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State Water Resources Control Board

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Arnold Schwarzenegger
Governor

April 20, 2007

To: Santa Ana River Water Right Hearing
Service List

SANTA ANA RIVER WATER RIGHT HEARING

Notice of Change in Hearing Room: Please note that the hearing room for the Santa Ana River water right hearing has been changed. The hearing will commence on Wednesday, May 2, 2007 at 9:00 a.m., and continue as necessary at 9:00 a.m., on May 3, 4, 7, 8, and 9, 2007. On May 2, 3, and 4, 2007, the hearing will be held in the **Sierra Hearing Room** (instead of the Coastal Hearing Room as originally noticed). Accordingly, all six days currently scheduled for this hearing will take place at the Joe Serna Jr./Cal EPA Building, Sierra Hearing Room, 1001 I Street, Second Floor, Sacramento, California.

Revised Service List: A revised service list is enclosed. The City of Redlands has withdrawn its protests against Application Nos. 31165, 31370, 31174, and 31371, and it will not participate in the hearing. The San Bernardino Valley Water Conservation District has withdrawn its Application No. 31371.

Ruling on Procedural Matters: Certain parties have objected to the presentation of evidence and conduct of cross-examination by the Center for Biological Diversity (Center), who filed a timely Notice of Intent to Appear in this proceeding, but who did not protest the water right applications that are the subject of this hearing. (The Center protested the City of Riverside's Wastewater Change Petition WW-0045.) By letter dated April 10, 2007, I gave the hearing participants an opportunity to brief the issue of whether the Center may participate in the hearing regardless of whether the Center is a protestant. San Bernardino Valley Municipal Water District, Western Municipal Water District of Riverside County (Muni/Western), Orange County Water District (OCWD), and the Center timely submitted briefs.

Muni/Western requests the State Water Board to issue an order striking the portions of the Center's Notice of Intent to Appear that do not relate to its protest against Wastewater Change Petition WW-0045, and to limit the Center's participation in the hearing to the wastewater change petition. In general, Muni/Western argues that the Water Commission Act contemplates that challenges to water right applications will proceed through the protest process, thus providing a means of fostering voluntary settlement of water right disputes. Muni/Western asserts that the Center's failure to protest the water right applications deprived the applicants of an opportunity to address the Center's concerns. To allow a "late" appearance at a hearing by a person who did not file a protest, Muni/Western contends, results in unfair surprise to the hearing participants. OCWD joined Muni/Western's request to limit the Center's participation.

California Environmental Protection Agency

I have concluded that the Center should be allowed to fully participate in this proceeding by presenting testimony and conducting cross-examination unless it has stipulated otherwise. The State Water Board's hearing procedures do not require the filing of a protest as a prerequisite to participating in a water right hearing. California Code of Regulations, title 23, section 648.1, subdivision (b) states:

In a water right proceeding, the party or parties shall include the water right applicant or petitioner, persons who have filed unresolved protests, persons who have filed unresolved objections to a temporary change petition, persons who have filed an unresolved written complaint with the Board concerning the subject matter of the hearing, *and any other persons who are designated as parties in accordance with the procedure specified in the hearing notice.* (Italics added.)

(See also Gov. Code § 11405.60 [defining "party" to include any person who is allowed to appear in the adjudicative proceeding].) The February 16, 2007, hearing notice allows interested persons who intend to present evidence to participate in the hearing as parties.

In general, early participation in the water right process should be encouraged. An interested person who fails to file a protest runs the risk that the matter will be resolved without a hearing if no other persons protest or all of the protests are resolved. Nonetheless, as the Administrative Procedure Act, the State Water Board's regulations and its hearing procedures acknowledge, the State Water Board has the discretion to allow an interested person, who has not submitted a protest, to participate in an adjudicative proceeding as a party. The rules governing adjudicative proceedings contain numerous requirements to ensure that the parties are treated fairly and evenly, and that there are no surprises. (See, *id.*, § 11425.10 [administrative proceeding bill of rights]; Cal. Code Regs., tit. 23, § 684.4, subd. (a) [policy to discourage surprise testimony].)


Acknowledging that the State Water Board's regulations allow a person who is not a protestant to participate in a water right hearing as a party, Muni/Western suggests that the State Water Board apply the same standard for intervention in water right proceedings that is used in civil actions. An adjudicative proceeding is not the same as a civil action, however, and may have less stringent requirements for the presentation of evidence and the identification of parties. (See, e.g., Gov. Code, § 11513, subd. (c) [a hearing is not required to be conducted according to technical rules relating to evidence].) Moreover, the adjudicative proceeding provides the evidentiary record to be used by the State Water Board in carrying out its statutory and public trust responsibilities. These independent responsibilities distinguish the State Water Board from a court, which is limited to the judicial function resolving disputes among the parties before it. Thus, it may be appropriate to allow a party to participate in an administrative proceeding even though the party would be precluded from participation in a civil trial.

In this case, the Center has an extensive history of advocacy and legal involvement in the Santa Ana River watershed. Its public trust and environmental interests in this proceeding are unique and are not represented by other parties. It proposes to introduce concrete evidence relevant to the key hearing issues. The Center has complied with the procedural requirements for participating in this hearing and it will be allowed to fully participate.

April 20, 2007

If you have any questions regarding procedure as a result of this ruling, please contact Erin K.L. Mahaney, Senior Staff Counsel, at (916) 341-5187 or emahaney@waterboards.ca.gov.

Sincerely,



Arthur G. Baggett, Jr.
Hearing Officer

Enclosure

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**SANTA ANA RIVER HEARING
May 2, 2007 HEARING
REVISED SERVICE LIST
(April 19, 2007)**

PARTIES TO EXCHANGE INFORMATION

(Note: The parties whose E-mail addresses are listed below agreed to accept electronic service, pursuant to the rules specified in the hearing notice.)

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