

Friends of the River et al.

City of Stockton

Counties of San Joaquin et al.

Central Delta Water Agency and South Delta Water Agency

County of Sacramento and Sacramento County Water Agency

December 11, 2018

**SENT VIA EMAIL (waterfixcert@deltacouncil.ca.gov;
coveredactions@deltacouncil.ca.gov)**

Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

**RE: Applicable Procedures for Delta Tunnels Appeals (C20185) Upon
DWR's Withdrawal of Consistency Determination**

Dear Delta Stewardship Council and Staff:

The undersigned counsel represent parties in five appeals filed on the Certification of Consistency for California WaterFix/Delta Tunnels project by the Department of Water Resources ("DWR"). We have received the Council's letter dated December 7, 2018, stating that the appeals are moot due to the fact that DWR withdrew its Consistency Determination on that same day. As described below, we believe it would be inappropriate for the Council to re-enter "early consultation" with DWR on the same project that is the subject of the nine appeals without the participation of the appellants.

This concern was included in the November 19, 2018, comments on the Council's Draft Determination by the Delta Counties and LAND:

DCL is concerned regarding the next steps in the consistency review process should DWR withdraw its Consistency Determination, or should the Council remand the Consistency Determination to DWR. A Consistency Determination for this Project has already been submitted and appealed by multiple parties. It is too late for a negotiated settlement that that does not include the most interested members of the public, the nine appellants.

While we understand the possible desire of DWR to obtain additional guidance on consistency, the early consultation process should be reserved for new covered actions that have not yet been appealed. Only if DWR was

to submit a consistency determination for a new, different project, should it be able to enter “early consultation” with Council staff.

“Early consultation” with Council staff on the consistency of this Project has already occurred and ended with DWR’s submission of the Consistency Determination. Should DWR wish to receive further consultation on the means to attain the Project’s consistency with the Delta Plan policies, that discussion should occur in public view. This process could be similar to the State Water Project and Central Valley Project contract negotiation meetings, which are publicly noticed and allow for limited public comment. Such a process would prevent serial consultation on the same Project with the intent to avoid ex parte restrictions that were put in place to ensure a transparent process and to protect the public interest.

(DCL Comments, pp. 9-10.) Unfortunately, the Council’s summary dismissal of the appeals as moot and invitation for DWR to re-enter an apparently private “early consultation” process does not address these issues.

The Council’s dismissal of the appeals and invitation for DWR to reenter “early consultation” on the same project for which a Consistency Determination was already submitted and appealed conflicts with the Council’s Appeals Procedures and violates appellants’ right to due process. Under Rule 2 of the Council’s Appeals Procedures:

Any state or local public agency proposing to undertake a covered action, as defined in Water Code section 85057.5 is encouraged to consult with the council at the earliest possible opportunity, preferably no later than 30 days before submitting its certification to the council pursuant to Water Code section 85225, to ensure that the project will be consistent with the Delta Plan. The council’s staff will meet with the agency’s staff to review the consistency of the proposed action and to make recommendations, as appropriate.

(Emphasis added.) As noted in the Council’s December 7, 2018 letter to the appellants, under Rule 26 of the Council’s Appeals Procedures, “Council members and staff face certain restrictions in the ex parte communications they may have while appeals are pending.” The Council is incorrect, however, in concluding that “the Certification of Consistency for that project has been withdrawn and the appeals dismissed, those restrictions are lifted.” Under Rule 26:

Hearings on appeals are subject to the ex parte communication restrictions of California Administrative Procedures Act (Gov. Code § 11430.10 et

seq.). Under that Act, an ex parte communication is a “communication, direct or indirect, regarding any issue in the proceeding, to the [council or council member] from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.” (Gov. Code § 11430.10.) The restrictions apply from the date that the appeal is filed to the date that the council reaches a final decision on the appeal.

(Emphasis added.) The Council has not yet made any findings on the appeals, which is a condition precedent to lifting the ex parte restrictions. To the extent DWR wishes to reconfigure its Consistency Determination for the same project, there is no opportunity to re-enter early consultation. Only if DWR was to propose a different covered action would the ability to enter “early consultation” with the Council on that project arise.

The above interpretations are consistent with public statements made by the Council regarding the Determination of Consistency for the Delta Tunnels project. For example, the Council’s December 7, 2018 press release stated: “During the appeals process this fall, several of the parties expressed a willingness to work toward resolving issues that were raised,” and “[t]he withdrawal of its Certification of Consistency for the California WaterFix now provides the opportunity to fully engage.” In his comments at the November 15 workshop, Judge Damrell also emphasized the need for DWR and appellants to work together constructively to resolve the concerns reflected in the appeals. Troublingly, however, Delta Tunnels proponents were quoted in the press stating that they viewed the draft staff determination as a “fix it ticket” and that a revised certificate of consistency could be submitted within a few months. DWR Director Nemeth referred to working with Council staff regarding “interpretation of the Delta Plan,” suggesting that DWR’s focus will be not on engagement with Delta residents and local governments, but on staff’s interpretation of Plan requirements. Collectively these statements indicate that the Council plans to consult with DWR on the same project that is the subject of the nine appeals. Given the clear direction from Council members, and implicit recognition in the draft staff determination that DWR must engage with the public to “resolve issues,” the Council should provide a public process to reach that outcome and avoid any appearance that Council members or staff have engaged in back room negotiations with DWR and other project proponents that exclude the public.

To the extent the Council wishes to consult further with DWR regarding the consistency of the Delta Tunnels project with Delta Plan policies, that process must occur in the open and include the appellants. The early consultation process can only be made available for projects that have not yet been certified for consistency. To proceed otherwise deprives appellants of the right to participate in the consistency review process—a process in which they have already made significant investment of time and

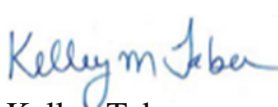
resources. There is no justification for treating DWR any differently now than prior to the withdrawal of the Consistency Determination with respect to the Delta Tunnels project. Providing an open and transparent process should have the added benefit of avoiding or minimizing the burden on Council staff in responding to Public Records Act requests relating to the renewed consultation, and any prejudice to the public in having to make and wait for responses to such requests.

The undersigned appellants are available to work with the Council to develop an appropriate, transparent process focused on resolving issues that were raised in the appeals and to find workable solutions to improve statewide water supply reliability as well as protect and enhance the Delta ecosystem, all in a manner that protects the Delta as an evolving place. But all meetings regarding the Delta Tunnels project, which has already been appealed, must be public, and communications with the Council regarding this project must continue to be disclosed to the public.

Sincerely,



E. Robert Wright
Friends of the River et al.
(Appeal C20185-A3)



Kelley Taber
City of Stockton
(Appeal C20185-A5)



Osha R. Meserve
San Joaquin County et al.
(Appeal C20185-A7)



Dante J. Nomellini, Jr.
Central Delta Water Agency
& South Delta Water
Agency
(Appeal C20185-A8)



For William C. Burke
County of Sacramento and
Sacramento County Water
Agency
(Appeal C20185-A9)

cc: Service List