
State Water Resources Control Board

May 2, 2025

Re: Procedural Ruling on Alleged Conflict of Interest and Conditional Waiver (Hearing on the Proposed Delta Conveyance Project)

TO ALL PARTIES:

This procedural ruling arises out of an alleged conflict of interest of the law firm Somach Simmons & Dunn (SSD), which firm represents several protesting parties in this proceeding, raised by the Department of Water Resources (DWR).¹ DWR asserts that this conflict prejudices its interests but has agreed to waive its rights to pursue any remedies against SSD in this proceeding and any subsequent appeal or litigation resulting from this proceeding, if the Administrative Hearings Office (AHO) timely proceeds with the hearing in accordance with the existing schedule. (2025-04-24 DWR email to AHO.) This ruling addresses DWR's offered waiver and, in addition, concludes that DWR will have waived its right to object to SSD's participation in this proceeding if DWR does not indicate in writing, before this hearing reconvenes at 9:00 a.m. on Monday, May 5, an intent to seek a remedy.

Background

On April 11, 2025, DWR informed the AHO by e-mail that on April 9, 2025, DWR "became aware that Ms. Casey A. Shorrock was actively involved with the Somach Simmons and Dunn law firm (Somach) in the representation of several clients ... opposing DWR's Delta Conveyance Project." (2025-04-11 DWR email to AHO, p. 1.) DWR further alleged that, "prior to joining Somach, Ms. Shorrock was an attorney at Remy Moose and Manley ... who has and is actively representing DWR regarding several elements of the Delta Conveyance Project." (*Id.* at p. 2.) Finally, DWR informed the AHO that, "DWR is in active discussions with Somach's managing shareholder regarding this perceived conflict. DWR wanted to bring this issue to the Hearing Officer's immediate attention, and to assert that DWR reserves its rights to pursue any and all remedies in this hearing or in any other venue." (*Ibid.*)

¹ The protestants represented by SSD are: Byron-Bethany Irrigation District, Sacramento County Water Agency, Sacramento County, City of Stockton, and Sacramento Area Sewer District.

On April 22, 2025, DWR requested that the hearing officer postpone cross-examination of its witnesses by Kelly Taber, an attorney with SSD, because of the alleged conflict.

Ann Carroll (DWR): *I would like to object to Ms. Taber's participation this afternoon in conducting cross. We filed on April 11th that we believe there is a perceived conflict, and we are still in ongoing discussions with the Somach firm. We'd like to request that Ms. Taber delay her cross until the end of this panel so that we can continue our conversations.*

I postponed Ms. Taber's cross-examination of DWR's witnesses until at least 9:00 a.m. on April 24, to allow additional time for DWR and SSD to discuss a resolution of the matter.

On April 24, to allow the hearing to proceed on schedule, DWR offered a conditional waiver in this proceeding of any right to seek a remedy based on the alleged conflict:

The parties to this proceeding are on notice that DWR believes that there is a conflict with Somach Simmons and Dunn that prejudices DWR, and only DWR. If the Administrative Hearing Officer allows the CPOD hearing to timely proceed in accordance with the existing schedule, DWR will waive any remedies it could pursue against Somach Simmons and Dunn with respect to the conflict in this CPOD hearing and any subsequent appeal or litigation resulting from this CPOD hearing.

DWR will continue to pursue its rights and remedies with respect to this conflict with Somach Simmons and Dunn in other appropriate forums.

(2025-04-24 DWR e-mail to AHO.)

Also on April 24, after discussion with the parties about how to proceed, I invited the parties to submit briefs on several questions that addressed the scope of the AHO's authority, standing of parties other than DWR to raise objections based on the alleged conflict, and whether the AHO should stay the hearing pending resolution of the conflict in an appropriate forum. (2025-04-24 N. Kuenzi email to Service List.) DWR, SSD, State Water Contractors, North Delta Water Agency, County of Contra Costa et al., El Dorado Irrigation District and Placer County Water Agency, and DTEC et al., submitted briefs on April 30.

The parties and the hearing officer further discussed the issues during the hearing on May 1, during which DWR made a statement memorialized in a May 1 e-mail to the AHO and the service list, to further clarify the scope of its proposed waiver. The statement provides in part:

If the Administrative Hearing Officer allows the CPOD hearing to timely proceed in accordance with the existing schedule, DWR will waive any

remedies it could pursue against [SSD] with respect to the conflict in this CPOD hearing and any subsequent appeal or litigation resulting from this CPOD hearing. DWR will not object to any CPOD record evidence being cited by other parties in any other proceeding on the basis of this conflict issue, but DWR retains its right to object on any other basis.

(2025-05-01 DWR email to AHO.)

The text of DWR's proposed waiver of remedies highlights an ambiguity that resulted in some confusion during the hearing on April 24 and May 1. The phrase "in this CPOD hearing" could be read to describe (1) the forum in which the potential conflict-of-interest remedies arose – the requested remedies are based on SSD's participation in this water rights proceeding as opposed to another pending matter, or (2) the venue in which such remedies are sought – this proceeding before the AHO, a different proceeding before the AHO, a future appeal arising from this proceeding, or a separate court action. As a result, several parties understandably were unclear on which rights, precisely, DWR proposed to waive. Among other matters, this ruling intends to address that ambiguity.

Analysis

DWR confirms that it has not "filed a motion, or other formal request, for the hearing officer to address the alleged conflict." (2025-04-30, DWR Response Brief, pp. 1-2.) "DWR wants to reiterate there is nothing pending before the hearing officer to decide." (2025-05-01 DWR email to AHO.) DWR's objection to proceeding with cross-examination of the Panel 2 witnesses by Ms. Taber is fully resolved, as DWR has withdrawn that request for relief. Therefore, no motion or objection remains outstanding for the hearing officer or the State Water Resources Control Board (State Water Board or Board) to address. To the extent that DWR has referred to maintaining an "objection" in discussions about this issue during the hearing, DWR clarified during the hearing on May 1 that it has no outstanding objection. (2025-05-01 Zoom Generated Transcript, pp. 10:111-11:115.) DWR also does not refer in its April 30 brief to any outstanding objection. Furthermore, I conclude that as a matter of law, absent some request for relief and further substantiation, such an objection cannot be maintained and has been extinguished.

On April 24, DWR indicated its willingness to voluntarily waive any remedies it could pursue in this proceeding based on the alleged conflict, in the interest of allowing this hearing to proceed in a timely manner. As subsequently clarified, DWR's waiver includes waiver of all objections based on the alleged conflict to SSD's participation in this hearing, evidence offered or elicited during cross-examination in this hearing by SSD, evidence developed in this hearing and offered in some other proceeding, and any final order adopted by the Board on the pending change petitions that are the

subject of this hearing.² (2025-05-01 Zoom Generated Transcript, pp. 5:43-45, 7:72-76, 14:151-160, and 20:220-224; 2025-05-01 DWR email to AHO.)

In addition to DWR's voluntary conditional waiver of any right to a remedy in this proceeding based on the alleged conflict, I further conclude that DWR will have waived its right to object in any forum to SSD's participation in this proceeding,³ if DWR elects not to file a motion or other statement of intent to seek some remedy before this hearing reconvenes. DWR has been at least constructively on notice of Ms. Shorrock's intended participation in this proceeding on behalf of protesting parties since August 5, 2024. (2024-08-05 Sac County – NOI.) DWR has been on actual notice of her participation since April 9, when Ms. Shorrock conducted cross-examination, and has to date declined to file any motion either with the AHO or, to my knowledge, any court, seeking to disqualify SSD from participation in this proceeding.

DWR has a right to pursue a remedy based on the alleged violation of the duties owed by an attorney to a former client. If substantiated, such a conflict could potentially have serious implications for DWR's interests either in this proceeding or other proceedings. DWR has also clearly expressed its preference for completing this hearing as quickly as possible. But DWR must choose between a temporary delay of the substantive portion of this hearing while it pursues a remedy or waive its right to do so. Given the substantial number of parties and the complexity of this hearing process, I cannot permit DWR to defer any objection that it may have to SSD's participation until after the AHO has conducted additional hearing days. Such a future objection would threaten to nullify significant resources invested by the many parties and the State Water Board in this highly complex hearing and further disrupt the orderly hearing process. In addition, and without any intent to impugn the professionalism of DWR's management or legal team, allowing DWR to maintain an inchoate right to object to the validity of the hearing and its outcome would invite future gamesmanship. The appropriate time for DWR to file a motion for disqualification, if it elects to do so, is now, before the hearing reconvenes.

Therefore, in addition to DWR's voluntary proffer of a conditional waiver of its right to a remedy in this proceeding, I find that DWR will have waived its right to object to SSD's participation in this proceeding if it does not indicate in writing, before this hearing

² The waiver does not include waiver of objections to evidence developed in this proceeding if the objection is not based on the alleged conflict, for example, an objection to evidence as hearsay.

³ I do not intend to include within the scope of this waiver DWR's ability to rely on actions by SSD in this proceeding to support a motion to disqualify SSD in some other proceeding.

reconvenes at 9:00 a.m. on Monday, May 5,⁴ an intent to seek a remedy. This waiver includes waiver of all objections based on the alleged conflict⁵ to SSD's participation in this hearing, evidence offered or elicited during cross-examination in this hearing by SSD, evidence offered or elicited during cross-examination in this hearing by another party coordinating with SSD, evidence developed in this hearing and offered in some other proceeding, and any final order adopted by the Board on the pending change petitions that are the subject of this hearing.

My determination of waiver is limited to the scope of this proceeding on DWR's petitions to change and is based on the particular circumstances of this hearing. I express no opinion on the merits of DWR's allegation that a conflict exists, and I do not intend this ruling to have any collateral effect on DWR's right to object to SSD's participation in any other proceeding.⁶

In California, standing to seek disqualification of counsel based on a former client relationship is generally limited to parties who can demonstrate a direct attorney-client relationship or a duty of confidentiality. (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160,175; *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1404.) This standing requirement "protects against the strategic exploitation of the rules of ethics and guards against improper use of disqualification as a litigation tactic." (*Great Lakes Construction, Inc. v. Burman* (2010) Cal.App.4th 1347, 1358.) It is my understanding, therefore, that no other party to this proceeding would have standing to object to SSD's participation in this proceeding, any evidence developed in this proceeding, or any final order issued by the Board, based on the alleged conflict. To the extent that any other party does have such a right, however, I similarly conclude that the right is waived if the party does not indicate in writing, before this hearing reconvenes, an intent to seek a remedy.

During the hearing on May 1, there was some discussion about whether there is a meaningful distinction between a waiver of the right to a remedy based on the alleged conflict, a waiver of the right to object based on the alleged conflict, and a waiver of the conflict itself. After reviewing case law involving waiver and motions for disqualification, courts generally refer to implied waiver of a "right to disqualify," or "attorney

⁴ The hearing officer discussed this timing with DWR during the hearing on May 1. DWR did not request additional time to file a statement before 9:00 a.m. on Monday, May 5, if it intends to seek a remedy.

⁵ DWR may, of course, raise these types of objections for reasons other than the alleged conflict by SSD.

⁶ It is, however, my understanding that this finding of waiver would estop DWR from objecting in any other forum to the introduction of evidence developed in this proceeding based on SSD's participation in this proceeding, though DWR could object to the evidence on any other lawful basis.

disqualification.” (*River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, 1313 [“implied waiver of the right to disqualify”]; *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 844-45 [“attorney disqualification can be impliedly waived”].) This ruling uses the phrase “waiver of the right to object,” so as to encompass motions to exclude evidence and other objections that may not explicitly seek disqualification, and concludes that DWR will have waived its right to object to SSD’s participation in this proceeding once the hearing recommences on May 5.

Date: May 2, 2025



Nicole L. Kuenzi
Presiding Hearing Officer
Administrative Hearings Office

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- Attachment 1 - Service List

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