
State Water Resources Control Board

May 31, 2017

VIA ELECTRONIC MAIL

TO: [CURRENT SERVICE LIST](#)

CALIFORNIA WATERFIX HEARING – RULING SUSTAINING OBJECTIONS TO REBUTTAL EXHIBITS OFFERED BY SNUG HARBOR RESORTS, LLC

Objections to Snug Harbor Rebuttal Exhibits

On May 24, 2017, DWR objected to rebuttal exhibits submitted by Snug Harbor Resorts, LLC (Snug Harbor) on the grounds that they were not referenced in the rebuttal testimony of Snug Harbor's rebuttal witness, Nicole S. Suard. By email dated May 25, 2017, DWR confirmed that it objects to the admission into the evidentiary record of all of Snug Harbor's rebuttal exhibits: SHR-359, -360, -362, -363, -364, -365, -367, -368, -369, -370, and -407. On May 28, 2017, Snug Harbor submitted a notice withdrawing Ms. Suard's rebuttal testimony (SHR-502, SHR-502-Revised, and SHR-502-Staff-Revised), and requesting that the corresponding oral testimony be stricken from the record to avoid confusion. In addition, Snug Harbor argued that SHR-359, -360, -362, -363, -364, -367, and -369 should be admitted into evidence "as reference" to assist in understanding Snug Harbor's cross examination of DWR's expert witness, Dr. Parviz Nader-Tehrani. In a response submitted on May 30, 2017, DWR renewed its objection to the admission of those exhibits on the grounds that they were not used during cross-examination, the scope of the cross-examination was improper, or Snug Harbor indicated that the exhibits were intended for demonstrative purposes only.

DWR's objection is sustained. In our February 21, 2017 ruling, we addressed a similar objection made by DWR to many of the exhibits that Snug Harbor submitted as part of its case-in-chief. We explained that, although not every exhibit needs to be cited in witness testimony, testimony should cite to and explain underlying exhibits as necessary. We sustained DWR's objection to numerous exhibits on the grounds that they had not been identified and authenticated by a witness, and they were either not identifiable on their face, or had been modified in a manner that raised questions concerning their authenticity.

Despite the guidance afforded by our February 21, 2017 ruling, Snug Harbor has again submitted exhibits without proper authentication. The rebuttal exhibits listed above were not cited or discussed in Ms. Suard's written, rebuttal testimony. Without the benefit of explanatory testimony, it is unclear what evidence these exhibits are intended to rebut. In addition, without testimony identifying the exhibits and attesting to the source and accuracy of the information contained in them, the exhibits are not sufficiently reliable to be admitted into the evidentiary record. Ms. Suard attempted to discuss some of these exhibits during her verbal, rebuttal testimony, but that testimony was improper because it exceeded the scope of her written, rebuttal testimony.

Snug Harbor's argument that SHR-359, -360, -362, -363, -364, -367, and -369 should be admitted into evidence because they were used during cross-examination of Dr. Nader-Tehrani lacks merit for two reasons. First, this request is late. The deadline for parties to offer into evidence any exhibits introduced during cross-examination was noon on Friday, May 26, 2017. Second, these exhibits were not authenticated by Dr. Nader-Tehrani. Snug Harbor only referred to SHR- 359, -363, -367, and -369 during its cross-examination of Dr. Nader-Tehrani, and Snug Harbor indicated that at least three of those exhibits were introduced for demonstrative purposes only. Dr. Nader-Tehrani did not prepare any of the exhibits and he did not attest to their accuracy during his cross-examination. For the foregoing reasons, none of Snug Harbor's rebuttal exhibits will be admitted into the evidentiary record.

It may be possible for Snug Harbor to resubmit these exhibits during sur-rebuttal, but only if they are submitted by the noon, June 9, 2017 deadline and are accompanied by written, sur-rebuttal testimony that (1) demonstrates that the exhibits are responsive to another party's rebuttal testimony or exhibits, and (2) authenticates the documents by identifying the source of the information depicted in the exhibits and attesting to its accuracy. Ms. Suard is also advised, as she has been advised before, that any written sur-rebuttal testimony must contain all of the details about which the witness intends to testify. The purpose of requiring written testimony in advance of the hearing is to allow the other parties to prepare their cross-examination. This purpose is not served and it is unfair to the other parties if witnesses are allowed to testify orally concerning issues that are not clearly and completely covered by their written testimony.

Disposition: Snug Harbor's written rebuttal testimony and exhibits are not admitted into the evidentiary record and Ms. Suard's oral rebuttal testimony will be stricken from the record.

Exhibits Submitted as Part of Snug Harbor's Case-in-Chief

In Snug Harbor's May 28, 2017 submittal, Snug Harbor also submitted a revised exhibit identification index for the exhibits submitted during its case-in-chief, seeking confirmation that certain exhibits have been admitted into evidence, and proposing to withdraw other exhibits. The disposition of the exhibits submitted by Snug Harbor during its case-in-chief is set forth at page 50 of our February 21, 2017 ruling. At this point, it is too late to resubmit exhibits that were excluded during that phase of the hearing, and withdrawing exhibits that were excluded serves no purpose. Similarly, we assume that Snug Harbor does not intend to withdraw any exhibits that already have been accepted into the evidentiary record. Accordingly, hearing team staff are directed not to make any changes to the status of the exhibits that Snug Harbor offered into evidence as part of its case-in-chief.

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