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May 14, 2021

Kelley M. Taber, Esq.
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500 Capitol Mall #1000
Sacramento, CA 95814

Re: Meet and Confer Response
South Feather Water & Power Agency v. North Yuba Water District, et al.

Dear Ms. Taber:

This letter is in response to your May 10, 2021 letter on behalf of North Yuba Water District (NYWD) initiating the meet and confer process and threatening demurrer to South Feather Water & Power Agency's verified petition for writ of mandate. The alleged pleading deficiencies raised in your letter are without merit. A demurrer will not be sustained. Given your client's concern about "wasteful expenditure of public funds", we would suggest you not file an unnecessary and meritless demurrer. Instead, your client should fully commit to complying with applicable law, including the Clean Water Act and California Environmental Quality Act. We look forward to discussing how NYWD can accomplish these tasks in the upcoming mandatory settlement conference.

I. Statute of Limitations

- A. The Agency's Petition Was Timely Filed Within 35 Days of March 9, 2021 – the Date NYWD's Only Notice of Exemption (NOE) Was Filed

The entirety of NYWD's statute of limitations claim rests on a faulty and erroneous premise that NYWD "properly posted its NOE with the Butte County Clerk on February 28, 2020, and SFWPA was required to bring any CEQA challenge within 35 days of that posting." This statement is factually and legally incorrect. In fact, an NOE was never filed by NYWD in Butte County.

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The document attached to NYWD's letter as Exhibit B lists the addressees as the Office of Planning and Research and County Clerk, County of Butte. It lists the project location as Butte County. However, the purported NOE has an "endorsed filed" stamp dated February 28, 2020 by "Terry A. Hansen, Clerk By Mandy Luis Deputy Clerk". Ms. Hansen is the clerk of Yuba County, not Butte County. NYWD never filed an NOE in Butte County.

On March 9, 2021 NYWD did finally transmit and OPR posted an NOE for the Oroleve Ditch Pipe Project. This is the only operative NOE filed by NYWD and this action was timely brought on April 2, 2021, well within the 35-day statute of limitations period.

- B. NYWD Nefarious Conduct Estops it from Alleging the Running of the Statute of Limitations and/or The Statute of Limitations Period was Tolloed Until the Agency Learned of NYWD's CEQA Subterfuge

NYWD has flagrantly violated and subverted the public purposes of CEQA. We encourage you to consider the following uncontroverted facts:

1. Tradition, common usage, contractual agreements, and NYWD's pre-project public planning documents define the Upper Forbestown Ditch (UFD) and the UFD Project as encompassing the Oroleve Ditch Sub-Project:
 - a. The SFWPA/NYWD 2005 Agreement defines "Forbestown Ditch" as "the following water conveyance ditches: (a) Oroleve Ditch; (b) Upper Forbestown Ditch; (c) Lower Forbestown Ditch; (d) Lake Wyandotte Ditch; (e) Miller Hill Ditch; and (f) South Honcut Ditch." (Underlining added.)
 - b. NYWD's August 2019 engineering drawings for the "Forbestown Ditch Project" include the whole of the project, including Oroleve Ditch. (See Sheets 40, 41, and 42 of NYWD Plan Pages for "Forbestown Ditch Piping Project available at www.nywd.org/publications.)
 - c. NYWD's September 2019 Scope of Work for Forbestown Ditch to Pipeline Replacement Project, describes the project as encompassing the Oroleve Ditch. (See Scope of Work available at www.nywd.org/publications.)
 - d. NYWD's September 2019 public newsletter stated that it received a \$500,000 planning grant to cover the engineering phase of the Forbestown Ditch Pipeline Project and stated "this phase is almost complete" and "Next up is the construction phase."
2. Consistent with this common usage, the Agency on October 29, 2019 requested that NYWD provide copies of "all CEQA notices and documents pertaining to North Yuba Water District's Upper Forbestown Ditch Piping Project as well as notifications of ministerial and categorically exempt actions...". (Petition, Exh. F.)

3. On August 3, 2020 this Firm emailed NYWD's General Counsel, Barbara Brenner, after discovering that NYWD prepared an initial study/mitigated negative declaration for the UFD Project. Despite the Agency's request for CEQA notices it was not notified of the preparation of the IS/MND. In response to the Agency's inquiry, Ms. Brenner stated "The District did not finalize the CEQA document and was told to not go forward with filing a notice with OPR. The District is working on a full EIR for the forbestown ditch project. SFWPA will have ample opportunity to review the document and provide comments. Please do not waste resources reviewing the mitigated neg dec." (Petition, Exh. G, underlining added.) Agency relied on this communication and did not pursue further action given the promise that NYWD was working on a "full EIR for the forbestown ditch project", meaning the whole of the action, and that it would have ample opportunity to review later.
4. Not until February 2021 did the Agency become aware of NYWD's piecemealing and improper segmenting of the UFD Project, into the smaller Oroleve Ditch Pipe Project and remaining UFD Project. A letter was promptly sent to NYWD's general counsel, Ms. Brenner, advising that Agency was not provided notice of this purported action and requesting a copy of any NOE. (Petition, Exh. H.)
5. Over a week later, on February 18, 2020, NYWD through Ms. Brenner provided a copy of the purported NOE. As noted above, however, it was not filed in Butte County or at that time OPR. NYWD did eventually file the NOE with OPR on March 9, 2021. This action was timely brought within 35 days of this first NOE filing.

NYWD's conduct is egregious and was deliberately designed to subvert public involvement, especially the Agency's participation in public review and comment of NYWD's CEQA decisionmaking. What the Agency now knows is that NYWD's General Manager, Jeff Maupin, executed a purported NOE on January 14, 2020. Over a month later, the purported NOE was apparently transmitted to Yuba (not Butte) County, despite the project location (and Agency headquarters) being in Butte County. The Agency's jurisdictional boundaries do not include any area in Yuba County and the Agency would have no reason to suspect or monitor CEQA filings in Yuba or any other county.

We would hope that NYWD is not taking the unreasonable and unsupportable position that an interested party, such as the Agency, is required to monitor CEQA filings in all of California's 58 counties, including counties unaffected by a proposed project. Such a position would create a perverse incentive to subvert CEQA's public purposes because a lead agency, like NYWD, would benefit from filing an NOE in an unaffected county that would be off-the-radar to interested parties in the hopes of running the statute of limitations.

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All of NYWD's CEQA activities were done without any notice to the Agency, despite the Agency's October 2019 request for such notices. Further, in August 2020 when the Agency inquired as to the status of the "Forbestown Ditch Project" after discovering an IS/MND on the State Clearinghouse, NYWD assured the agency that NYWD "is working on a full EIR for the forbestown ditch project" and that the Agency "will have ample opportunity to review the document and provide comments." In hindsight, with the facts now clear, NYWD deliberately misled the Agency to prevent the Agency from participating in NYWD's CEQA decisionmaking. NYWD now seeks to capitalize on this subterfuge by alleging that the statute of limitations period has run. That is not only wrong as a matter of law (see above), but it is also offensive to the equities of the parties. We are confident that a Judge will see this matter the same way.

II. Exhaustion

When it was afforded opportunity, the Agency expressed its ongoing interest in the UFD Project and NYWD's CEQA compliance for the UFD Project. Its October 29, 2019 request for CEQA notices specifically referenced NYWD's UFD Project. (Petition, Exh. F.) The Agency's August 3, 2020 correspondence upon learning of the IS/MND for the UFD Project stated the following:

Despite this request [for CEQA notices], SFWPA was not notified of NYWD's IS/MND or provided a copy of the CEQA notice of completion. SFWPA was not afforded an opportunity to review and offer comments on the environmental analysis or adequacy of the mitigation measures. As you know, the Upper Forbestown Ditch, while now owned by NYWD, was formerly owned by SFWPA. It remains vital to delivery of water to SFWPA customers. SFWPA maintains customers that are directly served from the Upper Forbestown Ditch and pursuant to the SFWPA/NYWD 2005 Agreement a certain volume is delivered/guaranteed to SFWPA through the Upper Forbestown Ditch. In short, SFWPA requested CEQA notices because it is vitally interested in ensuring no injury to SFWPA or its customers as a result of NYWD's proposed project. SFWPA may even be a responsible or trustee agency under CEQA for the proposed project, yet SFWPA is not listed at the clearinghouse as a reviewing agency.

(Petition, Exh. G.) In response, NYWD commented that the Agency would have "ample" opportunity to review the "full EIR for the forbestown ditch project" and cautioned the Agency to "Please do not waste resources reviewing the mitigated neg dec." (*Ibid.*) In light of NYWD's now-known subterfuge, the foregoing suffices for satisfying CEQA's exhaustion requirement, to the extent it even applies.

In addition, CEQA's requirement to exhaust administrative remedies "evaporates" where, like here, the lead agency fails to provide notice required by law. (*Fall River Wild Trout Foundation v. Co. of Shasta*, 70 Cal.App.4th 482, 489.) It is undisputed that NYWD failed to provide notice of its purported NOE as required by applicable law.

III. Mootness

Your letter provides one sentence in support of the conclusion that the Agency's Petition is moot because "construction of the project at issue in the litigation was completed in December 2020,...". You provide no documentary support for this statement, and in fact it is contrary to recent developments suggesting continued work on the NYWD's piecemealed project. NYWD failed to comply with the Clean Water Act in regard to the piecemealed project, a fact the Agency highlighted in a 60-day notice of intent to sue issued to NYWD under the Clean Water Act. In response to the Agency's letter and its undisputed violation of the Clean Water Act, NYWD correctly decided to cure its violation. This occurred on or about March 23, 2021 – after the date you cited for completion. In addition, NYWD continues to work on the whole of the action, namely, the UFD Project and for this reason this action is not moot. (See, e.g., *Arviv Enterprises, Inc. v. South Valley Area Planning Commission* (2002) 101 Cal. App. 4th 1333, 1350-1351.)

IV. Wasteful Expenditure of Public Funds

We appreciate your caution about avoiding the wasteful expenditure of public funds, especially given that both our clients are public agencies. We encourage you to provide the same advice to your client, NYWD, who has gone rogue and persistently threatened litigation against the Agency without any lawful basis. In response to these threats, the Agency has repeatedly attempted to engage NYWD to simply discuss matters of concern. Yet NYWD refuses to talk and instead has retained at least six outside consulting firms to challenge and threaten the Agency.

In our view, the best way to be mindful of the expenditure of public funds is to engage in direct discussions to raise and attempt to resolve issues. Yet NYWD refuses to do that. The following are examples of NYWD's insular behavior and refusal to engage:

- On May 29, 2019 the Agency asked NYWD to participate in an advisory committee of board members from each agency "so that we can enhance communication on the current 2005 agreement/partnership as well as updating NYWD on the status of the new FERC license and the future of hydro energy and power purchase work that is being performed to both protect and enhance revenue streams." This request was rejected.
- On June 12, 2020 the Agency extended an invitation to NYWD to participate in a facilities tour of the South Fork Power Project and learn about how it relates to the 2005 Agreement. This request was rejected.
- On September 16, 2020 the Agency invited NYWD to participate in the 2021 budget cycle and provide opportunity to see first-hand how the budget associated with the parties' 2005 Agreement is created and to ask questions about the joint facilities operating fund revenue and expense projections for the 2021 fiscal year. This offer was rejected.

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- On August 10, 2020 the Agency received a Public Records Act request from NYWD's General Counsel. The request largely sought creation, not duplication, of public records, an issue outside the scope of the Public Records Act. Consequently, efforts were made counsel-to-counsel to prepare an MOU to allow reciprocal onsite inspection of all non-privileged documents and to allow duplication of financial software and data. The MOU was agreeable as to form, only to have NYWD abruptly go silent and refuse to execute the MOU. Weeks later on January 22, 2021 the Agency learned that NYWD has retained special counsel, BoutinJones, who rejected the MOU and delivered a letter to the Agency threatening litigation within 7 days if NYWD's demands were not met.
- Since January 2021 the Agency has repeatedly invited NYWD to inquire about the Agency and its accounting under the 2005 Agreement by participating in a board-to-board public workshop. NYWD continues to reject this open invitation.

In sum, since January 1, 2019, the Agency has asked NYWD to engage in discussion on over 15 separate occasions. All have been rejected. We hope that your Firm can change NYWD's troubling behavior, refusal to meet, and its pattern of failing to comply with legal requirements, including CEQA and the Clean Water Act.

Very truly yours,

MINASIAN, MEITH,
SOARES, SEXTON & COOPER, LLP

By: 

DUSTIN C. COOPER

DCC:lmj
cc : Rath Moseley
General Manager, SFWPA