



State Water Resources Control Board



Division of Water Rights

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Secretary for
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Governor

NOV 7 2007

Bob Baiocchi
Anglers Committee of California
P.O. Box 1790
Graeagle, CA 96103
rbaiocchi@gotsky.com

BY E-MAIL

RE: PUBLIC RECORDS ACT REQUEST AND HEARING ON YUBA COUNTY WATER AGENCY PETITIONS FOR CHANGE AND LONG-TERM TRANSFER

Dear Mr. Baiocchi:

This letter responds your public records act request sent by e-mail dated October 30, 2007, and to several issues you have raised in e-mails over the past week regarding the upcoming December 5, 2007 hearing on Yuba County Water Agency's petitions for change and long-term transfer.

Public Records Act Request

Under the California Public Records Act, you have requested copies of any e-mail discussions between me and the attorneys or representatives of several agencies regarding the pre-hearing conference or the hearing for Yuba County Water Agency's transfer petition. Insofar as the State Water Board has responsive documents, copies of those e-mails have already been provided to you as a protestant. We will send you copies of all of those e-mails again, in a separate e-mail..

The California Code of Regulations affecting the Division of Water Rights is accessible through links on the Division's web site, at: http://www.waterboards.ca.gov/water_laws/index.html. The code sections adopted by the board concerning hearings are found in Title 23, California Code of Regulations, Division 3, Chapter 1.5, Article 2, Sections 648—648.8 and in Title 23, California Code of Regulations, Division 3, Chapter 2, Article 11, Sections 760-767. Additionally, we have bound copies of the water rights regulations available for review at any time during business hours. We do not have a policy statement concerning whether pre-hearing conferences require a court reporter. Please also note that the Division of Water Rights' website also contains a link to the Water Code itself.

While the State Water Board's Division of Water Rights does post a great deal of information regarding our hearings and our other operations, posting too much information makes the website difficult to use. Our e-mail correspondence with hearing participants is public information which we maintain in our files; however, in order to keep our website usable, we

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post only certain information regarding hearings and petitions on our site. Any member of the public who wishes to have access to more information regarding a specific decision currently (or previously) before the board may request the files.

Public Notice Procedures and the Service List

You have requested that certain people copied on your e-mail list be added to the list of parties¹ for the hearing. As described above, any member of the public may access the particular files for a water right hearing. Additionally, the petitions, the petition notice, the hearing notice, the service list, the Notices of Intent to Appear, the reporter's transcripts of the hearing (60 days after receipt by the State Water Board), the exhibits, any closing briefs, any hearing officer rulings, and the final decision are posted on the website.

When we notice receipt of a petition, the notice and the petition are posted on our website and a link is sent to those that have requested to be informed of petition notices. Additionally, those who have provided us with their address and requested to receive information regarding a particular site or who have regulatory responsibilities over a given site are sent the notice. If the petition becomes the subject of a hearing, this hearing is also noticed, the notice is posted on the website, and the information is sent to the same people. In the case of this hearing, the hearing notice was sent to those who have requested to be informed of actions concerning the Lower Yuba River Accord, those who have requested or require information on all hearings and workshops, contacts for the boards of supervisors of all counties served by the CVP and SWP, and those who have requested information regarding actions affecting the Bay Delta. Notice was also sent electronically to all who subscribe to the board's electronic mailing list for water right hearings, water right petitions, water right transfers and Bay Delta notices lists.

As we stated in the hearing notice for this hearing, anyone who wished to participate in the hearing beyond making a policy statement at the hearing had to file a Notice of Intent to Appear (NOI). Those who filed an NOI were then placed on the service list, which was sent to all who filed an NOI. The hearing notice describes the pre-hearing information that must be sent to participants, with those participants who will participate in direct testimony, cross-examination or rebuttal receiving more information than those who are only making policy statements.

This procedure ensures that notice of our hearings and petitions is widely distributed, and allows potentially interested parties to state their intent to participate more actively in the process and to receive more detailed information regarding the proceedings. Because we followed a specific process that involves broad public notice to develop a list of interested hearing participants, we will not add the additional names you requested. Additionally, we develop information lists

¹ It is worth noting that not all those on the service list are parties. The hearing officer has discretion whether or not to admit as parties those people who file a Notice of Intent to Appear, but did not file a protest.

based on the request of those who request certain information, not based on third-party requests. Because all of the documents issued on the service list are public documents, you may of course continue to forward them to those who have expressed an interest to you or to whom you feel should be more informed of the details of the proceeding.

Evidence and Testimony

As stated in the Hearing Notice, the date for submittal of testimony is noon, November 9, 2007. This deadline has not yet passed, so the timing of submittals received so far does not establish a reason to delay the hearing. Although you were not required to submit testimony before the deadline, you submitted the attached resume and testimony with your Notice of Intent to Appear, and have requested permission to submit additional materials in light of the filings by other parties. You are entitled to submit additional evidence until the deadline.

After reviewing your submittals, staff recommended that I describe the difference between legal and policy arguments and evidence, and discuss the appropriate hearing procedures in which to present each one. Legal and policy arguments are interpretations of the law and suggested policy direction, including, for example, interpretations of the scope of the State Water Board's duties to protect the public trust; the scope of state versus federal power; or views as to what policies best protect the interests of the people of the state. Legal and policy arguments are generally supported by references to laws (like statutes, regulations, and cases), to principles of legal interpretation or public policy, or to the participant's views of what represents good public policy. Opportunities to present legal and policy arguments at a water rights hearing arise in policy statements, in closing statements, and in requests for briefing, if any.

Evidence, on the other hand, consists of on-the-ground facts that do not depend on the law or on policy choices. For example, statements concerning fish population trends, the particular requirements of a species, or water quality data are all evidence. These are all things that exist regardless of what law or policy will be applied to the situation. If a certain water temperature is required for a species to spawn, it requires that water temperature no matter whether state law, federal law, endangered species protections, a broad interpretation of the public trust, or other specific legal structures or public policies apply. Testimony consists of evidence, not legal arguments.

The purpose of testimony is to allow the decision-maker to decide among conflicting evidence. For example, if one witness testifies that a fish species requires a certain water temperature to spawn, and another testifies that it requires a different temperature, the hearing allows the decision-maker to ask questions of both witnesses to help make the most informed decision about which temperature is actually required. If everyone agrees about the underlying evidence, and disagrees only about what the agency should do in the face of those on-the-ground facts, for legal or policy reasons, then no testimony is required.

Please take these definitions of evidence and legal or policy argument into account in any revisions or additions to your submittals.

Notices of Intent

At the prehearing conference, I requested that certain participants file amended NOIs, and permitted all participants to amend their NOIs to include fisheries experts on the Delta. Because I extended the NOI deadline for participants to revise their prior submissions to November 1, 2007, the revised NOIs submitted were not untimely. It is worth noting that only 20 days are required to notice a hearing on a change petition. (Water Code, Section 1704, subd. (b).) Therefore, allowing existing parties to revise their submissions more than one month before the hearing is well within the statutory timeframe.

Telephonic Hearing Participation

Unlike the pre-hearing conference, the hearing on Yuba County Water Agency's petitions for change and long-term transfer is an evidentiary proceeding that will rely on direct testimony, cross examination, and rebuttal to demonstrate and evaluate the material facts. Personal participation is a critical element in this type of proceeding. For example, it permits all parties to evaluate the demeanor of the witnesses, a crucial element in weighing their testimony. It also ensures that witnesses speak on their own authority, without consulting other people or materials not before the court, helps ensure the identity of all the witnesses, and helps ensure that all witnesses are impressed with the solemnity of the proceedings and the importance of testifying fully and truthfully. Title 23, California Code of Regulations, Chapter 1.5, Article 2, Section 648.4, subdivision (d) requires that "any witness providing written testimony shall appear at the hearing and affirm that the written testimony is true and correct."

The hearing has the potential to affect many rights and interests, including Yuba County Water Agency's water rights, current water users, potential future water users, and the public trust. It would be unfair to all of these interests if we did not require all witnesses to be present to testify in person.

Because of the importance of personal participation to an evidentiary hearing, and because this hearing will affect the rights and interests of other participants, I will not grant your request to participate in the hearing telephonically.

I understand that it may be difficult for you to travel to and participate in the hearing. Because of this, I will permit you to revise your Notice of Intent to have another representative testify on behalf of Angers Committee of California, or to limit your participation to submission of a written policy statement and closing brief, if you would prefer either of these options to participating in the hearing personally. This revised NOI (and a new witness's testimony) would be due on November 14, 2007, should you choose to submit it. Just to be clear, if you do not

revise your NOI, it will still be in effect, and you will be required to come to the hearing and present testimony in person.

If you would like to discuss potential accommodations during the hearing, please contact Debbie Sanchez, at (916) 323-4916 who will be coordinating access concerns for the State Water Board until we identify a permanent replacement for our recently retired coordinator.

Delay of Hearing for Federal Decisions and Pre-emption

Your e-mails suggest that the State Water Board delay the hearing on Yuba County Water Agency's petitions for change and long-term transfer until the resolution of certain federal decisions that also have the potential to affect the Delta and the Yuba River systems. For example, you have requested that hearing be delayed until the Federal Energy Regulatory Commission amends the permits for the Yuba Project, until there is a final decision in the *NRDC v. Kempthorne* case, and until the National Marine Fisheries Service and the Fish and Wildlife Service issue biological opinions for the Lower Yuba River Accord. You also suggest that our authority is preempted by the Federal Power Act.

Our final order will address the legal and policy arguments raised as part of the hearing, including your arguments concerning federal preemption and your arguments that it would be premature to act before other agencies have reached decisions that affect the same water bodies. Because these arguments can be addressed as part of any final order issued by the State Water Board when it acts on the petitions being considered at the hearing, these arguments are not a reason to delay the hearing.

It is worth noting that Yuba County Water Agency raised a similar argument when the State Water Board first opened the proceedings that ultimately resulted in D-1644. They sought a court order that would have enjoined our hearing, because they argued that our authority was federally preempted. However, the district court judge recognized that these legal issues could be addressed by the State Water Board as part of its proceedings, and by the courts on judicial review of the State Water Board's decision. Therefore, the judge allowed the State Water Board hearings to proceed.

Request for Recusal

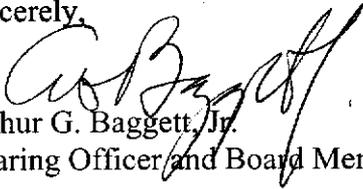
You have suggested that I should not participate in this proceeding. My co-hearing officer Charlie Hoppin will rule on this request at the beginning of the hearing.

Mr. Bob Baiocchi

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If you require further clarification on any of the issues addressed above, please contact Marianna Aue, in writing, at maue@waterboards.ca.gov. If the concern is regarding the hearing, and it is not a non-controversial procedural matter, please be sure to copy the correspondence to the service list.

Sincerely,


Arthur G. Baggett, Jr.
Hearing Officer and Board Member

Encl. Resume & testimony

cc. abl@bkslawfirm.com, pminasian@minasianlaw.com, rcolella@mp.usbr.gov,
Crothers@water.ca.gov, jrubin@diepenbrock.com, cschulz@kmtg.com, rsahlberg@mp.usbr.gov

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