

July 14, 2024

Via Email Only

State Water Resources Control Board
Administrative Hearing Office
RE: Delta Conveyance Project Hearing
P.O. Box 100
Sacramento, CA 95814-0100
DCP-WR-Petitioner@Wateboards.ca.gov

RE: Joinder in Objection to Notice of Assignment and Pre-Hearing Conference on the Petitions for Change of Water Rights Permits 16478, 16479, 16481, and 16482 (Applications 5630, 14443, 14445A, and 17512, respectively) of the Department of Water Resources

Dear Presiding Hearing Officer Nicole Kuenzi and Members of the Hearing Team:

Protestants Buena Vista Rancheria of Me-Wuk Indians, Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, Restore the Delta, San Francisco Baykeeper, California Indian Environmental Alliance, and Golden State Salmon Association submit this letter regarding the June 19, 2024 Notice of Assignment and Pre-Hearing Conference on the Department of Water Resources' ("Department") Petition for Change of Water Rights Permits associated with the Delta Conveyance Project (the "DCP"). The undersigned protestants join in objections to the pre-hearing conference and associated schedule submitted by numerous parties to this proceeding.¹ For the following reasons, protestants respectfully urge the Presiding Hearing Officer to continue the pre-hearing conference and consideration of hearing issues until the mandatory period for informal resolution of protests closes on November 12, 2024.

First, it is procedurally improper for the Hearings Office to hold this pre-hearing conference and identify and invite comment on hearing issues before the statutorily required period for informal resolution of protests closes on November 12, 2024. Pursuant to Water Code section 1703.4, protestants and the Department must make a "good faith effort" to resolve protests within 180 days of the close of the protest period on May 13, 2024. As the Department notes in its July 5, 2024 letter responding to objections by County of Contra Costa et al., the purpose of these informal resolution proceedings is to narrow and refine the issues subject to hearing.² Most informal resolution discussions have not yet begun and certainly will not be

¹ See County of Contra Costa et al., Letter RE Objection to Notice of Assignment and Pre-Hearing Conference (June 27, 2024); Sacramento County Farm Bureau, Letter RE Notice of Assignment and Pre-Hearing Conference (July 9, 2024); County of Sacramento et al., Letter RE Objection to Notice of Assignment and Pre-Hearing Conference (July 10, 2024).

² Department of Water Resources, Response to Objection to Notice of Assignment and Pre-Hearing Conference on the Petitions for Change of Water Rights Permits 16478, 16479, 16481,

concluded prior to the planned issuance of the Notice of Public Hearing later this month. For instance, the undersigned received no outreach at all from the Department inviting informal resolution discussions until June 25, 2024 and, due to holiday schedules, do not anticipate beginning discussions with the Department until mid- to late-July at the earliest. Proceeding to identify hearing issues and to invite comment on them before negotiations have even taken place is improper: It compromises the quality and efficacy of informal resolution by forcing premature comment on hearing issues and purports to establish the scope of hearing issues that may be substantially affected by ongoing discussions between the parties.

The Hearing Officer's proposed schedule in this proceeding is also out of line with recent precedent. In proceedings on the Sites Project Authority's water rights petition, the Administrative Hearings Office did not issue its Notice of Public Hearing and Pre-Hearing Conference until March 1, 2024 – after the 180-day informal resolution period had concluded on February 28, 2024. It did not hold the pre-hearing conference itself until April 10, 2024, well after the informal resolution period had concluded. The Hearing Officer also revised hearing issues after “duly considering the parties’ comment in the pre-hearing conference statements and during the pre-hearing conference,” underscoring the importance of deferring the pre-hearing conference until the informal resolution period has concluded.³

Second, the substantial overlap in the Hearing Officer's proposed schedule on the instant petition with the hearing schedule on the Sites Project Authority's petition is highly prejudicial to the many parties participating in both proceedings. The DCP and Sites Reservoir are related projects, both concerning changes to storage, conveyance, and flows of Delta water and both with severe consequences for ecosystems that are on the brink of collapse. Unsurprisingly, then, numerous parties are protesting in both proceedings, including several of the undersigned protestants. Overlapping parties include California Native American Tribes in the Delta and its headwaters whose rights and interests are affected by both projects and numerous non-profit organizations whose limited resources are taxed by participation in one, let alone simultaneous, months-long water rights adjudications. Case-in-chief evidence in the Sites Reservoir matter is due on July 15, 2024. Hearings on the Sites Reservoir petition and protests are then scheduled to commence on August 19, 2024, just after the planned August 13 pre-hearing conference in the instant proceeding, and run well past the September 5, 2024 deadline to file comments on (as yet unannounced) hearing issues in the instant proceeding.

and 16482 (Applications 5630, 1443, 14445A, and 17512, respectively) of the Department of Water Resources (July 5, 2024).

³ See Amended Notice of Public Hearing and Pre-Hearing Conference (Sites Reservoir) at 14 (June 5, 2024),

https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2024/2024-06-05-amended-notice-of-public-hearing.pdf.

The Department’s contention in its July 5 letter that the scheduled August 13 Pre-Hearing Conference is solely procedural misses the point. The Pre-Conference Hearing is intended to address issues critical to the substantive resolution of the DCP petition and protests, such as the schedule necessary to accommodate the anticipated scope of hearing issues and the conduct of site visits to inform resolution. As noted above, the Hearing Officer’s decision in the Sites Reservoir proceedings to “revise[] the hearing issues” after considering party statements made “during the pre-hearing conference”⁴ illustrates the entanglement of procedural issues with substance. Further, the Department overlooks the noticed September 5 deadline to file written comments on hearing issues, which undisputedly goes toward the merits. The overlap of important and substantive events between the Sites Reservoir and DCP proceedings compromises the quality, and even the viability, of meaningful protestant participation. It also conflicts with the State Water Board’s assurance in its April 17 response to requests to extend the DCP protest period that the Board would “endeavor to avoid significant overlapping due dates for the Board’s proceedings” based on these “resource concerns.”⁵

Third, as detailed in the March 26, 2024 Request to Extend, it is procedurally improper for proceedings on the instant petition to begin while the State Water Board is considering updates to water quality standards for the Bay-Delta. The Department’s petition asserts that Decision 1641, which currently governs Delta diversions, “is protective of beneficial uses until replaced through the update process and constitutes the standard for determining injury to those beneficial uses when considering the Petition.”⁶ The State Water Board issued its draft staff report in support of the Sacramento/Delta Update in September 2023, anticipating the release of specific changes to the Bay-Delta plan and the program of implementation “in early to mid-2024.”⁷ The Board is also in informal resolution discussions with the U.S. Environmental Protection Agency and five of the undersigned parties on a civil rights complaint under Title VI of the federal Civil Rights Act of 1964 concerning updates to the Bay-Delta water quality standards and instream flows governed by Decision 1641.⁸

⁴ *Id.*

⁵ State Water Resources Control Board, *Delta Conveyance Project Change Petition Proceeding – Response to Requests to Extend Protest Period and Address 2009 Time Extension Petition* at 3 (Apr. 17, 2024), https://waterboards.ca.gov/bay_delta/docs/2024/dcp-protest-letter.pdf.

⁶ DCP Petition at 14.

⁷ State Water Resources Control Board, *Staff Report/Substitute Environmental Document in Support of Potential Updates to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary for the Sacramento River and its Tributaries, Delta Eastside Tributaries, and the Delta* at 1-2 (Sept. 2023), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/2023/staff-report/ch01-execsumm.pdf.

⁸ See U.S. Env’tl. Protection Agency, External Civil Rights Docket, 2014 – Present, Complaint No. 01RNO-23-R9 (Case Update, “Pending: In Informal Resolution Agreement Negotiation”),

The revised Bay-Delta Plan will set the rules and standards against which the DCP will operate if it is eventually approved and constructed. There is no need to expedite consideration of this project ahead of these forthcoming regulatory actions. Doing so risks evaluating the Department's petition for consistency with soon-to-be-superseded standards rather than those that would actually govern project operations. Patience here will help to ensure consistency between Board decisions and avoid significant potential waste of party and government resources.

Deferring the Pre-Hearing Conference and identification of and comment on hearing issues on the Department's petition until the informal resolution period closes is consistent with Water Code section 1703.4. It will provide ample time for the Board to issue the proposed changes to the Bay-Delta Plan and allow for them to be considered in hearings on the DCP. It will avoid prejudicial overlap with the Sites Reservoir case-in-chief proceedings. And it will avoid compromising ongoing informal resolution efforts on the Department's petition and pending protests. The Hearings Office should wait until the resolution period has ended to set further proceedings in this matter.

Respectfully submitted,

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<https://www.epa.gov/external-civil-rights/external-civil-rights-docket-2014-present> (last visited July 14, 2024).