

September 22, 2017

Felicia Marcus
State Water Board Chair
BDCP Alternative 4A (California WaterFix) Project Co-Hearing Officer

Tam M. Doduc
State Water Board Member
BDCP Alternative 4A (California WaterFix) Project Co-Hearing Officer

Re: BDCP Alternative 4A (California WaterFix) Topics for Part 2 Pre-Hearing
Conference.

Delta Alliance believes that there are two appropriate topics for consideration at the pre-hearing conference: 1) How DWR will pay for costs expended by Protestants on expert witnesses if DWR withdraws or cancels the Petition prior to the Board taking final agency action on the change petition (issuing or denying a permit); and 2) Discussion of the “precautionary principle” standard of proof.¹

I. DWR’s Responsibility to Pay for Protestants’ Part 2 Experts

The current deadline for Protestants’ submission of written expert testimony and exhibits is November 30, 2017, and the deadline for Protestants’ general identification of experts and areas of expert testimony is October 13, 2017.

In order to have testimony and exhibits ready on time, parties must hire experts and begin work (and substantial expenditures) on expert presentations now. For example, Delta Alliance received a call from one of its experts wanting a yes or no answer this morning. If Delta Alliance doesn’t book the expert (and pay the retainer) within the next few days, it will lose the opportunity to present this expert. Competent experts are busy.

But that presents Petitioners with a Hobson’s Choice. It is more likely than not that expert testimony developed between now and November 30, 2017, will never be heard. The final death knell for the tunnels may not come until close to, or even beyond November 30. Protestants cannot forego their preparation and meeting deadlines in the hopes that the governor will see the light and declare the tunnels officially dead before November 30.

The tunnels may well take on the persona of the Yellow Man character in David Lynch’s dark masterpiece *Blue Velvet*. The character, dressed in a yellow suit, was shot in the brain at close range early in the film. However, the Yellow Man remained standing,

¹ By providing these good faith suggestions as requested by the Board, Delta Alliance does not acquiesce in the ongoing unlawful conduct of these hearings. The Board has a continuing non-discretionary ministerial duty to cancel the petition and should do so immediately.

blood oozing from the bullet hole in his temple, down his cheek and all over his yellow suit for the remainder of the film.²

Because DWR insists on going forward with hearings on what is at best a very shaky project, DWR should bear the costs of all expenditures made by Protestants from this point forward if DWR ultimately withdraws or cancels the Petition before the Board makes a decision to issue or deny the permit. Of course, if somehow the project survives to a final Board decision then DWR would not have to pay for Protestants' experts through the Board's offices.

However, section 1021.5 would not be available to Protestants if DWR withdraws the Petition because the tunnels have failed outside these hearings.

Delta Alliance believes that the pre-hearing conference would be the appropriate venue to discuss DWR's reimbursement arrangements with Protestants.

In the alternative, the Board could *sua sponte* continue the due date for general identification of experts from October 13 to November 17 and continue the following dates similarly by approximately 30 days each. The Metropolitan Water District is scheduled to vote on the tunnels on October 10. It does not make sense to force Protestants to expend money on experts before that date. But Protestants cannot afford to wait until after October 10 to begin preparation unless due dates before the Board are extended. After that date, there may be no project.

There are also two lawsuits that may be decided dispositively against the tunnels on or before November 17. Ordinarily validation actions (which the governor has instituted to get court permission to issue state bonds) and CEQA actions (which multiple plaintiffs have initiated against the state) take many months, if not years, to conclude. However, with regard to the tunnels, dispositive motions that would strike down the tunnels and result in early final judgments will be heard in both cases on or before November 17. Although the tunnels may have already turned into Yellow Man, it is also possible that litigation can give Yellow Man a decent burial in the near future.

These sorts of considerations are particularly appropriate in scheduling these hearings because of "DWR's lack of clarity on the need to begin the hearing process . . ." (February 11, 2016, Pre-Hearing Conference Ruling, p. 1.). Memories will not fade and evidence will not be lost in 30 days.

Delta Alliance will respectfully agree to disagree with the Board on characterizing such a continuance as "delay." However, finding out if there is any prospect of a project or not before forcing expenditures on experts might save a lot of parties and the Board a lot of grief and a lot of money—regardless of how the brief interregnum is named.

II. The Parties Should Discuss The Applicable Standard of Proof

In Act One of these hearings, DWR insisted on going forward with their plot to conceal the true nature of the project description. DWR misled the Board to believe that project operating criteria (such as flow in cfs at Rio Vista, Bypass Flow at the NDD, South Delta summer pumping, etc.) were part of the description of the Project that the Board has been considering for over a year. After playing cat and mouse for more than a year, DWR was finally cornered by Delta Alliance's August 3, 2017, letter and admitted in their letter of September 8, 2017, that there are no operating criteria at all before the Board.

The Project description, as far as these proceedings are concerned, consists of cartoon-level 10% engineering drawings and a promise to meet D-1641. That's it.

In Act Two, DWR proposes to go forward based on suggestions that there is a lot

² Although filmed on location in Wilmington North Carolina, some of the quaint residential neighborhoods in the film bear a striking resemblance to small California Central Valley towns in the heart of the Westlands Water District.

of information about the project publicly available on the internet. DWR makes the absurd suggestion that ample information exists to conduct an evidentiary hearing because materials not submitted into evidence, not a part of the Project application, and explicitly excluded from the Project description can help participants understand what is being proposed. But none of that information is before the Board and DWR has expressly disavowed any potential Board permit conditions that would incorporate that information.

The Board has mentioned that all of this will place a higher burden on DWR. What burden? Is the Board proposing to suspend the substantial evidence standard? Under these circumstances, should DWR be required to bear the burden of production and burden of persuasion that the precautionary principle has been satisfied? A “precautionary standard” would require DWR to show beyond a reasonable doubt that the project will not harm the environment or other legal users of water. Absent operating criteria of any kind, perhaps this would be a workable standard of proof. Under the precautionary standard, DWR would have to show that there is no possible operation of the tunnels that could harm the environment or legal users of water.

Perhaps other parties will have different suggestions for filling in the details of the Board’s suggestion that DWR will have to meet a higher burden because of the way it has presented its application.

Sincerely,


Michael A. Brodsky
Counsel for Petitioner
Save the California Delta Alliance

STATEMENT OF SERVICE

**CALIFORNIA WATERFIX PETITION HEARING
Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

I hereby certify that I have this day submitted to the State Water Resources Control Board and caused a true and correct copy of the following document(s):

Delta Alliance's September 22, 2017, suggested Part 2 Pre-Hearing Conference Topics

to be served **by Electronic Mail** (email) upon the parties listed in Table 1 of the **Current Service List** for the California WaterFix Petition Hearing, dated September 12, 2017, posted by the State Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

I certify that the foregoing is true and correct and that this document was executed on September 22, 2017, at Discovery Bay, California.



Signature: _____

Name: Michael A. Brodsky

Title: Attorney

Party/Affiliation:

Save the California Delta Alliance, et al.

Address:

Law Offices of Michael A. Brodsky

201 Esplanade, Upper Suite

Capitola, CA 95010