

CWFhearing

From: William Jennings <deltakeep@me.com>
Sent: Friday, January 22, 2016 4:22 AM
To: CWFhearing
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Subject: California WaterFix Hearing Procedural Issues
Attachments: CSPA et al, WaterFix Hearing Procdural Issues, 22Jan16.pdf

CWF Hearing Officers, Staff and Counsel:

Attached are comments respectfully submitted by the California Sportfishing Protection Alliance, California Water Impact Network and AquAlliance regarding procedural issues associated with the 28 January 2016 California WaterFix pre-hearing conference.

Please don't hesitate to contact me with any questions. Thank you.

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January 22, 2016

CWFhearing@waterboards.ca.gov
And California WaterFix Service List

via Email

Re: Comments Regarding Procedural Issues for the 28 January 2016 Pre-Hearing Conference for the California WaterFix Project

Dear State Water Resources Control Board Members, Counsel and Staff involved in the California WaterFix Petition Hearing Process:

The California Sportfishing Protection Alliance (CSPA), California Water Impact Network (C-WIN), and AquAlliance (collectively, CSPA parties), write in response to the request for comments on procedural issues as requested in the January 15, 2016 entitled *Service List of Participants, List of Other Interested Persons, and Prehearing Conference Agenda in the Matter of Hearing on Petition Requesting Changes in Water Rights of The Department of Water Resources and U.S. Bureau of Reclamation for the California Waterfix Project* (hereinafter, Prehearing Conference Agenda).

We divide our comments into two sections: general procedural issues and answers to specific procedural questions posed in the above-referenced document.

General procedural issues

CSPA parties raised three major procedural issues in our protest of the WaterFix petitions. We summarize these issues in our dismissal terms, which we restate in excerpted form and reaffirm here:

- 1) Prior to conducting hearings on adding new north of Delta points of diversion and rediversion for the CVP and SWP or on other aspects of the WaterFix program, the State Board must complete the update of the Bay-Delta Water Quality Control Plan.
- 2) Prior to conducting hearings on adding new north of Delta points of diversion and rediversion for the CVP and SWP or on other aspects of the WaterFix program, the State Board must, after completion of adequate environmental review, conduct licensing hearings for existing CVP and SWP water rights.
- 3) Prior to conducting hearings on adding new north of Delta points of diversion and rediversion for the CVP and SWP or on other aspects of the WaterFix program, the State

Board must complete a legally sufficient EIR/EIS at the expense of the Bureau and DWR. The new EIR/EIS must resolve the deficiencies Protestants have raised or cited in this protest and in our respective comments on the BDCP DEIR/EIS and the RDEIR/SDEIS.

Please refer to the protest of CSPA parties for specific discussion and rationale for the need to correct each of these procedural deficiencies.

In addition, the Prehearing Conference Agenda proposes a process in which the Executive Director of the State Water Board would be delegated the authority to issue or decline to issue a Clean Water Act Section 401 Water Quality Certification for the Waterfix Project, using information in the Hearing record for the proposed change in the point of diversion and rediversion or other information. The Prehearing Conference Agenda further proposes that the Executive Director be allowed to make his decision prior to a decision by the Board on the change in point of diversion and rediversion. CSPA parties object to this proposed process for the same reasons as stated above regarding the decision on the water rights: prior to issuing a 401 Certification, the State Board must first complete the update of the Bay-Delta Water Quality Control Plan, conduct licensing hearings for existing CVP and SWP water rights, and complete environmental review.

Further, CSPA parties object to the State Water Board's exclusion of numerous parties who will likely be seriously injured by any approval of the WaterFix petitions. The Notice of Petition and Public Hearing limits participation in Part 1 to legal users of water and implies that "legal users of water" means water rights holders; i.e., those who have rights to divert and/or store water. However, there is no Water Code definition of the phrase "legal users of water" and only limited application of "legal users of water" in the 2015 Statutory Water Rights Laws for California (§§ 1025.5, 1026 and 1028) addressing water leases and in the California Water Code addressing temporary urgency change petitions (Chapter 6.6, § 1437) and temporary changes to water rights, with respect to water transfers (Chapter 10.5, Article 1). None of the applications of the phrase are applicable to the subject petition.

There are, however, numerous applications of beneficial uses and beneficial users of water in other areas of state and federal law, including the federal Water Pollution Control Act and California's Porter-Cologne Water Quality Control Act. And parties that are legally entitled to use and enjoy the legally defined beneficial and designated uses of water are likely to be injured by approval of the petition and the subsequent impacts on water quality and other beneficial and designated uses of water. These legal users include, but are not limited to, commercial, sport and subsistence fishermen and recreational users of water that have no rights to divert and/or store water. These potentially injured parties must not be reduced to second-class citizens and deprived of their due process rights by being excluded from participating in Part 1 of the hearing and being permitted to demonstrate actual injury from being deprived of their legal rights to enjoy the legally defined beneficial and designated uses of water.

Consequently, CSPA parties believe that, once the prerequisites stated above have been met, the State Water Board should re-notice the hearing and ensure that all legal users of water, whether they be water rights holders or simply those who have a legal right to use and enjoy the legally defined beneficial and designated uses of water, are allowed to participate in Part 1 of the

hearing and to document how approval of the petition will cause them actual and irreparable injury.

Answers to specific procedural questions raised in the Prehearing Conference Agenda

While CSPA parties disagree that it is legal or appropriate to proceed with hearings at this time, we state our responses on several specific procedural issues that may apply once adequate prerequisite process has been completed. We note that for Part 2 of the hearing, the three CSPA parties will coordinate our cases and testimony, as we have in past proceedings before the Board.

- 1) The amount of time allowed for opening statements (20 minutes) is inadequate unless each party presenting a consolidated case who is represented by one attorney is allowed 20 minutes for each of the parties he represents. CSPA parties request 60 minutes for our opening statement.
- 2) The amount of time allowed for oral testimony is inadequate. This is the most important decision this Board or its predecessors has ever made or will likely ever make. The extent of the subject matter and the nature of the proceeding make it unreasonable to restrict individual oral testimony to 20 minutes and organizational testimony to one hour. We request one hour for oral testimony for each witness. We will coordinate the testimony of the witnesses from each of our respective witnesses.
- 3) The hearing notice states: "If a party presents multiple witnesses, the hearing officers will decide whether the party's witnesses will be cross-examined as a panel." Each witness should be cross-examined individually. Cross-examiners should have one hour to cross-examine each witness. Witnesses on a panel should not be able to respond to questions on cross-examination directed to other witnesses.
- 4) The Prehearing Conference Agenda asks, "whether petitioners or other parties should be required to submit proposed terms and conditions or other information." Requiring parties to submit proposed terms and conditions would prejudice the proceeding in favor of an affirmative decision; CSPA parties object to such a requirement.
- 5) Page limits for written opening statements should be 10 pages.
- 6) The Prehearing Conference Agenda states: "As a general rule, a responsible agency must assume that the CEQA document prepared by the lead agency is adequate for use by the responsible agency. (Cal. Code of Regs., tit. 14, § 15096, subd. (e).)" A responsible agency can no more rely on an inadequate environmental document than a lead agency. In the instant case, the State Board would be using a document that, among numerous other defects as described in our protest and comments on the RDEIR/SDEIS, fails to address actual project operations and upstream sources of water. Such a glaring omission cannot support reasoned decision-making, in particular the Board's need to make findings regarding injury to other water users, cumulative impacts, the public interest, and public trust resources. The Board cannot presume adequacy that is absent on its face. The Board must not proceed with hearings until it has an adequate environmental document in hand.

Thank you for the opportunity to comment on procedural issues relating to hearings for the WaterFix.

Respectfully submitted,

Bill Jennings, Executive Director
California Sportfishing Protection Alliance



Chris Shutes, Water Rights Advocate
California Sportfishing Protection Alliance



Barbara Vlamis, Executive Director
AquAlliance



Carolee Krieger, Executive Director
California Water Impact Network



Michael Jackson
Counsel to California Sportfishing Protection Alliance,
AquAlliance, and
California Water Impact Network
/s/ Michael Jackson

In accordance with requirements in the Prehearing Conference Agenda, all parties in the Service List of Parties to Exchange Information (Table 1) have been copied on this electronic transmittal. A full copy of this transmittal has been placed in a postage paid envelope and mailed to Suzanne Womack and Sheldon Moore, Clifton Court, L.P., 3619 Land Park Drive, Sacramento, CA 95818.