



FRIENDS OF THE RIVER

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September 21, 2017

Via Email

Tam Doduc, Hearing Officer
Felicia Marcus, Hearing Officer
State Water Resources Control Board
1001 I Street
Sacramento, CA 94596
CWFhearing@waterboards.ca.gov

Re: Agenda Topics for October 19, 2017, Pre—Hearing Conference to discuss Part 2 procedural issues

Dear Hearing Officers Doduc and Marcus:

Protestants Friends of the River and Sierra Club California respectfully request that the following be pre-hearing conference agenda topics to be discussed at the Pre-Hearing Conference on October 19, 2017:

NEED TO ADDRESS CEQA ISSUES

The August 31, 2017, State Water Board Ruling states with respect to CEQA (Ruling p. 12) that:

In particular, we would like to remind the parties that, consistent with the State Water Board's more limited role as a responsible agency under CEQA, the issue of whether the FEIR/EIS for the Water Fix Project satisfies CEQA or NEPA requirements is not a key hearing issue, and testimony on that issue will not be admitted.

The same Ruling goes on to say (at p. 12) that: "Parties to Part 2 of the hearing should submit exhibits and testimony responsive to the following issues that will be considered during this portion of the hearing:"

[deletions]

(Ruling, p. 13) 5. Should the Final Environmental Impact Report be entered into the administrative record for the petition?

So the parties are told to submit exhibits and testimony responsive to the issue of whether the FEIR should be admitted into the administrative record on one page of the Ruling while being told on the previous page of the same Ruling that testimony on the CEQA issue will not be

admitted. Perhaps the State Water Board is trying to confine the parties to one-word answers on the issue such as yes or no?

This attempted suppression of CEQA issues is directly contrary to the full environmental disclosure purposes of CEQA. CEQA requires that “an agency must use its best efforts to find out and disclose all that it reasonably can” about the project being considered and its environmental impacts. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 412, 428 (2007); 14 Cal. Code Regs 15144. Preliminarily, here, the subject FEIR/S as the State Water Board knows from previous filings received a failing grade from the Environmental Protection Agency. The Water Fix EIR is presently the target of 18 CEQA lawsuits filed on or before August 21, 2017.

One of the many deficiencies in the CEQA documentation for the project is the absence of the required accurate, stable, and finite project description. Pursuant to CEQA, “[a]n accurate, stable and finite project description is the *sine qua non* [absolutely indispensable requirement] of an informative and legally sufficient EIR. However, a curtailed, and enigmatic or unstable project description draws a red herring across the path of public input. Only through an accurate view of the project may the public and interested parties and public agencies balance the proposed project’s benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives.” (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654 [internal citations omitted].)

The inaccurate, unstable, shifting project description is evidenced by the August 31, 2017 Ruling, admitting (at p. 7) that “SCDA [Save the California Delta Alliance] has raised legitimate questions concerning whether some of the proposed operating criteria have changed.” The Ruling (at p. 7) directed:

To eliminate any confusion concerning petitioners’ current proposal, we direct the petitioners to provide an updated summary of operating criteria that makes explicit whether particular criteria are proposed conditions of operation or are set forth solely as modeling assumptions. The summary shall be submitted by petitioners by September 8, 2017.

The letter submitted by DWR on September 8 was nonresponsive, as reflected by the Motion to Strike submitted by the Natural Resources Defense Council, The Bay Institute, and Defenders of Wildlife on September 13, 2017, and joined in by the South Delta Water Agency on September 15, 2017.

Other significant changes in the project and circumstances include the September 19, 2017, reported decisions by the Westlands Water District and Los Angeles to not participate in the Water Fix Project. This is additional evidence of the need to consider alternatives such as conservation and recycling to the project that would eliminate the claimed need for the new North Delta diversion. As either a lead or responsible agency, the State Water Board needs to consider requiring a subsequent EIR under CEQA, Public Resources Code § 21166(a), (b), and (c), because substantial changes are proposed in the project, substantial changes occur with respect to the circumstances under which the project is being undertaken, and new information has become available. *Accord*, 14 Code Cal. Regs (CEQA Guidelines) § § 15162; 15096(e)(3).

In conclusion, the attempt by the State Water Board reflected in the August 31 Ruling to blind itself to new information and developments demonstrating the inadequacy of the FEIR/S and the need for a subsequent EIR, if continued, constitutes a failure to proceed in the manner required by CEQA.

NEED FOR A STAGGERED BRIEFING SCHEDULE

The Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute submitted their Objection to and Petition for Reconsideration of August 31, 2017 Ruling regarding Scheduling of Part 2 on September 6, 2017. That filing set out the reasons why staggered briefing requiring the Water Fix proponents to file and serve their cases in chief first is necessary. The reasons set forth requiring staggered briefing include the lack of legally adequate biological opinions analyzing Water Fix operations; the inconsistencies between those opinions and the incidental take permit issued under the California Endangered Species Act; and the continued delay by the State Water Board in updating the 1995 Bay Delta Water Quality Control Plan.

Now there is more. The updated summary of operating criteria was submitted by DWR pursuant to the August 31, 2017 Ruling. That summary is inadequate and the subject of well-reasoned motions to strike. And now, on September 19, 2017, Westlands Water District and Los Angeles have determined not to participate in funding the Water Fix. Other beneficiaries will be voting on whether to be in or out within the next month. Uncertainties abound, ranging from operations, to whom, if anyone, is willing to pay for the project. It would be difficult to have a more uncertain project. It is imperative that project proponents file and serve their cases in chief first so that the protestants and the public have a fair opportunity to respond to an accurate project proposal.

Sincerely,



E. Robert Wright
Senior Counsel
Friends of the River