

CWFhearing

From: Mae Empleo <mae@semlawyers.com>
Sent: Friday, January 22, 2016 12:01 PM
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Cc: Meserve, Osha@semlawyers.com
Subject: Comments re: Procedural Issues to the Pre-Hearing Conference Agenda for the California WaterFix Petition Hearing
Attachments: SM Law Prehearing Conference Comments 1.22.2016.pdf

Attached please find the comments submitted on behalf of Local Agencies of the North Delta, Bogle Vineyards, Diablo Vineyards and Brad Lange, Elliot-Stillwater Orchards, Delta Watershed Landowner Coalition and Friends of Stone Lakes National Wildlife Refuge regarding the procedural issues to the pre-hearing conference agenda in the matter of hearing on the petition requesting changes in water rights of the Department of Water Resources and U.S. Bureau of Reclamation for the California Waterfix Project.

Sincerely,

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January 22, 2016

SENT VIA EMAIL (CWFhearing@waterboards.ca.gov and CWF Service List)

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RE: CWF Petition - Pre-Hearing Conference Items for Discussion

Dear State Water Resources Control Board Member Hearing Officers, Counsel and Staff:

This firm represents several protestants in the above-referenced petition.¹ This letter provides comments and suggestions regarding procedural matters to address at the pre-hearing conference, as requested in the January 15, 2016 Pre-Hearing Conference Agenda.

READINESS TO COMMENCE HEARING PROCESS

1. Availability of Expected Project Information from Petitioners

Proceeding with the hearings in advance of release of the Final environmental documents for the proposed change, in particular, prejudices protestants. Protestants are expected to submit all materials for Part 1 of the proceedings by March 1st. Yet the CWF petitioners apparently plan to release the final environmental review documents in April 2016. These documents are expected to contain new modeling of water quality impacts and other information responsive to comments received from the public, including many protestants. If this new information will be considered in the hearing process (as apparently planned) protestants must be provided the opportunity to review and respond to this information in their initial submittals. Thus, the deadline for protestant submittals should be delayed until at least 90 days after release of the final EIR/S, and after the other missing project information (discussed below) is provided. Otherwise, a second round of submittals and additional hearings will be necessary to address this expected new information.

1 Local Agencies of the North Delta, Bogle Vineyards, Diablo Vineyards and Brad Lange, Elliot-Stillwater Orchards, Delta Watershed Landowner Coalition, Friends of Stone Lakes National Wildlife Refuge.

2. The Change Petition Improperly Seeks a New Water Right

While styled as a Petition for Change, the Petition in fact seeks a change to the Petitioners' water rights. Petitioners have the responsibility to show that there is water available to service the Tunnels. The water availability assumptions in the Petition are incorrect and must be explicitly stated in the context of a petition for a new water right in order for additional points of diversion to be added to the SWP/CVP. Since the Petition for change involves the grant of a new water right, it is improperly framed as a Petition for Change, and should not proceed.

3. The Change Sought in the Petition has not been Fully Described

A complete application for a change in water rights has not yet been submitted for the proposed change as required by Water Code sections 1701 and 1701.2. In addition, inadequate information is available at this time for the SWRCB to act on the Petition for the following reasons:

- The petition requests a new water right, yet is framed as a change;
- The environmental review for the Project is not complete, and the impacts of the Project have not been disclosed, including impacts on other legal users of water as well as fish and wildlife;
- The proposed Project operations have not been adequately defined for other water users to analyze potential injury;
- The proposed WaterFix Project was not modeled, and there are major differences between the model runs used to assess impacts and the features of the proposed WaterFix Project;
- How the adaptive management process will be employed to change Project operations in the future has not been defined.

These deficiencies impair the protestants' ability to analyze the potential impacts of the Project on water rights and fish and wildlife impacts. These deficiencies also make it impossible for the SWRCB to make a properly assess harm to other beneficial uses.

As a result of these and other deficiencies, the full nature and extent of injuries on legal users of water and fish and wildlife uses have not been identified and analyzed. ***The Notice of Petition concedes that inadequate information is available to adequately consider fish and wildlife issues in Part 2 of these proceedings. The same information that is necessary for an adequate analysis of injury to legal users of water.*** Moreover, harm to legal users of water is not synonymous with significance determinations in draft environmental documents. Here, the Tunnels Petition cites generally to the RDEIR/S as

evidence “protective thresholds for beneficial uses currently enacted by the State Water Board will be met.” (Petition, p. 19.) Yet the documents comprising the RDEIR/S take up about 48,000 pages, which in large part discuss other alternatives than the currently proposed CWF Tunnels.

Generally, the Petition (1) does not adequately describe the changes sought; (2) fails to attempt to demonstrate a reasonable likelihood that the change will not injure any other legal user of water; and (3) fails to describe the extent of impacts to fish and wildlife. These deficiencies must be corrected before any hearing process begins.

4. Water Quality Control Plan is Outdated and Does not Protect Beneficial Uses

The Board has chosen to advance the CWF petition prior to completion of the Water Quality Control Plan Update. Especially concerning is the plan to proceed with the CWF petition, which concerns a new water right on the Sacramento River, prior to the development of updated water quality objectives for the Sacramento River (Phase II). Processing the water rights petition for the largest water diversion ever proposed on the Sacramento River prior to addressing this critical issue is improper.

It is also unclear, given the Board’s approach to ex parte communications regarding the Tunnels, whether the key issue of lack of updated WQCP standards can be discussed in the CWF petition process if the WQCP update is also proceeding in separate hearings. Please be advised that should the CWF petition proceed, it will be necessary for protestants to discuss the status of the WQCP update in relation to the protection of beneficial uses at the CWF petition proceedings.

5. The 401 Certification May Not Proceed Prior to Other Key Actions

The Board’s plan to process the 401 Certification at the Executive Officer level and potentially in advance of completion of the environmental review is improper. The Pre-Hearing Conference Agenda does not explain how this proposal is compliant with the California Environmental Quality Act. Moreover, the importance of this water rights change should not be delegated to the Executive Director.

OTHER HEARING RELATED MATTERS

1. Defective Petition Process Raises Due Process and Fairness issues

Going forward with consideration of the CWF petition prior to the minimum information being provided to support the petition unfairly prejudices and burdens legal users of water and other protestants. It is unfortunate that the Board has chosen to rush

consideration of this Petition, which is the largest change to water rights proposed since the initial construction of the state and federal water projects in California. The proponents have spent some \$250 million to describe and analyze the proposed change. As confirmed by the U.S. EPA those documents are inadequate and incomplete.

Given the incompleteness of the application, the scale of the water rights change proposed, and the technical difficulties in assessing the effect the proposed change will have on other legal users of water and fish and wildlife, some accommodation must be made to assist the protestants in putting forth evidence of harm and other relevant information. The current timeframes have not and will not allow the thousands of affected water users and other interests to adequately respond to the CWF petition.

2. Ongoing Concerns Regarding Conflicts

As commented previously, there is a grave concern regarding the independence of the Board due to the fact that the consulting firm ICF International serves as a consultant to the Board for purposes of updating the WQCP and also is the lead consultant for the new CWF Tunnels diversions sought in the petition. In the past, we have been advised that there is a clear line between ICF staff working on the WQCP and ICF staff working on the CWF Tunnels. Given the profound effect water quality standards would have on operation of the CWF Tunnels, it is imperative that ICF staff not work both sides of this issue, and that the WQCP update process not be tainted by ICF's financial ties to the CWF Tunnels. While we continue to respectfully disagree with the Board's notion that the current staffing arrangement is permissible, we ask that the Board provide information to the public on an ongoing basis to demonstrate how the conflict described above is being addressed. Such reporting could potentially allay concerns and prevent further tainting of the process.

* * *

The CWF petition deficiencies, combined with the scale of the project, the severity of the effects, and the complexity of the analysis, severely constrain the ability of potentially injured legal users of water to effectively respond to the Petition. Based on the incomplete content of the Petition, it is premature and prejudicial for the Board to commence these proceedings on the change petition at this time. We respectfully request that these and the other issues raised in this letter be addressed prior to proceeding any further with this process.

Very truly yours,

SOLURI MESERVE
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By:



Osha R. Meserve

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