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January 22, 2016

CALIFORNIA WATERFIX PROJECT  
State Water Resources Control Board  
Div. of Water Rights  
Sacramento, CA 95814

**Sent Via Email:** CWFhearing@waterboards.ca.gov

**RE:** WATERFIX PROJECT PETITION – Pre-hearing Conference comments  
(City of Antioch)

Dear State Water Resources Control Board:

The City of Antioch submits the following comments relating to the WaterFix Project pre-hearing conference in response to the State Water Resources Control Board's (SWRCB) request for such comments. In making comments regarding the procedural process for the hearings, the City believes it is important to consider its comments within the context of the following factual, procedural, and legal background relating to the WaterFix Project:

- Neither the Change Petition nor the supporting environmental documents (RDEIS/SDEIR) describe essential fundamental operating criteria for the WaterFix Project regarding the project's adaptive management operation (see Petition 12, 13; RDEIS/SDEIR p. 4.1-13

for example). These operating criteria are being deferred to some unknown time in the future. Such deferral is prohibited by CEQA and results in a defective project description as a matter of law.<sup>1</sup> An inadequate project description also violates the requirements for a valid Petition. 23 Cal.Code.Regs 749 (a)(6).

- In addition, the Petition itself refers to 22 *future* studies related to WaterFix Project diversions that will establish the “biological baseline conditions” for project operations. (see pg. 14 of the *Supplemental Information* to the Petition). The results of these studies have not been completed or publicly disclosed, and by the Petitioners own admission are essential to form the “baseline” for biological conditions.<sup>2</sup>
- The present environmental documents do not “save” the inadequate Petition because as noted those documents suffer from the exact same omissions and defects.
- Petitioners (DWR and the US Bureau of Reclamation) have never responded to any of the public comments submitted on the original Bay-Delta Conservation Plan (“BDCP”), the original 2013 DEIR/DEIS or the more recent RDEIS/SDEIR. As a result, none of the Protestants nor the public in general have any idea whatsoever what the Petitioner’s positions are on the issues raised in such comments.

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1 “An accurate, stable, and finite project description is the sine qua non of a . . . legally sufficient EIR.” *San Joaquin Raptor/ Wildlife Rescue Center* (1994) 27 Cal.App.4th 713, 740.

2 “A study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.” *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70.

- As noted in the City’s Protest and in its comments on the Petition, the “modeling” performed related to the WaterFix project is fundamentally flawed. Among other flaws, the modeling fails to adequately address the preferred (4a) alternative for the project, relies on an incorrect and incomplete baseline condition, and omission of operating criteria.

Based on the foregoing, it is simply not possible to determine the scope of the impacts to other “legal users of water” by any Protestant or by the SWRCB in the upcoming hearing process. The lack of specifics and information in the Petition and in the RDEIS/SDEIR not only violate CEQA but are contrary to the change petition process. See generally Water Code sections 1702 et seq. and 23 Cal.Code.Regs 749 (a)(6). The object of the law is to provide potentially impacted water users with sufficient information to assess impacts to their water rights - and that information is significantly lacking in this proceeding.

With the above discussion in mind, the City submits the following comments and objections regarding the WaterFix Petition procedural process:

1. The Petitioners have failed to meet their burden of proof to demonstrate the absence of any harm to any other legal users of water because they have failed to adequately describe the proposed project. Therefore, the Petition should be dismissed until the issues discussed above are addressed and the public is allowed to analyze and comment on such issues. The SWRCB simply cannot make any finding of harm (or no harm) within the present information vacuum created by the Petitioners.

2. If the Petition is not dismissed, the SWRCB should stay all further proceedings until Petitioners address the issues discussed in this letter. As stated, without these issues being addressed neither Protestants nor the SWRCB can make any factually or legally sufficient determination of harm. The City maintains that the lack of such information in the present Petition and supporting environmental documents is in fact evidence of “harm” to legal users in itself. A mere “promise” by the Petitioner to meet present water quality standards is not sufficient evidence supporting a finding of no harm.
3. If allowed to proceed, the Petition invalidly shifts the burden of proof to the Protestants – and in fact it already has. Protestants, such as the City, are placed in the situation of “proving” harm to their water rights based on a Project that is not sufficiently described, has not disclosed certain operating criteria, has not completed its environmental impact analysis in the form of a biological baseline, and is universally acknowledged to be based upon flawed modeling.
4. Protestants such as the City are being forced to participate in a process in which the City has no information regarding the Petitioners’ responses to the City’s comments on the environmental documents as the Petitioners have never responded as required by CEQA. It is very likely that Protestants will hear certain contentions and positions by the Petitioners relating to the issues raised during the CEQA process (as well as seeing certain “evidence”) for the first time ever during the upcoming SWRCB hearings. How can Protestants such as the City adequately prepare for the unknown and undisclosed? The answer is that they cannot. At the very least, the SWRCB should order that Petitioners not be allowed to present any rebuttal evidence of any kind

not already disclosed in the Petition or in the supporting environmental documents with respect to operating criteria, biological baseline, or the flawed modeling because this would substantially prejudice Protestants.

In sum, the hearing process should not be allowed to proceed until the defects and omissions discussed above are fully addressed by the Petitioners or else the SWRCB should dismiss the Petition entirely. Thank you for allowing the City of Antioch to provide these comments with respect to the upcoming CalWaterFix pre-hearing conference.

*MATTHEW EMRICK*

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