



AQUALLIANCE
DEFENDING NORTHERN CALIFORNIA WATERS



February 25, 2016

Via E-mail service and US Mail Service to Clifton Court LP
CWFhearing@waterboards.ca.gov

Hearing Chair Tam Doduc
Hearing Officer Felicia Marcus
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: Response of Environmental Parties to Petitioners' and others' requests for clarification on California WaterFix Project Pre-Hearing Conference Ruling

To whom it concerns:

The signatories below provide this written response to recent letters from the Petitioners (California Department of Water Resources and the U.S. Bureau of Reclamation; collectively, Petitioners; San Joaquin Tributary Authority; South Delta Water Agency et al; and State Water Contractors) seeking clarification and modifications of certain substantive and procedural issues affecting Protestants' preparation for Part 1 of the Petition's evidentiary hearing.

Our organizations are aware that the Board's Hearing Officers have granted Petitioners' request to delay the submittal of pre-hearing materials to March 30, 2016, and commence Part 1A hearings on May 5, 2016. We await the Board's next ruling on other scheduling matters, and

provide our views on scheduling and other related matters addressed in the recent correspondence the Board has received.

In their letter, Petitioners also sought additional clarifications:

- Petitioners also request “the ability to seek a modification of the Ruling to allow flexibility to the Executive Director in determining when to act on the 401 application should it become necessary at a future date.”
- Finally, Petitioners request that a passage in the ruling indicating that “appropriate flow criteria will be more stringent than petitioners’ current obligations and may well be more stringent than the petitioners’ preferred project” be struck from the Hearing Officers’ ruling, since determinations regarding flow criteria will be made during Part 2. We note too that State Water Contractors commented on February 22, 2016, that this passage is prejudicial and they requested this passage also be struck as part of reconsideration of the ruling.

1. The Board is not required to define the human use scope of Part 1 beyond what is contained in its Pre-Hearing Conference Ruling.

As Restore the Delta, California Water Impact Network, California Sportfishing Protection Alliance, AquAlliance, and Environmental Justice Coalition for Water stated in their protests submitted January 5, 2016, there is no specific definition of the scope of “legal users of water” in the California Water Code which is relevant to this change petition proceeding. The scope for “human uses” in Part 1 should therefore include evidence pertaining to injury to water rights holders as well as harms to other beneficial users of water.

We appreciate that the Board, in its email of February 25th granting initial schedule changes to the Petitioners, chose not to address substantive requests for clarification of what it meant by human uses, where the ruling specifically identified “flood control” and “environmental justice” concerns. We believe that it is unnecessary to address this matter.

There are plain meanings of terms like “flood control” and “environmental justice” in law and policy. For example, “flood control” is defined in Water Code Section 85057.5(a)(4) as involving programs that reduce risks from flooding to people, property and state interests. “Environmental justice” is the object of California Environmental Protection Agency (CalEPA) programs (see <http://www.calepa.ca.gov/EnvJustice/Legislation/>), and is defined in statute as “the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations and policies.” (Government Code Section 65040.12) The scopes of these terms are adequate for Petitioners’ and Protestants’ preparations alike.

The Board recently approved resolutions that address environmental justice concerns in relation to water quality. These should be helpful to Petitioners as they prepare their testimony. Using these types of human uses, Petitioners should prepare their testimony accordingly. It would be

redundant for the State Water Board to provide further guidance, when with basic research into State Water Board and CalEPA activities, the information may be readily found by Petitioners.

2. The Board should hold to its staggered approach to submittal and presentation of evidence, testimony, and witness lists.

Petitioners have received time extensions for submitting testimony and exhibits and the start of Part 1A, but seek to compress the time between when they begin presentation of their case and when other parties would be required to submit their testimony and evidence.

The Hearing Officers' Ruling makes clear that the Petition is incomplete.¹ The Petitioners' full presentation will be essential for establishing through their cases in chief whether they can demonstrate persuasively the completeness of their Petition. As a matter of due process, it is only fair for other parties to have the same amount of time or more to respond to that information as the Ruling originally provided, given that the Hearing Officers have granted Petitioners' request for a 30-day delay.

We further respectfully request that all subsequent dates in the Ruling's schedule recede at least 30 days so that, for example, the due date for receipt of any written procedural / evidentiary objections concerning Protestants' cases in chief would become April 15th at the earliest, etc. It would make no procedural sense to require such deadlines from the February 11th ruling be kept when Petitioners' written testimony and evidence has not been submitted; there would be nothing available on which other parties could base their motions, and would therefore be a waste of time, requiring later changes. Similarly, it makes procedural sense to preserve (or extend, where appropriate) the time spacings and sequencing for all other deadlines established in the Ruling, now that the Board has granted Petitioners' request.

3. The Ruling's treatment of the 401 application and certification process should stand.

The Petitioners appear to request the Hearing Officers reconsider their decision on how the Board will treat the 401 application for the California WaterFix project. If the Board were to allow the Executive Director to provide a 401 certification to the project before the evidentiary hearing process was completed, and it received any approval of a water right to divert, the project would be allowed to proceed to obtain a 404 permit from the Army Corps of Engineers and possibly begin construction before it had obtained a water right permit even to divert water at any of the north Delta intakes. This would be, in our view, illegal for three reasons. First, there exists no legally adequate CEQA document to support such a certification, and it is not a foregone conclusion that there would be one at some future time at which the Executive Director would decide the 401 certification. Second, no documentation exists to support the necessary finding regarding the Petition's impacts to water quality; indeed, the data show its operations are

¹ Ruling, February 11, 2016, pages 2, 5, 6, and 7; see also Cal. Code Regs., tit. 23, §794.

expected to violate water quality objectives in the Delta.² Finally, such an action would not be in the public interest, especially if water rights are denied to the project at the end of the Petition's evidentiary hearing.

The Ruling's treatment of the 401 application should stand as originally published on February 11, 2016.

4. "Appropriate flow criteria" required for the Petition by the California Water Code should be handled separately and preferably through the Bay-Delta Water Quality Control Plan process.

We agree with the San Joaquin Tributaries Authority (SJTA) comments that "the Board must hold a separate and independent hearing to determine what constitutes 'appropriate Delta flow criteria' under Water Code section 85086 before proceeding with any other aspect of the Petition." Our organizations have advocated, since filing our protests against the Petition, that the place to handle Delta flow criteria applicable to the Petition is the Bay-Delta Water Quality Control Plan update process. In our view, flow criteria, including those required under Water Code Section 85086, are a legislative responsibility of the State Water Board. It would be improper to develop them as "interim" flow criteria during the quasi-judicial Petition hearing process, since Section 85086 does not provide for interim flow criteria as part permit approvals for the Central Valley Project and State Water Project. Flow criteria are also policies, and as such their development by the State Water Board is subject to state policies concerning environmental justice (cited above) and the human right to water (Water Code §106.3).

We further agree with SJTA that the Board and Hearing Officers need to clarify this issue, including any scheduling challenges it will pose, and we specifically and respectfully urge the Board to conduct a separate, independent process for determining "appropriate Delta flow criteria" that would apply in the Delta and to the Petition project's operations. We do not support including this flow criteria development process in the context of the Petition's hearing process. But if the Board decides to follow that path, the Hearing Officers must factor that into Part 1 and Part 2 scheduling.

5. Given the Petitioners' announced schedule for ESA-CESA and NEPA-CEQA compliance, it appears that further delays in scheduling Part 2 hearing are likely.

The fishery services informed the Petitioners to expect the vague date of "early September 2016" for issuance of the final biological opinion for the California WaterFix project. "Assumptions for this target date include that the current working draft of the BA [biological assessment] is sufficient for the purposes of formal consultation; the peer review process does not result in significant changes to the information supporting the consultation process; and the project as described in the current working draft of the BA avoids jeopardy to listed species and/or adverse modification of critical habitat."

² See EWC comments on California WaterFix project water quality impacts, pages 51-83. Online at <http://ewccalifornia.org/reports/comments-rdeir-dseis-10-30-2015.pdf>.

Reading between the lines, it seems to us that the qualifying assumptions for completion of the biological opinion introduce significant uncertainties into that target date. Not the least of these is that the draft biological assessment is “sufficient” for formal consultation given that it appears that new modeling has been performed and that we have not had a chance to review the assessment to determine whether it has findings that point to jeopardy or not.

Slippage in the schedule due to failure of these assumptions will envelop CESA and CEQA-NEPA compliance. The CESA completion date provided by California Department of Fish and Wildlife to the Petitioners is likely to slip. Moreover, a completed biological opinion is required for completion of the Final EIR/EIS on the Petition project since determination and incorporation of reasonable and prudent alternatives must be factored into the Final EIR/EIS. However, Petitioners fail to take account of this in establishing June 2016 as the time by which the Final EIR/EIS would be completed, with Bureau of Reclamation issuance of a Record of Decision by “late September 2016.” It is illogical from a due process standpoint to consider the Final EIR/EIS completed without prior completion and incorporation of the biological opinion and still comply with NEPA/CEQA due process requirements.

We also reiterate that we understand from the pre-hearing conference that Part 2 hearings on the Petition cannot and should not start until after the state of California has issued a Notice of Determination for the Petition’s Final EIR/EIS. It is our understanding that the Final EIR/EIS cannot be completed until some time after September 2016, when the biological opinion has been issued by the fishery services, not June 2016. It will take considerable time for parties to review the documents and develop testimony. And that depends greatly on the viability of assumptions that went into how Petitioners determined the September 2016 date.

6. Alternative, the Hearing Officers Should Cancel the Incomplete Petition

Last, we note that Petitioners’ chronic failure to meet deadlines associated with this Petition strongly points to the fact that they are not prepared for these proceedings. While Petitioners have testified that it is important to expedite these hearings, they have failed as of yet to provide a complete Petition, as discussed in the Hearing Officers’ February 11th Ruling. Every failure by Petitioners to follow through on their Petition translates into hundreds of people’s schedules having to change, untold hours of attorney and staff time expended by Protestants (many of whom have very limited or no budget for this proceeding), as well as a burden on State Water Board staff who have other pressing tasks to perform, such as updating the Water Quality Control Plan. Given what has occurred thus far, it appears scheduling and rescheduling will continue if the Petitioners are left to their own devices. Therefore, in the interest of State Water Board efficiency as well as in light of the obvious incompleteness of the Petition, we respectfully request that the Board cancel the Petition, as authorized under Water Code sections 1701.4 and 1703.6 (or other applicable authority). Petitioners may resubmit the Petition at such time when they are prepared to follow through with the hearing process in accordance with procedures described in the Water Code and other applicable authority.

Thank you for the opportunity to comment.

Sincerely,



Barbara Barrigan-Parrilla
Restore the Delta



Jonas Minton
Planning and Conservation League



Bill Jennings
California Sportfishing Protection Alliance



Carolee Krieger
California Water Impact Network



Barbara Vlamis
AquAlliance



Colin Bailey
Environmental Justice Coalition for Water



E. Robert Wright, Counsel
Friends of the River



Michael Brodsky
Save the California Delta Alliance



Kyle Jones
Sierra Club California

cc: Revised service list (February 10, 2016) via email and US Mail to Clifton Court LP.