



January 17, 2018

State Water Resources Control Board Hearing Officers
WaterFix Hearing Team

Re: California Water Fix Hearing Part 2: JOINDER IN AND CEQA SUPPLEMENT TO COUNTY OF SACRAMENTO et al.'s MOTION TO STAY OR CONTINUE WATERFIX PART 2 HEARING

Dear WaterFix Hearing Officers and Hearing Team:

Protestants Friends of the River (Friends) and Sierra Club California (Sierra Club) hereby join, and make this California Environmental Quality Act (CEQA) supplement to, County of Sacramento et al.'s Motion to Stay or Continue Waterfix Part 2 Hearing. That Motion was filed January 15, 2018.

Among other things, the Motion asserts that “Even in the absence of direct cause-and-effect evidence, however, the information already disclosed establishes an appearance of pre-decisional bias and collusion so compelling that this proceeding has been irrevocably tainted.” (Motion, p. 17:2-3.)

Actually, there appears to be *actual* pre-decisional bias here, given what the State Water Board has done with respect to its CEQA duties during this hearing process. With one hand, the Hearing Team had secret, private, *ex parte* meetings with DWR about CEQA. It took a Public Records Act Request to discover the *ex parte* meetings almost 2 years after they occurred and after the conclusion of Part 1 of the Water Fix hearing. With the other hand, the Hearing Officers have done their best to prohibit protestants from raising and discussing CEQA issues in public.

So Board staff meets about CEQA with petitioner DWR in secret. Board Hearing Officers try their best to prohibit protestants from raising and discussing CEQA issues in public.

An important key here, as is true so often, is the timeline. Here is a summary of the timeline:

On November 24, 2015, protestant Friends, and three other protestants, Restore the Delta, California Sportfishing Protection Alliance, and Environmental Water Caucus, submitted a 12 page letter to State Water Board Members, Chief Counsel, and Staff. The letter contended, among other things, in a heading, that “An Adequate Draft EIR/EIS must be Prepared Because the Water Fix SDEIS is Inadequate and the EPA Has Determined it to be Inadequate,” followed by four pages of text and citations. The cc’s at the end of letter show that it was copied to James Mizell for DWR, and Amy Aufdemberg for Reclamation.

On January 4, 2016, protestants Friends and Sierra Club filed their joint protest. Pages 8-12 of the attachments addressed the inadequacies of the Draft EIR/S. Pages 13-22 addressed the deficiencies under CEQA of the alternatives analyses.

Also on January 4, 2016, there was an *ex parte* meeting between 11 AM and 12:30 PM at Cal EPA room 1410. The meeting included Samantha Olson, Dana Heinrich, Rich Satkowski, and John Gerlach (Water Board Hearing Team members) and Kenneth Bogdan and Cassandra Enos (DWR.) The subject was “Water Fix EIR Discussion.”

On January 15, 2016, the Hearing Officers issued their instructions to all participants. The instructions included under “CEQA Compliance” (at p. 5):

“As the CEQA lead agency, DWR is responsible for preparing an EIR that satisfies CEQA requirements. As a responsible agency under CEQA, the State Water Board’s role is more narrowly circumscribed. A responsible agency must consider the CEQA document prepared by the lead agency before making its own decision whether or under what conditions to approve a project. As a general rule, a responsible agency must assume that the CEQA document prepared by the lead agency is adequate for use by the responsible agency. (Cal. Code of Regs., tit. 14, § 15096, subd. (e).) *Accordingly, the adequacy of DWR’s EIR for the WaterFix Project for purposes of CEQA compliance is not a key hearing issue, and the parties should not submit evidence or argument on this issue.*” (Emphasis added.)

The Hearing Officer’s instructions also included (at p. 6) the *ex parte* prohibition which they have included in virtually every Ruling they have issued:

“Ex Parte Communications

Parties and interested persons are reminded that *ex parte* communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Please be sure to copy the parties identified in Table 1 of the Service List (or as it may be amended) on

any correspondence to Board Members and the hearing team related to this matter.”

On January 21, 2016, protestants Friends, Sierra Club, and Planning and Conservation League submitted their 22 page “Written Comments for January 28, 2016, Pre-Hearing Conference.” After the cover page and the table of contents, pages 3-5 of the Comments addressed the CEQA issue contending that “An Adequate Draft (or Subsequent) EIR/EIS must be Prepared and made part of the Hearing Record before Commencing any part of the Evidentiary Hearing.” Pages 5-8 addressed the CEQA issue contending that “The Responsible Agency Excuse does not justify the Failure to prepare and circulate the Adequate Draft or Subsequent EIR required by CEQA.” Pages 8-9 addressed the CEQA issue that “The Board must Develop, Circulate, and Consider the Required Range of Reasonable Alternatives before Commencing the Evidentiary Hearing.” Pages 9-12 addressed the CEQA issue that “Alternatives Increasing Delta Flows must be Developed and Considered.” Pages 13-14 addressed the CEQA issue that “The Board must develop and Evaluate Alternatives that will Increase Delta Flows in order to comply with CEQA.” Pages 14-15 addressed the CEQA issue that “Expert Federal and California Agencies have also Found the Current BDCP Alternatives Analysis Deficient.”

On January 25, 2016, there was an *ex parte* meeting between 2 PM and 4 PM at a DWR office in the Bonderson Building. The meeting included Diane Riddle, Dana Heinrich, Rich Satkowski, and John Gerlach (Water Board Hearing Team members), Kenneth Bogdan and Cassandra Enos (DWR,) Chandra Chilmakuri, and Jennifer Pierre (by phone)(DWR consultants.) The subject of the meeting was “Preparation of the Final EIR/EIS.” *There is more here. Jennifer Pierre was actually a witness in Part 1 of the Hearing.* Her written testimony included her claim that alternatives have been considered (written testimony, pp. 10-12). Witness Jennifer Pierre also participated in *ex parte* meetings on April 21, May 26, June 16, June 24, July 14, and October 4, 2016. Her participation in the July 14 and October 4 *ex parte* meetings took place after Friends and Sierra Club filed objections on July 11, 2016, to her testimony.

On February 11, 2016, the Hearing Officers issued their pre-hearing conference Ruling. The Ruling (at p. 8) included the following admonition to not keep bringing up CEQA:

“CEQA Compliance

In our January 15, 2016 letter regarding the issues to be discussed at the pre-hearing conference, we explained that the State Water Board’s role as a responsible agency under CEQA is limited, and for that reason the adequacy of the CEQA documentation for the WaterFix for purposes of CEQA is not a key hearing issue. Despite this admonition, several parties

argued that the draft Environmental Impact Report (EIR) that DWR has prepared for the project is inadequate, and that an adequate document must be prepared before the State Water Board may hold a hearing on the change petition.”

On February 17, 2016, Friends, the Sierra Club, and six other protestants¹ submitted a letter objecting to the muzzling of CEQA comments including (at p. 3):

Finally, our use of the word “*astonishing*” at the outset of this letter is reflective of the fact that the Board’s admonishments to protestants and attempts to suppress CEQA comments and arguments during this process fly in the face of the informational 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. The State Water Board needs to turn around and embrace CEQA instead of trying to silence parties trying to raise CEQA issues.

What we only learned a few days ago is that the Hearing Officers were *suppressing* CEQA comments from protestants during the same time the Hearing Team was having *ex parte* meetings with petitioner DWR on critical substantive, controversial, hearing issues including whether there had been CEQA compliance.

On March 4, 2016, the Hearing Officers issued another admonition (at pp. 6-7) against raising CEQA issues:

“Comments of Friends of the River et al.
Friends of the River and a number of other environmental organizations submitted a letter dated February 17, 2016, responding to the discussion of CEQA compliance contained in our February 11 ruling. This letter essentially repeats the arguments that Friends of the River and two other organizations made in a letter dated January 21, 2016, except that the more recent letter is addressed to all of the State Water Board Members, not just the hearing officers in this proceeding. The arguments raised by Friends of the River et al. have been reviewed and considered and addressed in our February 11 ruling. In addition, the hearing officers have consulted with the other Board Members and kept them apprised of procedural matters pertaining to this proceeding during closed sessions permitted under the Bagley-Keene Open Meeting Act. (See Gov. Code, § 11126, subd. (c)(3).) In our February 11 ruling, we strongly discouraged follow-up comments on rulings and duplicative motions such as the most recent letter submitted by Friends of the River et al. We will continue to provide parties ample opportunities to be heard and to participate in this hearing; however, all parties should be aware that in the future, we may not acknowledge or respond to repetitive arguments.”

¹ The other 6 protestants on the letter were Planning and Conservation League, Environmental Water Caucus, Restore the Delta, California Water Impact Network, California Sportfishing Protection Alliance, and Save the California Delta Alliance.

The Hearing Officers have made similar rulings about CEQA over and over and have likewise repeated the prohibitions *on ex parte* communications.

Most recently, in their January 4, 2018 Ruling (at pp. 4-5), the Hearing Officers excluded testimony in Part 2 of the Hearing about CEQA and the inadequacy of the Water Fix environmental documents:

“California Sportfishing Protection Alliance

Pages 44 through 49 of Bill Jennings’s testimony on behalf of CSPA (CSPA-200) contains discussion of the legal adequacy of the WaterFix CEQA-NEPA document. Pages 6 and 7, 19 through 21, and 24 of Marc del Piero’s testimony on behalf of CSPA (CSPA-208) similarly contain discussion of the WaterFix CEQA-NEPA document’s legal adequacy. We have reminded the parties repeatedly—most recently in our August 31, 2017 ruling—that the issue of whether the FEIR/EIS for the WaterFix Project satisfies CEQA or NEPA requirements is not a key hearing issue and that testimony on that issue will not be admitted. Accordingly, we will strike that discussion from these testimonies.”

“South Delta Water Agency

John Nomellini, Sr.’s testimony (SDWA-300) on behalf of South Delta Water Agency contains an extended discussion regarding the legal adequacy of the WaterFix Project’s FEIR/EIS and allegedly pre-decisional commitments by the petitioners. We reiterate that the legal adequacy of the CEQA- NEPA document is not a key issue in this proceeding. Similarly, alleged procedural irregularities in the development of that document and in the petitioners’ respective approval decisions are beyond the scope of this proceeding. Framing such issues in terms of a public interest in legal compliance does not put them within the scope of Part 2. Those portions of Mr. Nomellini’s testimony will be stricken accordingly.”

In conclusion, meeting *ex parte* with petitioner DWR to discuss CEQA and the adequacy or inadequacy of the EIR while attempting to muzzle protestants, and ignoring CEQA comments from protestants is powerful evidence of actual, let alone an appearance of, pre-decisional bias and collusion.

We respectfully request that the County of Sacramento et al.’s Motion to Stay or Continue WaterFix Part 2 Hearing be granted.

Respectfully submitted,



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