

CWFhearing

From: Colin Bailey <colin@ejcw.org>
Sent: Friday, January 22, 2016 11:46 AM
To: CWFhearing
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Subject: California WaterFix pre-hearing conference comments
Attachments: EJCW WaterFix pre-hearing comments 01-22-16.pdf

To whom it may concern:

Attached to this e-mail, below, are the pre-hearing conference comments, submitted on behalf of The Environmental Justice Coalition for Water (EJCW).

All parties on Table 1 of the service list for this proceeding are have been served a copy of this communication or submittal by electronic mail with the exception of one party, who has been served a copy of this communication or submittal by regular mail via the United States Postal Service.

If you have any difficulty accessing the attached PDF document, please contact me by e-mail at <colin@ejcw.org>.

Thank you.

[Colin Bailey, J.D.](#)

Executive Director, [The Environmental Justice Coalition for Water](#)

P.O. Box 188911, Sacramento, CA 95818-8911([map](#))

(916) 432-EJCW (3529) text okay / ejcw.org / [@EJCW](https://twitter.com/EJCW)

Host a screening of the documentary film, *Thirsty for Justice: the struggle for the human right to water*, in your community! Watch the 2-minute [trailer](#) or view the 38-minute [film](#).

Reduce e-mail! Schedule a 15-minute meeting with me [here](#).

The ENVIRONMENTAL JUSTICE COALITION FOR WATER

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VIA ELECTRONIC MAIL TO <CWFHEARING@WATERBOARDS.CA.GOV>
AND THE CALIFORNIA WATERFIX SERVICE LIST

January 22, 2016

Ms. Tam Doduc, Board member and Co-chair
Ms. Felicia Marcus, Board Chair and Co-chair
WaterFix Change Petition Water Rights Proceeding
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Subject: Procedural issues associated with Pre-Hearing Conference, January 28, 2016

Dear Board Members Doduc and Marcus:

The following comments on procedural issues associated with the Pre-hearing Conference, set for January 28, 2016, in the matter of the WaterFix Change Petition, are submitted on behalf of The Environmental Justice Coalition for Water (EJCW).

About EJCW

The Environmental Justice Coalition for Water (EJCW) is a statewide coalition of grassroots groups and intermediary organizations building a collective, community-based movement for democratic water allocation, management, and policy in California.

Mission & Vision

Mission: Our mission is to educate, empower, and nurture a community-based coalition that serves as a public voice and an effective advocate for environmental justice issues in California water policy.

Vision: We envision all communities throughout California having access to safe and affordable water, clean rivers, streams, and bays for personal, cultural, ceremonial, and recreational uses.

Approach

EJCW empowers the most under-served communities throughout California, including low-income and communities of color, to advocate for clean, safe, and affordable water. EJCW plays a critical bridge-building role in connecting grassroots communities and statewide policy advocates across California. Together, we are building a broad movement for water justice by tackling structural inequity in how California's water resources are managed.

To that end, EJCW seeks to participate fully in Parts I and II of this proceeding, as well as offer policy statements. In order to ensure that this can be achieved, EJCW offers the following comments on procedural issues for further discussion at the January 28, 2016, Pre-hearing Conference.¹ In summary, the issues are as follows:

1. The Board should ensure that the scope of Part I of the proceeding offers the opportunity for the interests of environmental justice communities in avoiding injury from the change herein petitioned to be fully considered;
2. The Board should make resources available to those representing environmental justice constituencies and other beneficial users of water to make possible their full participation and ensure adequate representation, upon a reasonable showing that financial hardship would ensue without the provision of public resources; and, lastly,
3. The Board should allow reasonable time, over and above the one hour time limit put forward in the January 15, 2016, communication from the Board, titled, 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, for parties, such as EJCW, which seek to represent environmental justice and other public interests by way of arguments intentionally seeking to push and expand upon existing law.

A more detailed explanation of these issues, follows below.

¹ Please note that EJCW is also a co-signatory to comments that speak to different procedural issues associated with the January 28, 2016, Pre-hearing Conference than those appearing herein. Specifically, see comments submitted by Restore the Delta, Environmental Water Caucus, and The Environmental Justice Coalition for Water. Additionally, EJCW wholly endorses and incorporates by reference, as if fully set forth herein, the Pre-hearing Conference comments submitted by Friends of the River, Sierra Club California, and Planning and Conservation League, on January 21, 2016.

THE BOARD SHOULD ENSURE THAT THE SCOPE OF PART I OF THE PROCEEDING FULLY CONSIDERS THE INTERESTS OF ENVIRONMENTAL JUSTICE COMMUNITIES IN AVOIDING INJURY FROM THE SUBJECT CHANGE PETITION

The Board's use of the phrase "legal users of water" causes EJCW concern. The Board appears in its Notice of Petition and of Public Hearing to imply that "legal users of water" means "water right holders," a legal category of property owners—owners of one or more rights to divert and/or store water under California water law. We think this implied meaning is far too narrow to apply to the WaterFix Change Petition evidentiary proceeding.

We find only limited application of this phrase in the 2015 Statutory Water Rights Laws for the State of California, available from the State Water Board's web site. It is employed in three sections (Sections 1025.5, 1026 and 1028) that deal strictly with water leases, and which do not apply to the Tunnels Petition. In Chapter 6.6 of the Water Code, Section 1437, the phrase is used in the context of temporary urgency change petitions (again, a situation that does not apply here). Finally, the phrase appears in Chapter 10.5, Article 1, dealing with temporary changes to water rights regarding water transfers. None of these applications of the phrase "legal users of water" appears to be relevant to the change petition coming before the Board.

There are no other places in the 2015 Statutory Water Rights Laws where this phrase is applied. There are no other references even to the more general phrase "legal users." Finally, there is no Water Code definition of the phrase "legal users of water" nor of "legal users." As a consequence, there is no justification in the California Water Code for limiting the phrase "legal users of water" to just water right holders as owners of usufructuary property.

There are a number of other areas of state and federal water law, including water quality control law, where there are "legal users of water" known as "beneficial uses" or "beneficial users." The federal Clean Water Act and California's Porter-Cologne Water Quality Control Act come to mind. In addition to investigating the potential injuries from the Tunnels Petition to owners of water rights, the potential injuries to beneficial and designated users of water should also be investigated in both Parts 1 and 2 of the evidentiary hearing process, especially since prompts in the Board's Notice for both parts address injuries and impacts on water quality of the Tunnels Petition.

We also appreciate the Board for asking the question for Part 1 whether the project represented by the Tunnels Petition is "in effect a new water right?" We think the Board should take note that in addressing whether water is available for such a new water right, the Board must take account of Water Code Sections 1205(b), which indicates that a declaration that a stream system is fully appropriated shall contain a finding that the supply of water in the stream system is fully applied to beneficial uses where the Board finds that previous water rights decisions have determined that no water remains available for appropriation. The Board's Water Right Order 98-08 notes a number of Central Valley streams that met that criterion at that time. The phrase "beneficial uses" is the limiting factor in this requirement and should reasonably include human beneficial uses of these streams that are not also property owners of water rights. We also note that this order needs to be updated to reflect the many new water rights that have been issued up and down the rivers of the Central Valley.

In updating its fully appropriated streams order, the Board must also take account of the beneficial uses and that they are not limited in definition to strictly water right property owners in the Water Code. We urge that the Board update this Order as soon as possible.

In this instance, we also urge specific admission by the Board to Part 1 for beneficial users including California Indian tribal traditional and cultural uses, tribal subsistence fishing uses, and subsistence fishing uses of the broader population in California, including the Bay-Delta Estuary and the Legal Delta.

We further urge that the Board add an additional prompt to its hearing notice questions that seeks evidence on injury to these beneficial uses and the impact of any such injuries on whether the WaterFix Change Petition is or is not contrary to present California policy upholding a human right to water.

By expressly including these interests in the scope of Part 1, the State Water Board will gain the benefit of a fuller spectrum of potential human injuries to all beneficial and designated users of water in the Legal Delta as well as in upstream locations, and one that is cognizant of the broad framework of California water policy. The evidence received by the Board will make the evidentiary hearing process more comprehensive and yield an administrative record that is more robust and supportive of the decision the Board makes on the WaterFix Change Petition.

THE BOARD SHOULD MAKE RESOURCES AVAILABLE TO ENSURE FULL PARTICIPATION BY ENVIRONMENTAL JUSTICE INTERESTS AND AVOID UNDUE HARDSHIP AND DE FACTO EXCLUSION

The Board's mission is "to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations." See: http://www.swrcb.ca.gov/about_us/water_boards_structure/mission.shtml (last visited, January 22, 2016). As a public agency, the Board depends on input, questions, and feedback from the general public. By hearing from different perspectives, the Board is better able to make informed decisions that consider the impact of proposed actions affecting water on all Californians. The Board does not currently, to the knowledge of EJCW, make provision for the provision of resources to qualified parties in its proceeding. We believe it should, in general and in this particular proceeding.

By contrast, the California Public Utilities Code allows qualified parties in proceedings before the California Public Utilities Commission (Commission) to request compensation for their participation (allowable fees and costs). The Commission has instituted an Intervenor Compensation Program, which is intended to ensure that individuals and groups that represent otherwise underrepresented utility customers have the financial resources to bring their concerns and interests to the Commission during formal proceedings.²

² See, generally, <http://www.cpuc.ca.gov/icomp/> (last visited, January 22, 2016).

The Commission's Intervenor Compensation Program Guide³ summarizes the program, as follows:

The requirements for eligibility to request compensation through this program are set forth in California Public Utilities Code Sections 1801–1812. When an individual or group meets the eligibility requirements, that individual or group is considered an intervenor for the purposes of the Program. Notably, the Intervenor Compensation Program only provides compensation for reasonable costs incurred by intervenors as a result of their substantial contribution to CPUC proceedings in which they participated. Compensation is usually granted after the proceeding or a phase of the proceeding has concluded.

As in proceedings before the California Public Utilities Commission, the general public and those representing traditionally underrepresented interests need support to ensure their full and adequate participation. Without these supports, full participation and adequate representation of the issues imposes a undue hardship and/or presents an obstacle that amounts to de fact exclusion from the proceeding. EJCW faces these challenges and implores the Board to make resources available to ensure EJCW is able to participate full, in terms of seeking and securing representation, marshaling evidence and witnesses, and more. Participation in this proceeding without, for example, intervenor compensation or its functional likeness, puts non-traditional, low-resource, public interest parties, like EJCW and those whose interests it represents, at a disadvantage, and risks replicating the unjust power dynamics that have given rise to the very inequities our participation aims to address.

Let this be the forum where all stand equal before the law. EJCW looks forward to discussing what resource supports are available from the Board or elsewhere, with the Board's facilitation and assistance, at the Prehearing Conference.

THE BOARD SHOULD ALLOW REASONABLE TIME, OVER AND ABOVE THE ONE HOUR TIME LIMIT, FOR DIRECT TESTIMONY IN SUPPORT ARGUMENTS SEEKING TO PUSH AND EXPAND UPON EXISTING LAW

The January 15, 2016, communication from the Board, titled, 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"), expresses the Board's interest in conducting an efficient proceeding, notwithstanding its complexity, and signals the Board's intention to enforce time limits "subject to some flexibility if special circumstances arise as the hearing moves forward. With reference to pages 34-35 of the Hearing Notice, the Board identifies a one-hour time limit for each party's witnesses to present a summary of their direct testimony.

EJCW shares the Board's interest in an efficient proceeding and will come to the Prehearing Conference prepared to present proposals to combine efforts with other parties to this proceeding and other time-saving measures. EJCW also anticipates that, given the number and potential novelty of the testimony EJCW now believes it will offer in this proceeding in support of arguments that expressly

³ See: <http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=2558> (last visited, January 22, 2016).

seek to push and expand upon existing law, presenting its direct testimony, even in summary form, would likely take several hours.

Therefore, for the reasons stated above, EJCW respectfully requests that the Board, at the outset of this proceeding, allow EJCW up to four (4) hours to present its direct testimony.

Conclusion

We look forward to discussing these issues and more at the January 28, 2016, Prehearing Conference.

Thank you for your consideration.

Sincerely,



Colin Bailey, J.D.
Executive Director

The Environmental Justice Coalition for Water