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## State Water Resources Control Board

July 24, 2020

VIA ELECTRONIC MAIL

TO: CURRENT SERVICE LIST

### **COLLEGE LAKE PROJECT HEARING: PROCEDURAL RULING FOLLOWING THE JULY 10, 2020 PRE-HEARING CONFERENCE**

On July 10, 2020, a Pre-Hearing Conference, officially noticed in the June 10, 2020 Notice of Public Hearing (Hearing Notice), was held to discuss procedural aspects of the College Lake Project hearing. This ruling letter addresses procedural issues discussed at the Pre-Hearing Conference and provides guidance and clarification on conduct and expectations for the upcoming hearing.

In addition, we encourage parties to confer regarding factual stipulations or agreements about portions of the draft permit prior to the scheduled hearing to narrow the scope of issues to be addressed through the hearing.

#### **1. Hearing Dates, Deadlines, and Format**

The following schedule and deadlines apply to this hearing:

- **August 6, 2020, 12:00 p.m. (Noon)** – Deadline to serve case-in-chief exhibits, exhibit identification indices, proposed permit terms, and statements of service to all other parties and for receipt of these documents by the State Water Resources Control Board (State Water Board or Board).
- **August 13, 2020, 12:00 p.m. (Noon)** – Deadline to submit written objections to case-in-chief evidence to the Board and serve these written objections on all other parties. Parties will be permitted to respond orally to any written objections during the hearing.
- **August 17, 2020, 12:00 p.m. (Noon)** – Deadline to serve case-in-chief presentations on all other parties and for receipt of these presentations by the Board.
- **August 21, 2020, 12:00 p.m. (Noon)** – Deadline to serve cross-examination and rebuttal exhibits on all other parties and for receipt of these documents by the Board.

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

- **August 21, 2020, 3:00 p.m.** – Opportunity to participate in a dry run of the hearing procedures on the Zoom platform.<sup>1</sup> Participation is not required.
- **August 24 and 25, 2020, beginning at 9:00 a.m.** – Hearing to be conducted remotely via Zoom.<sup>1</sup>

During the Pre-Hearing Conference, the conference participants agreed to participate in the hearing remotely via an online audio-visual conferencing platform. Therefore, the hearing will take place via the Zoom platform on the previously noticed hearing dates, August 24 and 25, 2020. Video sharing will be required of parties, their representatives, and witnesses when testifying or presenting arguments during the remote hearing.

Two additional procedural requests were raised by parties during the Pre-Hearing Conference. First, Pajaro Valley Water Management Agency (PV Water) requested that we set a deadline for the service of cross-examination exhibits given that the remote hearing will not allow parties to physically exchange cross-examination exhibits during the hearing. Second, Jolie-Anne Ansley, speaking on behalf of Diffenbaugh Family Farms, requested that case-in-chief presentations for the hearing be submitted and served on other parties prior to the hearing. These requests are reasonable and would likely minimize technical and procedural challenges during the hearing; therefore, the requests are granted. For the same reasons, we are also setting a deadline for submission of rebuttal exhibits.<sup>2</sup> Deadlines for the service of cross-examination exhibits, case-in-chief presentations, and rebuttal exhibits are included in the above schedule.

### **1.1. Guidance on Submittal Format**

In accordance with page 5 of Information Concerning Appearance at Water Rights Hearings (enclosed with the [Hearing Notice](#)), documents submitted or served electronically must be in Adobe Portable Document Format (PDF) except for the following types of documents submitted in Microsoft Office-supported formats:

- Microsoft Excel for spreadsheets
- Microsoft PowerPoint for slide presentations
- Microsoft Excel or Word for Exhibit Identification Indices

Please note that all documents must contain page numbers. When preparing presentations to accompany oral testimony, include references on each slide to the specific exhibit(s) and/or portion(s) of your written testimony, including page numbers, that contain the information presented.

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<sup>1</sup> Information for remote attendance of the dry run of the hearing procedures and the hearing will be provided to the parties separately at a later date.

<sup>2</sup> Rebuttal testimony is not required to be submitted in writing.

## **1.2. File Transfer Protocol Account for Submitting Exhibits to the State Water Board, Serving Exhibits on the Hearing Parties, and Access to Copies of Party Submitted Correspondence**

The State Water Board is providing access to two secure File Transfer Protocol (FTP) accounts for the College Lake Project hearing parties to facilitate the electronic service of the parties' exhibits and provide downloadable copies of hearing documents. The FTP accounts will avoid issues with file size limitations for emails and with exchange of larger exhibit files. The FTP accounts will also alleviate the need for parties to send any physical storage devices to other parties and to the Board.

The first FTP account will allow parties to upload submittals ahead of time. No other parties will be able to view those submittals until after the submittal deadlines. Although it will be possible to upload documents after the deadlines, we will disapprove of late submittals unless there is good cause shown for the tardiness.

The second FTP account will allow parties to download files. Staff will make timely submittals available for download after the appropriate deadlines and notify the service list when they are available. Parties may then serve submittals on the other parties by sending an email to the service list confirming that their submittals are available and accurate.

For full guidance, please see the attached Notice of Availability of FTP Accounts for the College Lake Project Hearing.

## **1.3. Guidance on Associating Evidence to Permit Terms**

The Board has three options for acting upon PV Water's water right application for the College Lake Project (Application A032881):

- Option 1. Approve the application with the existing draft permit terms.
- Option 2. Approve the application with amended permit terms.
- Option 3. Deny the application.

The Hearing Notice directs parties submitting evidence in support of Option 2 to identify the specific term in the draft permit, proposed amended term, or proposed new term that the submitted evidence is intended to support. The notice directs those supporting Option 3 to note that the evidence is intended to support denial of the application and to identify the key issue to which the evidence relates. If a party's evidence is intended to support the approval of the application using the existing draft permit terms, i.e., Option 1, but the evidence does not relate to a specific draft permit term, the party must identify the key issue to which the evidence relates and note that the evidence is intended to support approval of the application using the existing draft permit terms. Similarly, if a party submits evidence in support of approval of the application using amended permit terms (Option 2) but the evidence does not relate to a singular specific draft or proposed permit term, the party must also identify the key issue to which the

evidence relates and note that the evidence is intended to support approval of the application using the permit terms proposed by the party.

Parties are not required to submit specific alternative language to be included in the permit, although specific alternative language is certainly encouraged. A precise description of the nature of the proposed changes is sufficient.

## **2. Jerry Busch's Request to be Designated as a Party is Granted**

On July 1, 2020, Mr. Busch submitted a Request for Party Designation with his Notice of Intent to Appear form (NOI), outlining his personal qualifications as an expert witness and his interest in providing testimony regarding the project's potential impacts on local wetlands. In PV Water's July 9, 2020 Pre-Hearing Conference Statement and in oral comments made during the Pre-Hearing Conference, PV Water requested that we limit Mr. Busch's participation in the hearing to providing a policy statement only, for failing to show good cause for his participation as a party.

During the Pre-Hearing Conference, Mr. Busch explained that the College Lake Project's Environmental Impact Reports (EIRs) were released after the protest period for the project's water right application had concluded and he believed it would have been a showing of "bad faith" for him to protest the application under the assumption that the EIRs would not adequately address his concerns. The Project's water right application protest period extended from January 5 to March 6, 2018. The Project's Draft EIR is dated April 2019 and the Project's Final EIR and Consolidated Final EIR were released in late 2019. In general, Mr. Busch's explanation would not be sufficiently good cause to justify participation in a hearing absent a timely protest. Interested persons who seek to protest an application for a water right must file their protest in a timely manner to preserve their opportunity to participate in the protest process. The statutory process provides both the applicant and the protestant procedural opportunities to resolve and refine their areas of disagreement. An end-run around this procedure does not afford the applicant an opportunity to resolve the dispute and does not provide for the narrowing of issues that leads to a streamlined and efficient hearing.

In this instance, however, we find that the subject matter of Mr. Busch's proposed evidence and testimony may include information that will assist the Board in evaluating PV Water's application and appropriately conditioning any permit to be issued. As noted during the Pre-Hearing Conference, Mr. Busch intends to present evidence on subjects that somewhat differ from and are broader in scope than the areas of protest raised by Mr. Diffenbaugh. Mr. Busch's proposed testimony appears relevant to several key hearing issues including whether the proposed appropriation and release from priority would result in adverse impacts to fish, wildlife, or public trust resources, and whether the proposed appropriation is in the public interest. Because the interests raised by Mr. Busch are not already represented in this proceeding and his evidence may assist the Board in its consideration, we will allow Mr. Busch to participate as a party. Since we are creating an exception by granting Mr. Busch party status to

represent the interest of the public in fish, wildlife, and trust resources, specifically the project's impacts to wetlands, his testimony will be limited to this topic.

PV Water requested to present an additional witness in its case-in-chief or as rebuttal to Mr. Busch's testimony should Mr. Busch be designated as a party. In accordance with the procedures outlined in the Hearing Notice, PV Water may present additional witness(es) to rebut Mr. Busch's testimony.

### **3. Clarification of the Requirement for Statement of Qualifications**

In their July 9, 2020 statement, PV Water requested that protestants submit Statements of Qualifications with their case-in-chief evidence and noted that PV Water may request to examine protestants regarding their qualifications during the hearing.

In accordance with page 4 of Information Concerning Appearance at Water Rights Hearings (enclosed in the Hearing Notice), "a party who proposes to offer expert testimony must submit an exhibit containing a statement of the expert witness's qualifications." In other words, the hearing requires all expert witnesses to submit Statements of Qualifications. Mr. Busch has designated himself as an expert witness and, thus, is required to submit a Statement of Qualifications, along with the other evidence he wishes to present, by the exhibit submittal deadline of 12:00 Noon, August 6, 2020. John Diffenbaugh did not designate himself as an expert witness and, therefore, is not required to submit a Statement of Qualifications.

We would like to note in advance that we are not bound in our proceedings by Evidence Code section 720, which requires a court to qualify an expert witness prior to allowing him or her to testify. Instead, we generally consider each witness' qualifications in determining what weight to afford the witness' testimony. Our usual practice for expert witness testimony, is to determine based on our review of the record after the submission of all relevant evidence, whether the expert's opinion is "based on a matter (including [the expert's] special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates . . . ." (Evid. Code, § 801, subd. (b).) To this end, examination of expert witnesses on their qualifications and backgrounds is permissible in hearings before the State Water Board to investigate the relative weight to be afforded their testimony, and PV Water may choose to cross-examine Mr. Busch about his qualifications as an expert on the subject matter of his testimony.

### **4. Release from Priority**

In its July 9, 2020 statement, PV Water requested that we limit protestants from submitting testimony or conducting cross-examination regarding PV Water's request to release SFA A018334 from priority in favor of Application A032881.

According to the NOIs received, neither protestant is proposing to testify on this issue. Should the protestants submit case-in-chief testimony on this issue, PV Water may renew their objection at that time.

## **5. Time Limits to the Proceeding**

Mr. Diffenbaugh and Mr. Busch requested 60 minutes and 45 minutes, respectively, to orally summarize their written testimony during the hearing. These requests are in excess of the 20 minutes provided for each witness in the Hearing Notice. Both Mr. Diffenbaugh and Mr. Busch expressed that although they believe they can summarize their testimonies in the allotted 20 minutes, they would prefer additional time.

Written testimonies and other case-in-chief submittals are due August 6, 2020. We will be able to assess any time limit extension requests for oral summaries of testimony more accurately after we examine these submittals. At this time, we will maintain the time limits outlined in the Hearing Notice and reiterated in this ruling letter.

A summary of the order of proceeding and time limits set in the Hearing Notice is provided at the end of this ruling letter. To conduct this hearing expeditiously and fairly, we expect all hearing participants to adhere to the procedures and guidelines set out in the Hearing Notice and this ruling letter.

## **6. Ms. Ansley is Added to the Service List**

During the July 10, 2020 Pre-Hearing Conference, Ms. Ansley, who will be advising Mr. Diffenbaugh on procedural aspects of this hearing but will not be representing Mr. Diffenbaugh at the hearing, requested to be added to the Service List. No participants to the Pre-Hearing Conference objected to this request. Ms. Ansley has been added to the Service List as an interested person to the hearing and this change is reflected in the revised service list which is attached to this letter.

## **7. Clarification of Staff Exhibits Outlined in the Hearing Notice**

During the Pre-Hearing Conference, Ms. Ansley requested clarification on citation to exhibit SWRCB-3, the College Lake Integrated Resources Management Project EIRs, because it includes both the draft and final versions of EIR. We appreciate her identifying this potential issue and make the following clarifications regarding the staff exhibits offered into evidence, described on page 9 of the Hearing Notice:

- SWRCB-1: All Division of Water Rights files, including correspondence, related to SFA A018334 and SFA A018334X02.
- SWRCB-2: All Division of Water Rights files, including correspondence, related to Application A032881.
- SWRCB-3A: College Lake Integrated Resources Management Project, Environmental Impact Report, dated April 2019.

- SWRCB-3B: College Lake Integrated Resources Management Project, Response to Comments on the Draft Environmental Impact Report, dated October 2019.
- SWRCB-3C: Consolidated Final Environmental Impact Report for the College Lake Integrated Resources Management Project, dated December 2019.

Thank you for your continued cooperation in this hearing. Questions regarding non-controversial procedural matters may be directed to [wr\\_hearing.unit@waterboards.ca.gov](mailto:wr_hearing.unit@waterboards.ca.gov).

Sincerely,

*ORIGINAL SIGNED BY*

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**Tam M. Doduc**  
State Water Board Member  
College Lake Project Co-Hearing Officer

*ORIGINAL SIGNED BY*

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**Laurel Firestone**  
State Water Board Member  
College Lake Project Co-Hearing Officer

## ORDER OF PROCEEDING AND SUMMARY OF TIME LIMITS

This order of proceeding and the associated time limits may be modified at the discretion of the hearing officers.

### TABLE 1 – FOR INTERESTED PERSONS

Type of Statement or Testimony	Description	Time Limits
<b>Policy Statements</b> (Non-evidentiary)	<ul style="list-style-type: none"> <li>• Requested to be provided in writing before oral presentation.</li> <li>• May be provided in writing only, without oral presentation.</li> </ul>	5 minutes

### TABLE 2 – FOR PARTIES

Type of Statement or Testimony	Description	Time Limits
<b>Opening Statements</b> (Non-evidentiary)	<ul style="list-style-type: none"> <li>• Requested to be submitted in writing before the hearing.</li> <li>• May include parties' policy-oriented statements.</li> <li>• Should include an overview of the party's objectives for the case-in-chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and key hearing issues.</li> </ul>	20 minutes per party
<b>Oral Testimony (Direct Examination)</b>	<ul style="list-style-type: none"> <li>• Summarizes or emphasizes a witness's prior-submitted written testimony.</li> <li>• Provided by a witness during the hearing under oath that it is true and correct.</li> <li>• Is not an oral reading of the witness's written testimony.</li> </ul>	20 minutes per witness and limited to 1 hour per party
<b>Cross-Examination of Oral Testimony</b>	<ul style="list-style-type: none"> <li>• Parties or their representatives questioning of another party's witnesses regarding their written submittals, oral and written testimony, and other relevant matters.</li> <li>• May be conducted per witness or panel of witnesses.</li> </ul>	1 hour per witness or panel of witnesses
<b>Redirect &amp; Recross Examination</b>	<ul style="list-style-type: none"> <li>• May be allowed as determined by the hearing officers.</li> <li>• Limited to scope of cross-examination and redirect examination, respectively.</li> </ul>	Set by hearing officers

<p><b>Rebuttal &amp; Cross-Examination of Rebuttal</b></p>	<ul style="list-style-type: none"> <li>• Presentation of new evidence used to rebut another party's case-in-chief evidence.</li> <li>• Does not include evidence that should have been presented during that party's case-in-chief, or repetitive evidence.</li> <li>• Written rebuttal testimony is not required but all rebuttal exhibits must be submitted to the Board and served on the other parties by the deadline specified in this ruling letter.</li> <li>• Cross-examination of rebuttal evidence is limited to the scope of rebuttal evidence.</li> </ul>	<p>Set by hearing officers</p>
<p><b>Closing Statements &amp; Legal Arguments</b> (Non-evidentiary)</p>	<ul style="list-style-type: none"> <li>• May be allowed orally at the close of the hearing or in writing at a later date.</li> </ul>	<p>Set by hearing officers</p>

*For additional information, please see the [Notice of Public Hearing for the College Lake Project](#) and the associated [Draft Permit](#), or visit the list of [Frequently Asked Questions](#) on the [Division of Water Rights' Hearings Program](#) webpage.*