

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



1515 CLAY STREET, 20TH FLOOR
P.O. BOX 70550
OAKLAND, CA 94612-0550

Public: (510) 879-1300
Telephone: (510) 879-0750
Facsimile: (510) 622-2270
E-Mail: Marc.Melnick@doj.ca.gov

January 26, 2021

Via E-mail Only

Mr. Christopher M. Pisano
Best, Best & Krieger LLP
300 South Grand Avenue, 25th Floor
Los Angeles, CA 90071

Mr. Shawn Hagerty
Best, Best & Krieger LLP
655 West Broadway, 15th Floor
San Diego, CA 92101

Mr. Scott Slater
Brownstein Hyatt Farber Schreck LLP
1021 Anacapa Street, 2nd Floor
Santa Barbara, CA 93101

Ms. Jeanne Zolezzi
Herum Crabtree Suntag
575 Pacific Avenue, Suite 222
Stockton, CA 95207

Mr. Neal P. Maguire
Ferguson Case Orr Patterson LLP
1050 South Kimball Road
Ventura, CA 93004

RE: *Santa Barbara Channelkeeper v. State Water Resources Control Board*
Superior Court of California, County of Los Angeles, Case No. 19STCP01176

Dear Counsel:

On behalf of the California Department of Fish and Wildlife (the "Department") and the State Water Resources Control Board (the "State Water Board"), we are writing to ask that your clients reconsider requesting, in the upcoming case management conference statement to be filed on February 2, 2021, that the Court set a schedule for holding an evidentiary hearing to decide whether the Court should enter your proposed physical solution as a judgment in this action. We realize that you just received our settlement letter of January 21, 2021, laying out our concerns with the stipulated physical solution and judgment you proposed in September 2020, but we hope that we will be able to discuss those concerns and work towards a negotiated solution acceptable to all parties and stakeholders. We believe continuing dialogue on a settlement negotiation path rather than activating the litigation path is in all parties' best interest.

In addition, as we discussed briefly by phone today, your proposed schedule raises numerous procedural issues that we should discuss before any scheduling request is made.

First, as you know, the Department and the State Water Board have been engaged for several years in scientific investigations, respectively, of the flow needs of species in this watershed and the interconnectedness of groundwater and surface water in this watershed. From the beginning of this case being assigned to Judge Highberger, those two investigations have been brought to the Court's attention in numerous joint filings with the Court, and the parties have all understood that these investigations are essential to a complete understanding of flow requirements for this watershed and developing an appropriate and defensible physical solution. As you know, the Department has completed some of its work, including the Watershed Criteria Report, and has tentatively scheduled a public meeting for February 26, 2021, just a few weeks from now, to present its draft flow recommendations for the lower Ventura River and two technical reports. The Department's remaining work is scheduled to be finished this year. A draft of the State Board's modeling work is scheduled to be released later this year, and the State Board is scheduled to finish its modeling next year.

The Department and State Board cannot support a rushed judgment in this case that would come before this essential work has been completed, reviewed by the parties, and discussed. We urge you to wait until that important work is complete, and can be digested by all concerned, before the stay is lifted and we start litigating anything in this case.

Second, the City has not completed its service of all named parties in this action. That is clear from the City's December 30, 2020 ex parte application for extension of time to serve pleading and order extending time to serve, which explained that the City has over four hundred cross-defendants left to serve and successfully requested that the time to serve them be extended to April 1, 2021. While it may be likely that none of those to-be-served parties will have a material effect on the nature of this litigation, we cannot be certain of that at this time. The Court should not start moving down the path towards entering your proposed physical solution as a judgment as you have proposed without first ensuring all those parties have been served, and are able to express their views on this process. To move forward as you have proposed risks depriving those parties of due process. Judge Highberger himself has been particularly attentive to those concerns during our various case management conferences.

Third, as you know, this case is proceeding under the streamlined comprehensive groundwater adjudication statutes (Code of Civil Procedure sections 830 to 852). But the case as pled by the City comprises much more than that. It also includes claims seeking to adjudicate surface water rights, and the proposed physical solution proposes to resolve those surface water rights. The streamlined comprehensive groundwater adjudication statutes provide, in part: "*If* the Court finds that including an interconnected surface water body . . . is necessary for the fair and effective determination of the groundwater rights in a basin, the court may require the joinder of persons who claim rights to divert and use water from the surface water body . . . in a comprehensive adjudication conducted pursuant to this chapter." (Code Civ. Proc., § 833, subd. (c), emphasis added.) But no one has asked the Court to make such a finding. That finding must be made before the Court asserts jurisdiction over the surface water rights holders in this case, and should be made before the Court sets a schedule on resolving your proposed physical solution.

Fourth, the groundwater adjudication statutes address the Court's adoption of a proposed stipulated judgment such as yours. (See Code Civ. Proc., § 850, subd. (b).) Such a judgment must meet the requirements for any judgment under the streamlined comprehensive groundwater adjudication statutes, including consistency with section 2 of article X of the California Constitution (which requires reasonable use of water). (Code Civ. Proc., § 850.) But by the explicit terms of the statutes, a stipulated judgment may only be proposed if it "is supported by more than 50 percent of all parties who are groundwater extractors in the basin or use the basin for groundwater storage and is supported by groundwater extractors responsible for at least 75 percent of the groundwater extracted in the basin during the five calendar years before the filing of the complaint." (*Id.*, § 850, subd. (b).) While the Court would have to decide how to apply that standard here, where there are four groundwater basins and surface water as well, we do not believe you can meet that standard for even one of the four groundwater basins at issue in this adjudication. You certainly have not explained that to us, or even addressed this issue as far as we know. Since these percentage thresholds in Code of Civil Procedure section 850 are part of the prima facie case that you need to make, we believe you should make such a showing before starting down the process of seeking the Court's consideration of any proposed physical solution.

Fifth, without getting into the substance of your proposal, we have concerns about the uncertainty inherent in your proposed physical solution. We raised some of these issues with you in our recent settlement letter, dated January 21, 2021. As some examples: (1) the term "good condition" — the stated goal of the proposed physical solution — is vaguely defined in the proposed physical solution and there are few constraints on how the management plan would define that term; (2) there are no standards for how much gravel enhancement, boulder and large woody debris augmentation, Arundo removal, and predator removal will occur; (3) the Foster Park flow protocols contain an exception to minimum instream flow protocols for situations where there exists "the inability of the City to obtain sufficient usable replacement water from Casitas or other sources to serve its customers," which would seem to leave implementation of those flow protocols to depend largely on the circumstances and/or the discretion of the City; and (4) after the first ten year period, there appears to be complete discretion by the management committee as to the components of the management plan. Given this uncertainty, it is difficult to understand how the Court would be able to find — as it must (Code Civ. Proc., § 850, subd. (a)(1)) — that your proposed physical solution will be consistent with the reasonable use standard of section 2 of article X of the California Constitution. There is simply no assurance that your proposed physical solution will meet this standard based on information provided to date, particularly since it lacks minimum instream flow requirements for most of the watershed and vaguely defines the desired ecological outcome and how progress towards this outcome will be evaluated, among other concerns raised in our January 21, 2021 settlement letter. Thus, it is hard to see how you can even make a prima facie case for entering this proposed physical solution as a judgment.

Sixth, even if you could resolve the preceding five issues, your schedule still needs to reflect a reasonable schedule while the parties are still managing challenges associated with the COVID-19 pandemic. Given that we have not yet reached consensus on critical aspects of an

January 26, 2021

Page 4

discovery before an evidentiary hearing on any proposed physical solution occurs. To date, you have not yet disclosed your comprehensive expert report, and you apparently have at least five experts for this case. In addition, there is the added complication that we do not know how the thousands of cross-defendants will engage with the evidentiary hearing process. While we reiterate that no dates should be set at this time, if any dates are to be set, we believe that a schedule consistent with our August 3, 2020 proposal, leading to an evidentiary hearing in the November 2022 to January 2023 timeframe, is a more appropriate starting point. That would still give us three to six months to negotiate before we started with motion practice and discovery. Those few months might not be enough time to reach a settlement, but we could at least try to make progress.

Please consider these concerns, and let us know your thoughts. We would like to hear back from you within the next few days, and in advance of February 2, 2021, when our case management conference reports are due. If you wish to discuss them, please let us know.

Thank you.

Sincerely,



MARC N. MELNICK
Deputy Attorney General



NOAH GOLDEN-KRASNER
Deputy Attorney General

For XAVIER BECERRA
Attorney General

cc: David Coupe, SWRCB
Matthew Bullock, DAG, San Francisco
Noah Golden-Krasner, DAG, Los Angeles
Eric M. Katz, SDAG, Los Angeles
Daniel Cooper, counsel for Santa Barbara Channelkeeper
Robert Kwong, counsel for Casitas Municipal Water District

MNM: