

Pre-Hearing Conference Statement

Delta Conveyance Project

Submitted by 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, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, and Golden State Salmon Association

August 7, 2024

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, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, and Golden State Salmon Association (collectively, "Protestants") submit this pre-hearing conference statement regarding the Presiding Hearing Officer's proposed hearing schedule and deadlines on the Department of Water Resources' ("Department") Change Petitions for the Delta Conveyance Project ("Project" or "DCP"), noticed on July 31, 2024. As discussed in Protestants' July 14, 2024 letter to the Presiding Hearing Officer, Protestants object to the proposed schedule and the Hearing Office's departure from precedent in expediting hearings on the Project. Among its defects, the proposed schedule would finalize issues for hearing while informal resolution proceedings are in progress; prematurely adjudicate the Project's consistency with water quality standards while those standards are in the process of being materially revised; conflict with the schedule for adjudication of the Sites Reservoir project, thereby limiting participation by Tribal Nations and disadvantaged communities impacted by both projects; and invest significant public resources in this adjudication process before public financing for the Project has even been secured and at the expense of vital Board programs and activities. For these and additional reasons discussed below, Protestants continue to urge the Presiding Hearing Officer to wait to determine hearing issues and to start these proceedings until the informal resolution period on the Department's Change Petitions has closed and the Board has announced its preferred alternative for updating the Bay-Delta water quality standards to which this Project must conform.

In their July 14, 2024 Joinder in Objection to Notice of Assignment and Pre-Hearing Conference letter, Protestants explained the procedural impropriety of holding a pre-hearing conference before the close of the mandatory period for informal resolution of protests on November 12, 2024. Water Code section 1703.4 requires protestants and the Department to make a "good faith effort" to resolve protests within 180 days of the close of the protest period on May 13, 2024. The Sites Project Authority's water rights petition process respected the 180-day informal resolution period: The informal resolution period on Sites Project protests concluded on February 28, 2024, and the Hearings Office waited 42 days to hold the first Sites

Project pre-hearing conference on April 10, 2024. The Hearings Office appropriately waited until the informal resolution period had closed and positions had been distilled to even propose hearing issues.¹ The Hearings Office has provided no explanation for its departure from precedent for this proceeding. Indeed, the Hearing Officer's July 24, 2024 response to objections fails even to mention the ongoing 180-day informal resolution period, despite multiple letters urging the Hearings Office to wait until that period concludes before initiating adjudication proceedings, consistent with precedent. Prematurely convening a pre-hearing conference compromises the integrity of these negotiations by forcing parties to comment on hearing issues that may still be subject to change due to ongoing informal discussions. It also undermines the Legislature's directive that parties endeavor in good faith to resolve disputes without a formal hearing process.

Likewise, the Hearing Officer's July 24 response neglected to substantively address the prejudicial overlap between the DCP and Sites Reservoir proceedings. The DCP and Sites Reservoir projects are interrelated, working together to overhaul Delta water storage and conveyance with significant impacts on Delta ecosystems, fisheries, and communities. Many parties are involved in both proceedings. Among them are Tribal Nations with deep and enduring relationships to Bay-Delta waters, whose water rights, cultures, religious practices, sacred sites, and fundamental ways of life will be materially impacted by the Board's decisions in these proceedings. These Tribal Nations, as well as non-profit organizations participating in both proceedings, are already stretched thin in resource capacity and now face the challenge of simultaneously navigating multiple lengthy hearing processes.

If the Hearing Officer proceeds with the proposed DCP schedule, these parties would be expected to: file slide presentations for the Sites Reservoir adjudication on August 12, participate in a pre-conference hearing on the DCP on August 13, participate in Sites Reservoir hearings starting August 19 and the evidentiary portion from August 27, submit written comments on DCP hearing issues on September 5, participate in additional Sites Reservoir hearings the following week, and then join a second DCP pre-hearing conference on October 17 just days before a Sites Reservoir site visit on October 22. This list of conflicts only accounts for the Sites Reservoir case in chief; rebuttal and sur-rebuttal presentations for the Sites proceedings are not yet scheduled but are likely to occur between November and early 2025, at the same time as the proposed DCP evidentiary proceedings. The overlap between these proceedings is untenable, particularly for Tribal Nations and advocates from disadvantaged communities within the Delta and its headwaters. These groups, along with fisheries organizations, waterkeepers, and other non-profits, hold significant stakes in these adjudications, and it is imperative that their voices are recognized and heard throughout both processes.

¹ See State Water Resources Control Bd., Notice of Public Hearing and Pre-Hearing Conference, Sites Reservoir Project (Mar. 1, 2024), [https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2024/2024-03-01-notice-of-public-hearing-and-pre-hearing-conference-\(sites\).pdf](https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2024/2024-03-01-notice-of-public-hearing-and-pre-hearing-conference-(sites).pdf).

Protestants also maintain that DCP proceedings should not progress concurrently with the State Water Board’s ongoing update of the Bay-Delta water quality standards. The Hearing Officer’s response did not sufficiently consider the implications of moving forward without these crucial regulatory updates in place. Evaluating the DCP for consistency with outdated standards undermines the integrity of this adjudication and poses profound risks to the ecological health of the Delta, the sovereignty of Delta tribes, and the welfare of Delta communities.

Expediting hearings on the Delta Conveyance Project, as currently proposed, risks repeating the mistakes from the WaterFix adjudications. The Board spent nearly two years in hearings on the WaterFix project, only to see the project application withdrawn after it proved untenable.² Ultimately, the adjudications resulted in the waste of party and Board resources at the expense of other vital programs, like the long-awaited update to the Bay-Delta water quality standards. Despite this experience, the Hearings Office is now proposing to accelerate hearings on the DCP before the Department has established that this \$20.1 billion megaproject is financially viable. As explained by a recent University of Pacific report, the State Water Project will need to recover DCP costs from ratepayers to achieve the promised avoidance of taxpayer funds.³ Yet many agricultural agencies have already elected not to participate in the Project due to its low expected benefit-cost ratio, and some are in active litigation against the Project. Because “the DCP is a bad investment for agriculture,” “more of these users can be expected to drop out of financing the plan, and those who remain are at high risk of default.”⁴ The Board should learn from its prior mistakes and avoid investing public resources in the DCP adjudication until it receives assurance that the Project can pencil.

The Hearing Officer’s justification for proceeding with the proposed schedule is unsound. The Hearing Officer’s response letter states that delaying the August 13 pre-hearing conference discussion “will require parties to begin preparations for the hearing without the opportunity to comment on the schedule as it is set in the hearing notice.” Yet the objection letters ask the Hearing Officer to defer not only the August 13 pre-hearing conference but also the initiation of the hearings themselves – including the September 5 comment deadline and ensuing hearing dates. Parties preparing for and participating in Sites Reservoir case-in-chief evidentiary hearings throughout August and September cannot realistically be expected to submit meaningful comments on DCP hearing issues by September 5, with just over a month’s notice. This is particularly problematic for tribal parties, who are additionally taxed this month with annual ceremony. The proposed hearing schedule also includes critical hearing deadlines and

² See, e.g., Cal. State Auditor, *The Unexpected Complexity of the California WaterFix Project Has Resulted in Significant Costs Increases and Delays*, Report 2016-132 (Oct. 2017), <https://information.auditor.ca.gov/pdfs/reports/2016-132.pdf>.

³ Jeffrey A Michael, University of the Pacific, *Review of Delta Conveyance Project Benefit-Cost Analysis: Implications for Decision-Makers and Financing* 26 (June 24, 2024), <https://www.pacificcbpr.org/wp-content/uploads/2024/06/DCP-BCA-review-062424.pdf>.

⁴ *Id.* at 27.

conferences that straddle the holiday season, further limiting preparation time and curtailing meaningful participation.

Rescheduling this adjudication to run on the typical timeline would resolve these conflicts and improve the quality and viability of equitable party participation in this process. For the above-stated reasons, Protestants again urge the Presiding Hearing Officer to decelerate these proceedings and defer the August 13 Pre-Hearing Conference and associated deadlines until, at the earliest, after the informal resolution period concludes on November 12, 2024. This deferral is necessary to accommodate good faith efforts at informal resolution and to avoid prejudicing participation by Tribal Nations, disadvantaged communities, and non-profits due to overlapping schedules. It will also provide time and preserve resources for the Board to release its preferred alternative for the Bay-Delta Plan update to inform the Hearing Officer's consideration of the Project's consistency with Delta flow. We urge the Hearings Office to consider these points carefully and reassess its approach to the DCP proceedings.

Respectfully submitted,

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