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**From:** petre, dan  
**Sent:** Monday, November 17, 2008 7:57 PM  
**To:** hobbs gregory

Upcoming elective surgery tomorrow prevents me from giving detailed comments to the proposed rule changes and forms, but I have received the 8/1/08 Report of the initial Committee and have spoken with some of you. Based upon those, and my own observations, I offer some conceptual suggestions which I hope the Committee will consider in its deliberations:

- 1) If the Committee is serious about getting cases evaluated and decided as expeditiously as possible, it seems to me that even the reluctant veteran members of the water bar – and I have counted myself among them – need to be willing to engage in the sort of up-front disclosure – putting their cards on the table – which the courts require of litigants in civil, domestic, criminal, and other areas. I appreciate that, for those who tend to specialize in water law, that may be a foreign concept, but in those other branches of the law, I believe that mandatory disclosure has been a beneficial development. Such early disclosure would also help to eliminate two complaints we have heard now and again in Division 5: the consultation process allows the Water Referee to hear the Division Engineer's side before the applicant's engineer has had a chance to weigh in; and the resulting summary of consultation is overlong and reflects a lack of understanding about what the applicant intended. If the Supreme Court is going to impose presumptive deadlines and require increased case management at the trial level, it is only fair that the other parties, the State and Division Engineer, and the judicial officers at that level all have the data, including reports, maps, etc., that they will need to get out of the gate quickly in evaluating and deciding these cases. Finally, as in those other areas, I hope that rule changes will include the ongoing obligation to supplement those disclosures.
- 2) Of course, water applications do, from time to time, need to be amended (e.g., once engineering is received, as the underlying project evolves). Amendment, particularly if it results in republication, can essentially require everyone to start over. There may be new opposition and new questions from the State and the Referee. As long as the rules allow applicants the flexibility to amend and for those applications to usually relate back to the date of the original filing, there will always be unavoidable costs and delays. Any new rules should take those into account.
- 3) The proposed rules should clarify what is meant by "opposed" and "unopposed" decrees. The assumption in the Report seems to be that, if no private party has opposed an application or all private opposition has been resolved by stipulation, it is more or less a ministerial function for the referee to bless the ruling and the water judge to sign it if there is no protest. Having served as a referee before I became a water judge, I would observe that the participants in our cases are increasingly the big institutional players. The smaller water uses are relying upon the Division Engineer and, to an extent, the Court to protect the system, and incidentally them, from injury. Where the applicant's dispute is with the Division Engineer, should it be regarded as an opposed matter?

- 4) I urge caution about putting the water judge in a position of micromanaging those aspects of case management now overseen, at least in our Division, by the referee. While this has manifested in the proposed rule which could involve the judge in reviewing the application prior to publication, there may be other instances, as well. Likewise, the proposed rules would seem to make it quite easy to move a case from the referee, where it could be properly investigated and handled informally, to the water judge, who has no authority to investigate and, often, has responsibilities for other matters which will prevent expedited determination of water cases. Is that really a good solution to the concerns which prompted the creation of the Committee in the first place?
  
- 5) Finally, I would urge the Committee to take into account something which, I suppose everyone involved in it already knows: compared to other endeavors, in water law, there are, state-wide, relatively few specialists in this area, both as attorneys and engineers. Imposition of tight time deadlines may run smack up against a phenomenon I encountered, not infrequently, as a referee, i.e., the illness or vacation of a particular engineer or a big water trial in one court can make it difficult for the courts elsewhere to move their cases along.

I hope that the foregoing is useful. If not, I appreciate the opportunity to vent.

Dan Petre  
Water Judge  
Water Division 5