
State Water Resources Control Board

March 16, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

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

On March 3, 2017, the San Joaquin River Exchange Contractors Water Authority (SJRECWA) served on the Department of Water Resources (DWR) a notice of deposition, seeking to compel the deposition of a DWR employee, Mr. David Mraz, or the persons most knowledgeable about the financing needed to maintain and repair levees in the Sacramento-San Joaquin Delta (Delta) in order to ensure that the existing through-Delta water conveyance system will be maintained as assumed under the proposed operating criteria for the California WaterFix Project. SJRECWA scheduled the depositions of Mr. Mraz or other DWR employees for 9:00 a.m. on March 20, 2017.

Following subsequent discussions by email and letter between SJRECWA and DWR, DWR filed a motion for protective order with the hearing officers on March 10, 2017. On March 14, 2017, SJRECWA submitted a reply to DWR’s motion for protective order. For the reasons given below, DWR’s motion for protective order is granted.

Procedural Background

This is the second time that SJRECWA has sought to compel DWR’s witnesses to testify concerning funding for levee maintenance and repair, and DWR has filed a motion for a protective order. On August 31, 2016, SJRECWA served a written notice on DWR, requesting the attendance of Mr. Mraz and other DWR witnesses during the hearing to testify on substantially the same topics that are the subject of SJRECWA’s proposed depositions. We vacated SJRECWA’s notice in a ruling dated December 8, 2016.

SJRECWA’s August 31, 2016 request sought to compel 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 feasibility of the modeling assumption that preferential pumping of up to 3,000 cubic feet per second at the South Delta intakes would occur during July through September, as well as the financial contributions that would provide reasonable assurance that a dual conveyance system would exist in the future, and (3) DWR employees or consultants with knowledge of why the California WaterFix Project does not provide a means for DWR, the U.S. Bureau of Reclamation (Reclamation), and local reclamation districts to implement specified levee improvement projects to maintain the ability to convey water through the Delta. As SJRECWA explained in a separate filing dated August 31, 2016, SJRECWA sought to have DWR’s witnesses testify instead of SJRECWA’s own expert witness, Christopher H. Neudeck, who was listed on SJRECWA’s Notice of Intent to Appear (NOI), but who had “become unavailable for that testimony”

Initially, DWR objected to SJRECWA's August 31, 2016 request on the grounds that SJRECWA was seeking to expand its participation beyond the scope of SJRECWA's NOI. In a ruling dated October 7, 2016, we overruled DWR's objection because the proposed testimony fell within the scope of Mr. Neudeck's proposed testimony as described in SJRECWA's NOI. We also noted that SJRECWA had followed the proper procedures for compelling the attendance of a party's witness, but otherwise did not address the propriety of SJRECWA's request.

Following our October 7, 2016 ruling, DWR and SJRECWA met and discussed SJRECWA's request, but were unable to reach agreement. On October 27, 2016, DWR filed a motion for a protective order. In our December 8, 2016 ruling vacating SJRECWA's notice, we concluded that it would be unreasonable to require DWR to provide witnesses to testify as requested by SJRECWA because SJRECWA did not seek to elicit testimony that was relevant to the key hearing issues for Part 1 of the hearing. Based on SJRECWA's notice and a detailed list of prospective questions for DWR's witnesses that SJRECWA had provided to DWR, we found that the issues that SJRECWA sought to explore concerned the need for funding for levee maintenance and repair in order to maintain DWR's and Reclamation's existing ability to convey water through the Delta. Other than the fact that DWR and Reclamation proposed to continue to convey water through the Delta, SJRECWA did not seek to explore any connection between the California WaterFix change petition and the need for funding for levee maintenance and repair. We noted that the need to maintain the existing ability to convey water through the Delta is an issue that will exist regardless of whether the California WaterFix change petition is approved, and it is not relevant to the issue of whether the proposed changes will cause injury to legal users or otherwise impact human uses of water.

On December 23, 2016, SJRECWA filed a petition for reconsideration by the State Water Resources Control Board (State Water Board) of our December 8 ruling vacating SJRECWA's notice. The petition remains pending. On January 31, 2017, SJRECWA also submitted a statement concerning issues that SJRECWA maintains should be addressed in closing briefs, which repeats many of the same arguments set forth in SJRECWA's petition for reconsideration.

As stated above, SJRECWA's March 3, 2017 notice of deposition seeks to depose Mr. Mraz or other DWR witnesses on substantially the same topics that were the subject of SJRECWA's August 31, 2016 notice requesting the appearance of DWR witnesses during the hearing. The only substantive difference is that the March 3, 2017 notice of deposition also seeks to depose the DWR employee most knowledgeable concerning the proposed operations plan for the California WaterFix Project in the event of impaired water quality conditions due to the failure of 10 to 20 levees and the funds needed to repair 10 to 20 levees.

Legal Background

The Board or any party may cause the deposition of witnesses to be taken in the manner prescribed under title 4 (commencing with section 2016.010) of the Code of Civil Procedure. (Wat. Code, § 1100.) The Code of Civil Procedure allows parties to obtain discovery regarding any relevant matter that is not privileged if the matter is admissible or appears reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Proc., § 2017.020.) Before, during, or after a deposition, a party or deponent may move for a protective order. (Id., § 2025.420, subd. (a).) For good cause shown, an order that prohibits or limits depositions may be issued if required in the interests of justice to protect the party or deponent from "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense."

(Id., § 2025.420, subd. (b).) Similarly, a protective order limiting discovery may be issued if the discovery sought is “unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.” (Id., § 2019.030, subd. (a)(1); see also § 2017.020, subd. (a).) A protective order may include any appropriate direction, including but not limited to the direction that the deposition not be taken at all, that it be taken at another time or place, or that the scope of the examination be limited to certain matters. (Id., § 2025.420, subd. (b)(1)-(16).)

Discussion

In this case, the proposed depositions would place an undue burden and expense on DWR because they are not likely to result in testimony that is relevant to the key hearing issues, and the information SJRECWA seeks to obtain is or was available from more convenient, less burdensome sources.

SJRECWA still has not clearly shown how the subject matter of the proposed depositions is relevant to the potential impacts of the California WaterFix Project. In SJRECWA's petition for reconsideration, SJRECWA asks “Is the Board really theorizing and presuming that DWR and the Federal government are going to continue to provide funding to aid local interests in protecting levees from failure or rapidly reconstructing those levees if they fail, when \$15 to \$30 Billion is already invested in Tunnels?” Similarly, in SJRECWA's reply to DWR's motion for a protective order, SJRECWA suggests that a court reviewing our decision would ask “Why was the Board excluding evidence which would indicate that the true project design was that the ‘second path’ means of delivery was to be abandoned when levee integrity became too expensive or inconvenient to maintain with general public funds after the Tunnels were in operation?” Judging from these rhetorical questions, SJRECWA's theory is that investment in the California WaterFix Project will somehow lead to a reduction in DWR's and Reclamation's financial contributions to levee maintenance and repair. We have permitted the parties to present evidence concerning the potential effects of constructing the California WaterFix Project on levee integrity. Unlike the potential, direct effects of construction, however, SJRECWA's theory that the WaterFix Project will reduce present or prospective funding for levee maintenance and repair is highly speculative and uncertain. Accordingly, the relevance of the information that SJRECWA seeks to obtain by deposing DWR's witnesses would be marginal at best.

To the extent that the information that SJRECWA seeks to obtain by deposing DWR's employees is relevant to the California WaterFix Project, this information is or was obtainable through alternative sources, including SJRECWA's own expert witness, publically available documents, and through cross-examination of DWR's witnesses who testified during Part 1A of the hearing. SJRECWA has never provided any justification for its proposal to substitute DWR's witnesses for SJRECWA's own expert witness. SJRECWA has not asserted or made any showing that Mr. Mraz or any other DWR employees possess unique knowledge or expertise concerning funding for levee maintenance and repair. In fact, as stated above, SJRECWA originally proposed to have Mr. Neudeck testify on that subject. Moreover, SJRECWA never explained why Mr. Neudeck became unavailable in August, whether he remains unavailable, or whether any other expert witnesses are available besides DWR employees. In addition, as indicated by DWR in its motion for a protective order, a substantial amount of the information that SJRECWA seeks to obtain by deposing DWR's witnesses is contained in publically available documents, which could be submitted as exhibits. Finally, SJRECWA could have cross-examined DWR's witnesses during Part 1A concerning some issues, such as the proposed operations plan for the California WaterFix Project in the event of catastrophic levee

failure. In its reply to DWR's motion, SJRECWA faults DWR for not specifying which witnesses had the knowledge or expertise to answer SJRECWA's questions, but this does not excuse SJRECWA's failure to even attempt to get answers to its questions through cross-examination. Based on these facts, we find that the discovery SJRECWA seeks to obtain by deposing DWR's employees is or was obtainable from more convenient, less burdensome sources.

We are not ruling out the possibility that SJRECWA could present evidence concerning the potential effects of the California WaterFix Project on funding for levee maintenance and repair. Any such evidence would be relevant to the issue of whether approval of the change petition would be in the public interest, and could potentially be presented in Part 2 of the hearing. The proposed depositions of DWR's employees, however, would place an undue burden and expense on DWR, given the fact that the depositions are unlikely to yield information that is relevant to the potential effects of the WaterFix Project, and the fact that the information is or was available from alternative sources. Accordingly, DWR's motion for a protective order is granted, and SJRECWA is directed not to depose DWR's employees as proposed in SJRECWA's March 3, 2017 notice of deposition.

As hearing officers, we cannot take action on the SJRECWA's petition for reconsideration of our December 8, 2016 ruling vacating SJRECWA's notice requesting attendance of DWR's witnesses during the hearing. We note, however, that only final decisions or orders are subject to reconsideration by the State Water Board. Our procedural rulings concerning discovery and other matters made during the course of this proceeding may be challenged as part of a petition for reconsideration of the final order adopted by the State Water Board in this proceeding, but petitions for reconsideration of our procedural rulings before a final order is adopted are not allowed. (See Order WR 2015-0001, pp. 6-9 [denying petition for reconsideration of hearing officer's procedural ruling in enforcement proceeding on the grounds that the petition was premature because a final decision or order had not been issued].) As hearing officers, we may in our discretion reconsider our own procedural rulings, but in this instance we decline to do so for the reasons given above.

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

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