

CWFhearing

From: Tim Stroshane <spillwayguy@gmail.com>
Sent: Friday, January 22, 2016 10:40 AM
To: Motecuzoma Sanchez; Aaron Ferguson
Cc: CWFhearing
Subject: Fwd: Procedural issues associated with Pre-Hearing Conference, January 28, 2016 - RTD, EJCW and EWC - Part 2
Attachments: 20160122 RTD EJCW EWC Pre-hearing Letter.pdf

Apologies to you for having incorrectly spelled email addresses in my service list. I've corrected them now.

Best,

Tim Stroshane

Begin forwarded message:

From: Tim Stroshane <spillwayguy@gmail.com>
Subject: Procedural issues associated with Pre-Hearing Conference, January 28, 2016 - RTD, EJCW and EWC - Part 2
Date: January 22, 2016 at 10:31:15 PST
To: Tim Stroshane <tim@restorethedelta.org>
Cc: Curtis Creel <ccreel@kcwa.com>, Craig S J Johns <cjohns@calrestrats.com>, "Douglas W. Wilhoit" <doug@stocktonchamber.org>, Douglas Headrick <douglash@sbymw.com>, Debbie Webster <edofficer@cvcwa.org>, Erik Gustafson <Erik.gustafson@chicoca.gov>, Brandie Owusu-Spencer <eyv209@gmail.com>, George Torgun <george@baykeeper.org>, Gustavo Medina <gustavo.medina@asm.ca.gov>, Ger Vang <gvang@lfcempowerment.org>, Jeff Davis <JDavis@sgpwa.com>, Jim Cox <jimcoxsportfishing@yahoo.com>, Kirby Brill <kbrill@mojavewater.org>, Kathy Mannion <kmannion@rcrcnet.org>, A Wearn <awearn@nrdc.org>, Rachel Zwillinger <rzwillinger@defenders.org>, Katelyn Roedner <kroedner@ccstockton.org>, Larry Ruhstaller <larryruhstaller@gmail.com>, Luis Magana <Lmagana@afsc.org>, Mark Gilkey <mgilkey@tlbwsd.com>, Mark Krause <mkrause@dwa.org>, Motecuzoma Sanchez <mtecps@gmail.com>, Matthew Stone <mstone@clwa.org>, Michael Van Zandt <mvanzandt@hansonbridgett.com>, Karl E Nate Knodt <nknodt@sanjoaquinrtd.com>, office@ecosacramento.net, Roger Mammon <r.mammon@att.net>, Robert C Cheng <rcheng@cvwd.org>, Rebecca Sheehan <rsheehan@mwdh2o.com>, Ryan Wulff <Ryan.Wulff@noaa.gov>, Steve Rotherth <srotherth@americanrivers.org>, Terri Crain <tcrain@scvchamber.com>, Tomas Torres <torres.tomas@epa.gov>, Martha V Vielma <vielmam07@yahoo.com>, Wes Rhea <wes@visitstockton.org>, Mike Savino <wirthsoscranes@yahoo.com>, Hengsothea Ung <usothea@apsaraonline.org>, Ryan Camero <rcarcamero@gmail.com>, Rogene Reynolds <reynolds6568@gmail.com>, Cynthia J Lau <cynthiajlau@gmail.com>, Ronald Forbes <bluse03@yahoo.com>, Joan Buchanan <bu4567@aol.com>, Paul Gosselin <pgosselin@buttecounty.net>, Tim Stroshane <tim@restorethedelta.org>

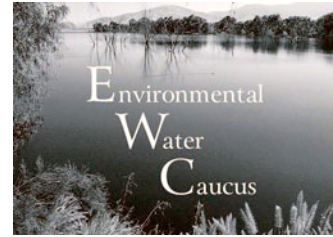
To the California WaterFix Hearings Service List:

On behalf of Restore the Delta, the Environmental Justice Coalition for Water, and the Environmental Water Caucus, I respectfully submit this letter concerning procedural issues associated with the Pre-Hearing Conference, January 28, 2016. This message is part 2 of our transmittal, given recipient limitations with Google Mail.

Please contact me should there be any questions.

Regards,

Tim Stroshane
Policy Analyst
Restore the Delta



January 22, 2016

Submitted to CWFhearing@waterboards.ca.gov and California WaterFix Service List

Tam Doduc
Felicia Marcus
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, and Board Staff organizing the California WaterFix Hearing process:

Restore the Delta's (RTD's) mission is to save the San Francisco Bay-Delta Estuary for our children and future generations, a grassroots campaign of residents and organizations committed to restoring the Sacramento-San Joaquin Delta so that fisheries and farming can thrive there together. We fight for Delta waters that are fishable, swimmable, drinkable, and farmable, able to support the health of the estuary, San Francisco Bay, and the ocean beyond.

The Environmental Justice Coalition for Water (EJCW) is a statewide coalition of grassroots groups and intermediary organizations whose mission is to educate, empower, organize and nurture a community-based coalition that serves as a public voice and effective advocate for environmental justice issues in California water policy.

The mission of the Environmental Water Caucus (EWC) is to achieve comprehensive, sustainable water management solutions for all Californians, employing political, legal and economic strategies to restore ecological health, improve water quality and protect public trust values throughout the San Francisco Bay-Sacramento/San Joaquin Delta estuary and the Central Valley/Sierra Nevada watersheds.

We write to raise several procedural issues with the State Water Board's Notice of Petition and Public Hearing in advance of the January 28th pre-hearing conference on the change petition submitted for the California WaterFix Tunnels Project (Tunnels Petition). We incorporate by reference our earlier, jointly written letter with Friends of the River and the Environmental Water Caucus, dated November 24, 2015, as well as echo the comments and concerns of today's letter to you from California Water Impact Network, California Sportfishing Protection Alliance, and AquAlliance.

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At the Pre-Hearing Conference, the State Water Resources Control Board (the Board) should address whether it will:

- Delay processing the Tunnels Petition until the Board has revised the Bay Delta Estuary Water Quality Control Plan, and suspend ex parte rules for Tunnels Petition parties so that Tunnels issues can be included in revision of the Plan.
- Delay the evidentiary hearing on the Tunnels Petition until such time as deficiencies in the CEQA documentation supporting the petition are corrected.
- Complete the 401 certification only after revising the water quality control plan and repair of the deficiencies to the Tunnels Petition's EIR.
- Include in Part 1 beneficial uses and users of water (that is, not just water right owners) as legitimate "legal users of water."

Delay processing the Tunnels Petition until the Board has revised the Bay Delta Estuary Water Quality Control Plan, and suspend ex parte rules for Tunnels Petition parties so that Tunnels issues can be included in revision of the Plan.

Policy should govern plumbing, and precede construction. When a house is to be built, its plumbing facilities are mapped out and sized in advance of its construction. Professional builders do not build first, then plan later. That is a recipe for mistakes, poor management, increasing costs, and conflict between owner and builder.

This is analogous to the predicament in which the Board finds itself. The Board is asked by the Department of Water Resources (DWR) to approve a major water diversion project in the Tunnels Petition while having no adequate or revised Bay Delta Estuary Water Quality Control Plan to govern how and whether the Tunnels Petition could or should be approved.¹ Moreover, if the tunnels are permitted without an adequate and protective Bay Delta Estuary Water Quality Control Plan, there will be enormous political pressure on this Board and future boards to set standards that make the Tunnels full export conveyance facilities regardless of water availability conditions. A \$17 billion water conveyance project would not be allowed to go unused and become a stranded asset. RTD's joint letter of November 24, 2015², with California Sportfishing Protection Alliance and Friends of the River details our position on this issue. Today we ask that the Board include this issue on the agenda of the pre-hearing conference issues.

Moreover, ex parte rules now applied to parties involved in the Tunnels Petition process bar them from discussing the relationship of the Tunnels project to the future health of the Bay-Delta Estuary with State Water Board members and staff when Tunnels concerns bear on water quality control planning issues. This problem exists because the Board proposes to

¹ We respectfully remind the Board that the Board's own 2010 Flow Criteria Report found that flows at that time were found inadequate to protect and recover public trust resources in the Delta, an implicit criticism of both the 1995 Bay-Delta Estuary Water Quality Control Plan and Water Rights Decision 1641.

² Online at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/early_petition_comments/docs/fotr_ltrtoswrcb.pdf, pp. 9-12.

both prepare the Plan and conduct the evidentiary hearing (which requires ex parte restraints) simultaneously. This is an untenable and irrational restraint on free speech that must be suspended while the Bay-Delta Estuary Water Quality Control Plan is being prepared, an additional reason the Plan should move forward first. If both the Petition and the Plan go forward simultaneously, and ex parte rules are applied in the context of Plan preparation and public participation, the Plan will be the worse for it. RTD, EJCW and EWC ask that the Board include this issue on the agenda of the pre-hearing conference issue as well: Consider that ex parte rules be suspended during preparation of the Plan, and that the Plan must be completed prior to processing of the Tunnels Petition.

Delay the evidentiary hearing on the Tunnels Petition until such time as deficiencies in the CEQA documentation supporting the petition are corrected.

Similarly, through the Environmental Water Caucus, we have conveyed our deeply held belief that the CEQA documentation prepared to date by DWR is inadequate. Its inadequacy is sufficiently egregious that corrections to the documentation require re-issuance of another draft EIR on the Tunnels Project. Another draft EIR is required in order to ensure that an adequate EIR is available for all parts of the evidentiary hearing and that all parties have access to an adequate EIR record for sufficient evidence. In our view, the evidentiary hearing should be delayed until a corrected EIR is completed. We ask at this time that the Board include this issue on the agenda of the pre-hearing conference issues.

Complete the 401 certification only after revising the water quality control plan and repair of the deficiencies to the Tunnels Petition's EIR.

Our organizations understand that Board staff proposes to complete the 401 certification for the Tunnels Project separately from the evidentiary hearing process, but while also relying on evidence amassed during the hearing process. The 401 certification should not be completed by the Executive Director, including designation of the Least Environmental Damaging Practicable Alternative, until after the Bay-Delta Estuary Water Quality Control Plan is revised and the evidentiary hearing process is completed (and all the evidence from that process is amassed and evaluated). We ask at this time that the Board include this issue on the agenda of the pre-hearing conference issues.

Include in Part 1 beneficial uses and users of water (that is, users of water not entitled by usufructuary rights to divert or store water) as legitimate "legal users of water."

We challenge the Board's use in the Notice of Petition of the phrase "legal users of water." The Board appears in its Notice of Petition and of Public Hearing to imply that "legal users of water" means "water right holders," property 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 Tunnels Petition evidentiary proceeding.

There is 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, a subject which does 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). The phrase appears in Chapter 10.5, Article 1, dealing with temporary changes to water rights regarding water transfers. None of these applications of "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 "legal users of water" are instead known as "beneficial uses" or "beneficial users." Such users and uses are legally acknowledged for purposes of water quality regulation. The federal Clean Water Act and California's Porter-Cologne Water Quality Control Act come to mind. Besides investigating potential injuries from the Tunnels Petition to just owners of water rights, 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 issue 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 asking the question for Part 1 whether the project represented by the Tunnels Petition is "in effect a new water right?" We think the Tunnels Petition represents a new water right, and the Board should take note that, in addressing whether water is available for such a new water right, the Board must take account of its responsibility to update its order on fully-appropriated stream as called for in Water Code Sections 1205(b). This section indicates that a declaration by the Board 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. This means that beneficial uses (which include but are not limited to water rights claims) are the basis for determining that a stream is fully appropriated.

The Board's Water Right Order 98-08 notes a number of Central Valley streams that met that criterion at that time. 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 all beneficial uses and that they are not limited by definition to strictly water right property owners in the Water Code. We urge that the Board update this Order as soon as possible.

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 an additional prompt in the hearing notice questions that seeks evidence on injury to these beneficial uses and the impact of any such injuries on whether the Tunnels Petition is or is not contrary to present California policy upholding a human right to water. We ask at this time that you include this issue on the agenda of the pre-hearing conference issues.

Thank you for the opportunity to present our suggestions to the Board on what should be included in the agenda for the pre-hearing conference, and we look forward to participating.

Sincerely,




Barbara Barrigan-Parrilla
Executive Director
Restore the Delta



Tim Stroshane
Policy Analyst
Restore the Delta



Conner Everts
Facilitator
Environmental Water Caucus



Colin Bailey
Executive Director
Environmental Justice Coalition for Water

cc: Service List for the Tunnels Petition
Suzanne Womack and Sheldon Moore, Clifton Court, L.P (USPS delivered)