

CWFhearing

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Sent: Friday, January 22, 2016 11:57 AM
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Subject: Comments of PCFFA and IFR on California WaterFix
Attachments: PCFFA and IRF Comments on California WaterFix 1-22-16.pdf

Attached please find the comments of the Pacific Coast Federation of Fishermen's Associations and the Institute for Fisheries Resources on the California WaterFix in advance of January 28, 2016 Pre-Hearing Conference.

Please make the attached comment letter part of the public record in this matter.

Should you encounter difficulty opening the attached PDF, please contact our firm.

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January 22, 2016

Via Email and U.S. Mail

Felicia Marcus
Tam Doduc
State Water Resources Control Board
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CWFhearing@waterboards.ca.gov

Re: Comments of PCFFA and IFR on California WaterFix

Dear Ms. Marcus and Ms. Doduc:

Pursuant to the State Water Resources Control Board’s (“Water Board’s”) request, we present the following comments of the Pacific Coast Federation of Fishermen’s Associations (“PCFFA”) and Institute for Fisheries Resources (“IFR”) on the Water Board’s notice of its WaterFix proceedings. On January 5, 2016 PCFFA and IFR submitted a Notice of Intent to Appear at the Water Board’s hearings and participate in the evidentiary portion of the hearings through direct testimony.

I. Proposed Addition of Procedural Issues

A. California Environmental Quality Act Compliance

The Water Board has described its duty as a responsible agency under the California Environmental Quality Act (“CEQA”) in this proceeding as follows:

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.

Jan. 15 WaterFix Notice, p. 2. This position appears to overlook several important duties owed by responsible agencies under CEQA that impact these hearing procedures. As the Water Board

acknowledges, it must examine “the potential effects of the water right change petition on other legal users of water.” Those effects necessarily include the environmental impacts of the WaterFix project (“project”). And, those impacts must be understood before the Water Board can make an informed determination of the availability of water for the project, and the terms and conditions, including those needed to protect the environment, that should be imposed should the project be approved.¹ *Id.*

The Water Board is the key responsible agency for the project and cannot make these essential determinations before CEQA review is complete. Where the Water Board acts as a “responsible agency” under CEQA, Public Resources Code (“PRC”) section 21069 and CEQA Guidelines [14 California Code of Regulations (“CCR”)] section 15096, the Board must fully participate in the environmental review process, *independently assess the adequacy of the final environmental impact report*, “make the findings required by [CEQA Guidelines] Section 15091 for each significant effect of the project and . . . make the findings in Section 15093 [i.e., a statement of overriding considerations] if necessary.” CEQA Guidelines § 15096(h). CEQA directs that “no public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant environmental effects of the project unless the public agency makes one or more written findings for each of those significant effects, accompanied by a brief explanation of the rationale for each finding.” CEQA Guidelines § 15091(a).

CEQA’s findings requirement enforces its mandate “that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.” PRC § 21002. Where a project poses significant effects on the environment, “[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.” PRC §§ 21002.1(b), 21081; CEQA Guidelines §§ 15091, 15093. To assure that agencies fully document their efforts to identify and mitigate a project’s potentially significant effects on the environment, CEQA directs:

21081. No approval if significant effect unless findings

Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:

- (a) The public agency makes one or more of the following findings with respect to each significant effect:

¹ To the extent this impacts the bifurcation of the hearing into two parts, and thereby implicates the Water Board’s Prehearing Conference Agenda item “Timing of Hearing,” we incorporate our comments regarding the Water Board’s duties as a responsible agency into our comments opposing the bifurcation of the hearing set forth below.

- (1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment,
 - (2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency,
 - (3) Specific economic, legal, social, technological, or other considerations, including consideration for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.
- (b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.

PRC § 21081. In making these required findings, “the public agency shall base its findings on substantial evidence in the record.” PRC § 21081.5.

These rules are applicable to responsible agencies such as the Water Board in its WaterFix-related decisionmaking. “Before approving or carrying out part of a project under CEQA, a responsible agency . . . ‘must . . . issue its own findings regarding the feasibility of relevant mitigation measures or project alternatives that can substantially lessen or avoid significant environmental effects. Furthermore, where necessary, a responsible agency must issue its own statement of overriding considerations. [Citations.]’” *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1207 (quoting Remy, et al., Guide to CEQA (11th ed. 2007), ch. III. B. 2., p. 53 and PRC § 21081). “If the responsible agency finds that any alternatives or mitigation measures within its powers are feasible and would substantially lessen or avoid a significant effect of the project, the responsible agency may not approve the project as proposed, but must adopt the feasible mitigation measures or alternatives.” *Id.* at 1202 (quoting 1 Kostka & Zischke, Practice Under the California Environmental Quality Act (Cont. Ed. Bar 2d ed. 2008) § 3.22, p. 126); CEQA Guidelines § 15096(g)(2). “[A]s with a lead agency . . . , ‘[b]efore approving the project, the [responsible] agency . . . must . . . find either that the project’s significant environmental effects identified in the EIR have been avoided or mitigated, or that unmitigated effects are outweighed by the project’s benefits.’” *Id.* at 1207 (quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 at 391).

Thus, the Water Board’s position that “a responsible agency must assume that the CEQA document prepared by the lead agency is adequate” is in error, and “the adequacy of DWR’s EIR for the WaterFix Project” is a *key hearing issue* that should be addressed prior to the Water Board’s review of the potential effects of the water right change petition on legal users of water and, as explained below, prior to a Clean Water Act 401 certification.

B. Clean Water Act and California Water Code Compliance

As we noted in Attachment 1 to our Protest, submitted to the Water Board on January 5, 2016, and incorporated herein by reference, the Water Board has a duty under the federal Clean Water Act (“CWA”) to (1) designate beneficial uses (33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.6(a)) of the Sacramento/San Joaquin River Delta and San Francisco Bay (“Bay-Delta”), (2) establish water quality criteria (33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.6(c)) sufficient to protect those uses, and (3) adopt an anti-degradation policy sufficient to identify and prevent degradation of the water quality mandated for a particular water body (40 C.F.R. §§ 131.6(d), 131.12(a)). The Water Board must submit its water quality criteria to the United States Environmental Protection Agency (“EPA”) for review to confirm their adequacy for protection of designated uses, and to conduct triennial reviews (33 U.S.C. § 1313(1); 40 C.F.R. § 131.20) of its water quality objectives (in federal parlance, “standards”) to assure that all designated uses are protected.

The current Bay-Delta Estuary Water Quality Control Plan (“Bay-Delta Plan”) does not protect fish, wildlife, and other public trust uses of the Bay-Delta. As a result of the Water Board’s past and continuing authorization of excessive diversions of freshwater flows, the Bay-Delta’s ecological system is collapsing. This imminent ecological crisis must be addressed *before* this Water Board may take any action on this project. In addition, the Water Board has neglected its duties under the California Constitution to avoid unreasonable uses of water (Art. 10 § 2) and requirements under the California Water Code to (1) take into account the amount of water required for fish, wildlife, and recreation (Water Code §§ 1243, 1243.5), (2) reduce reliance on the Delta (Water Code §§ 85020(c), 85021), (3) fully consider fish and wildlife and other public trust uses that must be protected by a water quality control plan (Water Code §§ 1257, 1258).

In summary, designation of beneficial uses, water quality criteria, unreasonable uses of water, amounts need for fish, wildlife, and recreation, updating of the Bay Delta Water Quality Control Plan and other applicable water quality control plans to protect beneficial uses, and the neglected state and federal triennial reviews of the Bay-Delta Plan under CWA section 303(c) are all *key hearing issues* that must be addressed *prior* to any examination of the potential effects of the project’s water right change petition on legal users of water and prior to a Clean Water Act 401 certification for the project.

C. Key Issues to Be Considered at the Hearings

In identifying key issues for consideration at the two proposed phases of the hearing, the Water Board has neglected to take into account fundamental constitutional, statutory, and regulatory requirements. These issues are, indeed, the principal hearing issues that must be addressed prior to any consideration and determination of (1) the project’s potential injury to existing water rights, (2) the creation of new water rights, or (3) the required Clean Water Act 401 certification. The National Environmental Policy Act (“NEPA”), CEQA, the Endangered Species Act (“ESA”), the California Endangered Species Act (“CESA”), the California Constitution, and relevant provisions of the Water Code all require protection for fish, wildlife, recreation and other public trust uses, and these protections must be determined after informed

environmental review – based on compliance with these statutory and constitutional mandates -- before the Water Board can make any informed decisions regarding the project.

One example of the Water Board's failure to take these legal protections into account is its use of the word "reasonable" to describe its assessment of impacts to fish, wildlife, and recreation. Most of the regulatory, statutory, and constitutional environmental protections enumerated above do not allow the Water Board to rationalize environmental degradation on the grounds of "reasonableness." Rather, if environmental harms will be committed, whether such harms are "reasonable" or not, the Water Board has no discretion to proceed. Under CEQA, for example, the Water Board "should not approve projects as proposed if there are feasible alternatives . . . available which would substantially lessen the significant environmental effects of such projects.: PRC §21002.

The CESA, CWA and the Water Code all contain substantive prohibitions that constrain the Water Board's discretion to approve this project. For example, there is no "reasonableness" exemption from CESA's prohibition against the "destruction or adverse modification of habitat essential to the continued existence of [endangered or threatened] species, if there are reasonable and prudent alternatives available consistent with conserving the species or its habitat which would prevent jeopardy." Fish and Game Code § 2053.

Similarly, where there is no "reasonableness" leeway under the CWA allowing violations of water quality standards. If water quality standards will be violated, the Water Board cannot issue a CWA section 401 certification for the WaterFix Project. 33 U.S.C. §§ 1319(a) (states responsible for enforcing water quality standards), 1341 (certification requirement), 1341(a) (state must certify that discharge will comply with waste discharge requirement); 40 CFR § 121.2(a)(3) (certification must include "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will *not violate applicable water quality standards*" (emphasis added)). The CWA contains no exemption allowing the violation of water quality standards on the grounds of "reasonableness."

Likewise, the petitioner Bureau of Reclamation is fully subject to the ESA's substantive mandate that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2).

Finally, the Water Board must consider impacts to *upstream* as well as downstream fish, wildlife, and recreational resources as well as other public trust uses. As the key issues listed now stand, the specific topics to be discussed improperly focus on *downstream* resources and impacts. Provision must be made for a discussion of upstream impacts as well.

II. Pre-Hearing Conference Agenda Items

A. Timing of Hearing

According to the Water Board's January 15, 2016, WaterFix Notice, the California Department of Water Resources ("DWR") requested that the water rights hearing begin *before* NEPA, CEQA, ESA, and CESA compliance had been completed. The Water Board therefore divided the hearing into two parts. Jan. 15 WaterFix Notice, p. 2. This timing is unlawful because it constitutes a premature commitment of the Water Board's resources and preemption of its decision making before it has sufficient information about the WaterFix's environmental impacts.

As detailed above, the Water Board is an essential responsible agency under CEQA, and as such it cannot proceed with Part I of the evidentiary hearing without the completion of an adequate Environmental Impact Statement and Environmental Impact Report ("EIS/EIR"). An adequate EIS/EIR will have to be based on an updated Water Quality Plan and water quality standards informed by an adequate environmental review. It must develop a reasonable range of alternatives to increase flows in the Bay-Delta and identify the Bay-Delta water quality standards and the water flows necessary to achieve them. The project does not even have an adequate Draft EIS/EIR, let alone a final document upon which to base responsible agency decisionmaking. *See Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1052 (adequate draft must be completed before final). Without water flow management objectives and requirements in place, and the necessary supporting environmental review and planning, any discussion of the impact a change in the point of diversion will have on individual water rights users in Part I of the hearing is premature.

The determination of water flow management objectives and requirements is doubly important for Part II of the hearing. The Water Board proposes to focus in Part II on effects on fish, wildlife, and recreational uses. October 30, 2015 WaterFix Notice of Petition, p. 2. The Water Board should wait to conduct Part II of the hearing until after such objectives and requirements are promulgated and evaluated for their environmental impacts, not just until NEPA, CEQA, ESA, and CESA compliance for the project itself is completed. The point of diversion and 401 certification decisions should not be made without updated Delta flow and salinity objectives, Delta outflows, Sacramento River flows, export restrictions, gate closure requirements, and reverse flow limits for Old and Middle Rivers.

The current drafts of the CEQA and NEPA documents that address the WaterFix are not adequate. EPA, the California Department of Fish and Wildlife ("CDFW"), and the Delta Independent Science Board have all found that the WaterFix project is not sufficiently defined or complete, so substantial revision of the draft EIR is required. CEQA Guidelines §§ 15162, 15163(a).

B. CWA 401 Application

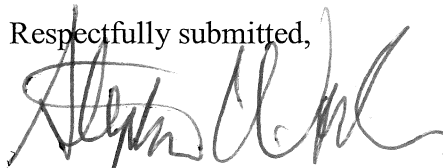
The Water Board's January 15, 2016 WaterFix Notice states that its CWA 401 certification decision, while a separate proceeding from the water rights change proceeding, will nonetheless rely on the information in the water rights change hearing. *Id.* p. 3. The CWA requires that activities that could cause a discharge into navigable waters obtain a permit to do so. "Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable water[s] shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . ." 33 U.S.C. § 1341(a)(1). Such certifications "shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with [33 U.S.C. §§ 1311, 1312, 1316, and 1317] and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section." 33 U.S.C. § 1341(d).

As stated above, if water quality standards will be violated the Water Board cannot issue a CWA section 401 certification for the WaterFix Project. 33 U.S.C. § 1341(a) (state must certify that discharge will comply with waste discharge requirement); 40 CFR § 121.2(a)(3) (certification must include "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards"). Therefore, the Water Board must first adopt water quality standards necessary to protect the Bay-Delta before proceeding with either phase of this proceeding.

III. Conclusion

Understanding the environmental impact of the WaterFix Project requires clear documentation of the current state of fish, wildlife, and recreational resources in the Bay-Delta, what water quality standards, particularly for flow, temperature, salinity and oxygen, will be necessary to protect those resources, how much water the project would take out of the Sacramento River by water year type and season, and what impact the volume of water diverted by the project will have on those (and upstream) resources. Proceeding with the hearings without such basic information is the polar extreme of informed decisionmaking. *See, e.g., Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 432 (informational demands of CEQA not met without documentation of future supplies).

Respectfully submitted,



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SCV:taf