOI, CCRB is a joint powers agency composed of the City of Santa Barbara, Goleta Water District, and the Montecito Water District. (2023-08-31 CCRB NOI – City of Solvang w Attached Ltr, p. 3.) CCRB states that its members rely on the Cachuma Project, on the Santa Ynez River, for approximately half of their total water supply portfolio and have a “strong, longstanding” interest in operation of the Cachuma Project and flows in the Santa Ynez River. (*Id.*, at p. 4.) CCRB also states that it did not receive actual notice of this proceeding or Solvang's petition to change water right Permit 15878 until August 15, 2023. (*Ibid.*)

CCRB's August 31 NOI and attached letter indicate that it does not intend to submit case-in-chief evidence but only to participate by cross-examination and presentation of rebuttal evidence. CCRB's September 22 Amended NOI indicates that CCRB intends to present rebuttal testimony by two expert witnesses to rebut testimony about (1) impacts to biological and public trust resources and (2) hydrology, water rights, and operation of the Cachuma Project.

Solvang objects that CCRB's NOI is untimely, CCRB did not submit a timely protest in 2016 to Solvang's petition for change, Solvang would be prejudiced by allowing CCRB to participate as a party in this proceeding, CCRB's environmental claims are time-barred under CEQA, and CCRB's interests are adequately represented by other parties to the proceeding. The Parent District also argues that the AHO should not allow CCRB to participate as a party because CCRB's interest in the operation of the Cachuma Project is outside of the scope of the hearing issues and the AHO should not re-examine operation of the Cachuma Project in this proceeding.

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

Whether to allow CCRB to participate as a party is within the discretion of the hearing officer. “In a water right proceeding, the party or parties shall include the water right applicant or petitioner, persons who have filed unresolved protests ... and any other persons who are designated as parties in accordance with the procedure specified in the hearing notice.” (Cal. Code Regs., tit. 23, § 648.1, subd. (b).) The August 15, 2023 Notice of Public Hearing for this proceeding states that the hearing officer may “designate persons or entities that do not file timely Notices of Intent to Appear as parties, for good cause shown and subject to appropriate conditions.” (2023-08-15 Notice of Public Hearing, p. 13.)

CCRB cites Government Code section 11440.50 in support of its request for party status. (2023-09-08 CCRB Response to Solvang Objection, p. 1.) Section 11440.50 directs that a hearing officer “shall” grant a motion for intervention when certain conditions are met. Section 11440.50 is not binding in adjudicative proceedings before the AHO because it “applies in adjudicative proceedings of an agency if the agency by regulation provides that this section is applicable in the proceedings.” (Gov. Code, § 11440.50, subd. (a).) As quoted above, regulations governing adjudicative proceedings before the State Water Resources Control Board (State Water Board) and the AHO (Cal. Code Regs., tit. 23, §§ 648-648.8) provide that the hearing officer may specify a process in the hearing notice for interested persons to request designation as a party (Cal. Code Regs., tit. 23, § 648.1) and do not strictly apply the provisions of section 11440.50. Although section 11440.50 does not directly limit the discretion of hearing officers, it provides useful guidance about factors that the hearing officer might consider when deciding whether to allow an interested person to participate as a party.

CCRB did not file an NOI by the initial deadline set by the hearing officer of April 15, 2020; did not file an NOI by the deadline set by the hearing officer for parties to submit Amended NOIs of August 15, 2023; and did not file a timely protest to Solvang’s petition for change in 2016. CCRB states that it did not receive actual notice of this proceeding or Solvang’s petition for change until after the AHO issued the August 15, 2023 Notice of Public Hearing. The AHO did not send any communications related to this proceeding to CCRB or its representatives until August 15, 2023, and there is no other reason to believe that CCRB or its representatives were aware of this hearing before August 15, 2023.

Records maintained by the State Water Board’s Division of Water Rights indicate, however, that the Division of Water Rights mailed notice of Solvang’s petition for change to CCRB in March 2016. (AHO-040B 2016-03-24 Mailing List – Notice of Petitions for Permit 15878 (Application 22423) [listing Cachuma Conservation Release Board, c/o Kevin O’Brien, Downey Brand LLP, 621 Capitol Mall Fl 18, Sacramento, CA 95814 and Cachuma Conservation Release Board, P.O. Box 4062, Santa Ana, CA 92702].) Regardless of whether CCRB received actual notice of Solvang’s petition for change, exercising my discretion, I do not find CCRB’s failure to file a timely protest to Solvang’s petition more than seven years ago to be a sufficient basis to deny CCRB’s request to participate as a party to the hearing to be held this year. CCRB demonstrates good cause to be granted party status because of the lack of actual notice to CCRB of this hearing before the AHO until August 15, CCRB’s interest in protecting an important

and substantial water supply of its member agencies, and the limited scope of CCRB's proposed participation.

Since the deadline to file a protest to Solvang's petition in 2016, the Board issued Order WR 2019-0148, amending water right Permits 11308 and 11310 held by the United States Bureau of Reclamation for operation of the Cachuma Project on the Santa Ynez River. Order WR 2019-0148 imposes conditions on operation of the Project to protect downstream water rights and instream flows for steelhead. As stated by CCRB, its members seek "to ensure that Solvang's change petition does not injure its member agencies' lawful use of Cachuma Project water by adversely impacting the release regime in WR-2019-0148." (2023-09-19 Ltr to AHO re Parent District Objection, p. 1.) The Parent District argues in opposition that Order WR 2019-0148 already includes exhaustive conditions that govern operation of the Cachuma Project and that the AHO should not re-examine those conditions through this hearing process. (2013-09-15 Ltr from BAS to AHO re CCRB's NOI, p. 1.) I do not understand CCRB to be seeking to re-address issues decided in Order WR 2019-0148 in this hearing. My understanding is that CCRB wants to participate in the hearing to ensure that any approval of Solvang's petition would not adversely affect the amount of water supplied to its members by the Project. (2023-08-31 CCRB NOI – City of Solvang w Attached Letter, p. 3.) Although the Parent District and Solvang may argue that approval of Solvang's petition will not affect operation of the Cachuma Project or the ability of the Project to meet the terms and conditions imposed by Order WR 2019-0148, that issue is best addressed through the hearing process in which all parties may present evidence and argument on the issue.

I conclude that Solvang and the other parties will not be prejudiced by CCRB's participation in this proceeding. CCRB plans to participate solely by cross-examination and submission of evidence in rebuttal. Because CCRB has not submitted case-in-chief evidence, Solvang and the other parties are not prejudiced by the lack of advance notice to rebut that evidence. CCRB also has not requested any change in the hearing schedule to accommodate its participation.

Solvang argues that NMFS, Cal Trout, and CDFW already intend to present evidence on the issues raised by CCRB, and therefore, CCRB's interests are adequately represented. (2023-09-06 City of Solvang's Objection to NOI, p. 6.) None of these entities stand in a similar position to CCRB and its members as users of water supplied by the Cachuma Project. Therefore, I cannot conclude that NMFS, Cal Trout, or CDFW would represent the interests of CCRB or its member agencies, even if these parties intend to present evidence on the same issues.

Solvang also objects that the environmental concerns raised by CCRB are time-barred under CEQA because Solvang certified the final EIR for the project in 2014. (*Id.* at p. 5.) Even if the claims are time-barred under CEQA, CEQA does not limit the State Water Board's authority or responsibility to consider impacts to fisheries, public trust resources, and other instream beneficial uses under the Water Code and the public trust doctrine, or the potential impact of approval of a petition on other legal users of water.

Therefore, I grant CCRB's request for designation as a party to this proceeding, limited to participation by cross-examination, submission of evidentiary objections, presentation

of evidence on rebuttal, and submission of a closing brief. This approval of CCRB's request for party status is without prejudice to Solvang's or the Parent District's rights to object to specific rebuttal evidence submitted by CCRB, including objection that the evidence is not responsive to evidence submitted by another party or is not relevant to the hearing issues. I encourage Solvang and CCRB to meet and confer before the hearing about terms or conditions that could be included in any amended permit issued by the Board that would resolve CCRB's objections to Solvang's petition and obviate the need for CCRB to present rebuttal evidence.

Sincerely,

*/s/ Nicole L. Kuenzi*

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