
State Water Resources Control Board

March 01, 2018

VIA ELECTRONIC MAIL

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CALIFORNIA WATERFIX HEARING – RULING ON REQUESTS FROM DEIRDRE DES JARDINS

This ruling addresses the requests by Ms. Deirdre Des Jardins for (1) clarification of our ruling of February 21, 2018, and (2) an order directing the Department of Water Resources (DWR) to provide additional responses to the subpoena duces tecum issued by Pacific Coast Federation of Fishermen's Associations (PCFFA) and Institute for Fisheries Resources (IFR) on July 8, 2016. This ruling also denies as duplicative the motion to disqualify hearing officers and hearing counsel based on alleged fraud upon the hearing, submitted by Ms. Des Jardins on February 21, 2018. Finally, this ruling contains information concerning a subpoena form provided to Ms. Des Jardins in response to her request.

Request for Clarification

On February 21, 2018, Ms. Des Jardins filed a request for clarification of our ruling of the same date. Ms. Des Jardins seeks clarification as to whether the State Water Resources Control Board (State Water Board) will require a subsequent Environmental Impact Report (EIR) for the WaterFix Project. In that request and in an earlier motion dated January 19, 2018, Ms. Des Jardins argues that the Board has improperly relied on DWR to prepare environmental documentation to support the Board's consideration of appropriate Delta flow criteria. Ms. Des Jardins asserts that the Board must prepare its own subsequent EIR in order to make an independent determination concerning appropriate criteria.

We offer the following clarification in response, but suggest that Ms. Des Jardins may wish to consult with an attorney knowledgeable in California Environmental Quality Act (CEQA) practice for further clarification.

The EIR for the WaterFix Project does not determine appropriate Delta flow criteria. That determination is a primary purpose of this hearing, and is a matter within the discretion of the State Water Board. As we explained in our November 8, 2017 ruling, the Board will determine the appropriate Delta flow criteria based upon the entire hearing record, and the Board is not limited by the scope of the Final EIR or findings of significance by the lead agency. If, based on the entire hearing record, the Board is considering approval of the change petition for the WaterFix Project conditioned upon flow criteria that are outside the range of alternatives evaluated in the Final EIR, the Board will then have to evaluate the nature and scope of any additional environmental documentation necessary to inform such an approval. It is premature for the Board to engage in that evaluation now.

Motion to Compel Supplemental Responses

During the hearing on February 23, 2018, Ms. Des Jardins renewed her request made at the close of Part 1 of the hearing for the hearing officers to compel supplemental responses by DWR to a subpoena issued by PCFFA and IFR. On February 26, 2018, Mr. Stephen Volker submitted a letter stating that PCFFA and IFR “join in the oral requests” by Ms. Des Jardins “for an order enforcing the subpoena duces tecum filed on July 8, 2016.”

The subpoena in question was issued to Petitioners on July 8, 2016, by PCFFA and IFR, and was signed by Mr. Volker, attorney for PCFFA and IFR. The subpoena requested the production of categories of documents related to modelling for the WaterFix Project. DWR responded to the subpoena on July 29, 2016, by objecting to the scope, relevance, and burden of the requests; identifying responsive documents that had already been produced; and committing to produce other responsive, non-privileged documents.

By letter dated May 8, 2017, and again by letter dated July 10, 2017, Ms. Des Jardins requested that DWR fully respond to the 2016 subpoena. During the hearing on July 11, 2017, Ms. Robin McGinnis, stated on behalf of DWR that, to the extent that Ms. Des Jardins’ letter of July 10, 2017, was a request for documents, there were “no additional responsive documents” to be produced. Ms. Des Jardins objected that DWR’s response to the subpoena was incomplete, and requested an “adequate, complete, and non-evasive response.” Hearing Officer Doduc replied that she would take the matter under consideration. Until February 26 of this year, Mr. Volker had not, to our knowledge, filed any motion or sought any additional action by DWR after receiving DWR’s July 29, 2016 response to the subpoena.

Standing to raise a motion to compel the production of documents lies with the party who issued the notice, subpoena, or other form of discovery request. Although this proceeding is not governed by the California Civil Discovery Act (Cal. Code Civ. Proc., § 2016 et seq.), we find the provisions of the Act informative in this context. California Code of Civil Procedure section 2031.310 allows the demanding party to move for an order compelling further response to a demand for production of documents. A party who did not formally participate in a request for production cannot file a motion to compel compliance. Ms. Des Jardins does not have standing to move to compel further response to a subpoena issued by another party. Mr. Volker’s “joinder” in Ms. Des Jardins’ request does not render Ms. Des Jardins an authorized representative of his clients’ interests.

Furthermore, Ms. Des Jardins’ oral request of July 11, 2017, was submitted nearly a year after DWR provided a written response and objections to the subpoena. Even if we were to construe Ms. Des Jardins’ earlier letter to DWR of May 8, 2017, as a motion directed to the hearing officers, that motion was submitted many months after DWR served its objections. Mr. Volker did not join Ms. Des Jardins’ request on behalf of PCFFA and IFR until this week. We note that in civil matters under California law, a motion to compel must be filed within 45 days of service of a response or the demanding party waives any right to compel a further response. (Code Civ. Proc., § 2031.310.) Although this section of the Code of Civil Procedure does not directly apply to this proceeding, the principle that parties must raise an objection within a reasonable period of time or be deemed to have waived the objection is necessary to the orderly conduct of any proceeding.

Nonetheless, we are not denying the request of PCFFA and IFR at this time. Based on DWR’s written response to the subpoena dated July 29, 2016, and Ms. McGinnis’ representation during the hearing on July 11, 2017, it is unclear whether there are documents within the scope of the subpoena that DWR has not produced either based on its objections or on the basis of privilege. Therefore, prior to

our further consideration of the pending requests, DWR is directed to inform PCFFA and IFR whether it has produced all documents that are responsive to the subpoena, or whether it limited its production based on objections or assertions of privilege. PCFFA and IFR must then identify for DWR with specificity to which categories of documents described in the subpoena, if any, PCFFA and IFR believe DWR has not responded with a complete production of documents. If, after this discussion, there remains a dispute between DWR and PCFFA and IFR as to whether the subpoena has been satisfied, then the requesting parties may present their request for relief orally to the hearing officers. We will not accept written submissions on this subject unless we grant explicit permission. This direction to meet and confer is limited to the July 8, 2016 subpoena, and does not extend to any other requests for documents.

Motion to Disqualify Hearing Officers and Hearing Counsel

Also on February 21, 2018, Ms. Des Jardins filed a motion to disqualify hearing officers and hearing counsel based on alleged "fraud upon the hearing." We have considered Ms. Des Jardins' motion, and find that she has failed to raise any arguments that have not been addressed in our previous rulings. Consistent with those previous rulings, the motion is denied. In our ruling of February 21, 2018, we admonished Ms. Des Jardins that we may ignore or summarily deny duplicative motions. We reiterate that admonition.

Request for Subpoena to Compel Attendance of a Witness

During the hearing on February 22, 2018, Ms. Des Jardins requested a signed and sealed subpoena to compel the attendance of a witness from the California Department of Fish and Wildlife (DFW) to be questioned as part of her case-in-chief in Part 2. Ms. Des Jardins had previously indicated her intent to call a witness from DFW on her Supplemental Notice of Intent to Appear for Part 2 dated October 13, 2017.

Pursuant to Government Code section 11450.20, a subpoena shall be issued by an agency at the request of a party in accordance with sections 1985 through 1985.4 of the California Code of Civil Procedure. Section 1985 provides that "[t]he clerk, or a judge, shall issue a subpoena or subpoena duces tecum signed and sealed but otherwise in blank to a party requesting it, who shall fill it in before service." On February 28, 2018, we provided Ms. Des Jardins with a subpoena in blank, embossed with the seal of the State Water Board, and signed by the Deputy Director for the Division of Water Rights pursuant to the delegation of authority under Resolution No. 2012-0029.

We want to clarify that this signed and sealed subpoena has the same legal effect as a subpoena signed by an attorney at law, and is not an endorsement by the hearing officers or the State Water Board of the appropriateness or validity of the subpoena. A person served with a subpoena may object to its terms by a motion for protective order, including a motion to quash, at which point the hearing officers will consider the merits of any such motion. (See Gov. Code, § 11450.30.)

Ms. Des Jardins also requested a date certain for the date of appearance on the subpoena compelling attendance of the witnesses from DFW. At this time we do not have an accurate estimate of the date on which Ms. Des Jardins will be presenting her case-in-chief. As we progress in the hearing process, we will work with Ms. Des Jardins and her witness to identify with adequate notice an appropriate date for attendance.

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