

From: "Michael A. Brodsky" <michael@brodskylaw.net>
Subject: Re: California WaterFix C20185 request to reconsider dismissal of appeals
Date: December 10, 2018 at 4:41:32 PM PST
To: "Pane, Bethany@DeltaCouncil" <Bethany.Pane@deltacouncil.ca.gov>

Dear Ms. Pane, Council Staff, Council Members, and Parties to the Consistency Appeals:

We are in receipt of the December 7, 2018, letter from the Department purporting to withdraw its certification of consistency and request to dismiss all appeals and the immediate dismissal of all appeals three hours later, without opportunity for Appellants to respond to the Department's request to dismiss all appeals.

Delta Alliance objects to the dismissal of its appeal, especially without the opportunity to be heard.

The apparent plan of the Department to begin closed-door ex parte negotiations on WaterFix has the strong public appearance of impropriety. It appears to the public to be an end-run by the Department around the public process that was well underway to reach a set of findings spelling out exactly what is wrong with WaterFix that needs to be repaired in order to make the project consistent with the Delta Plan. Neither transparency, effective direction to the Department, or administrative economy are served by dismissing the appeals.

We believe the appropriate course of action is to finalize the staff findings, have them voted on by the Council, and remand the matter to the Department. We believe that this is the only lawful course at this point. We respectfully urge the Council to reconsider the decision of December 7 dismissing the appeals.

The Council's Administrative Appeal Procedures Rule 15 provides an exclusive list of two situations in which an appeal may be dismissed. Neither Rule 15(c)(1) or 15(c)(2) is met here.

Further, we can think of no situation, in court or agency practice, where an *Appellee* can unilaterally "withdraw" from an appeal once underway.

The appeals are not moot. For an appeal to become moot, the underlying facts must change. The basic definition of mootness is when the underlying facts change in such a way that the tribunal can no longer grant effective relief. A case is generally deemed moot if a ruling "can have no practical impact or provide the parties effectual relief." (*Woodward Park Homeowners Ass'n v. Garreks, Inc.* (2000) 77 CA4th 880, 888.) A moot case "is one which seeks to determine an abstract question which does not arise upon existing facts or rights." (*Wilson v. Los Angeles County Civil Service Comm'n* (1952) 112 CA2d 450, 452.) A moot case is "[a] matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights." (Black's Law Dictionary, 10th ed., 2014.)

Here, the Department's December 7 letter does not commit to or even discuss the possibility of making any changes to aspects of the project that Appellant's find objectionable. No facts have changed. Indeed, the Department's December 7 letter is recalcitrant in stating that "this record more than adequately supports the findings that WaterFix is consistent with the Delta Plan."

There remains all of the live controversy over interpretations of the Delta Plan and Delta Reform Act, including the Department's and Water Supplier's responsibilities under WR P1, the proper interpretation of the Department's responsibilities under DP P2, and all of the other issues raised in the appeals. Indeed, the Department's December 7 letter states that its only aim in withdrawing the certification and beginning closed-door negotiations with the Council is to address "unresolved issues related to the interpretation of the Delta Reform Act and Delta Plan policies." In other words, the Department wishes to push its interpretations of the Delta Reform Act and Delta Plan, which have been rejected by staff findings and vigorously disputed by Appellants, behind closed doors without the Appellants exercising their due process rights to continue to refute the Department's arguments and point out the law and the facts to the Council.

"A case becomes moot when intervening developments have so changed the posture of the case that there is no longer a present, live controversy." (Ninth Circuit Civil Appellate Practice §14:216.5 (Rutter 2018).) Here, there is a present live controversy as to law and facts upon which the Council can provide relief to appellants. Delta Alliance can receive relief under all of the claims filed in its appeal, and draft staff

findings at the last draft did grant effective relief on several of those claims. For example, draft findings agree with Delta Alliance that the Department has not provided substantial evidence of compliance with Policies WR P1 and DP P2. Staff findings have also made interpretations of the intent of Policy WR P1—that the Department must comply with the three core compliance requirements and may not substitute alternative means of showing reduced Delta reliance. Nothing has changed that would make these findings moot. The Department continues to dispute all factual and legal claims advanced by Delta Alliance, including those upon which the draft findings have held against the Department and in favor of Delta Alliance.

"A *voluntary* termination of a challenged practice will not necessarily moot a case so long as the challenged party remains *free to reinstate* the practice at its own discretion." (California Practice Guide: Administrative Law § 16:305, Rutter 2018.) Here, the Department has not even stated that it will change anything. It is entirely free to meet privately with Council staff and then re-submit the same project if it is not able to convince staff to change their interpretations of the Delta Reform Act and Delta Plan.

We also respectfully urge the Council to continue the ex parte communications ban until such time as resolution of the issues raised herein is reached.

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