

# The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

## **Statement on October 17, 2024 Pre-Hearing Conference Issues Regarding the Department of Water Resources’ Petitions for Change of Water Rights Permits 16478, 16479, 16481, and 16482 (Applications 5360, 14443, 14445A, and 17512, respectively) for the 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, and Golden State Salmon Association

October 10, 2024

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## INTRODUCTION

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 (collectively, “Protestants”) submit this pre-hearing conference statement in response to the Presiding Hearing Officer’s request for comment on the legal and policy issues raised by the Department of Water Resources’ (“Department”) August 23, 2024 Minor Change Request (“August 23 Request”) and withdrawal of its petitions for extension of time pertaining to the Change Petitions for the Delta Conveyance Project (“DCP”), noticed on September 17, 2024. The undersigned appreciate the Presiding Hearing Officer’s invitation for comment and provide this statement in response to the questions posed in the September 17 Notice on procedural and jurisdictional defects inherent in the Department’s submittals.

First, the Board lacks statutory authority to consider the Department’s August 23 Request and must reject it outright on this basis alone. The Request seeks to amend the Department’s February 22, 2024 Petitions for Change of Water Rights Permits (“Change Petitions”) to construct the DCP by retroactively modifying the underlying permits to extend their deadline for construction work by *fifty-five* years. The Board has no authority to authorize such a modification of midstream change petitions, not to mention the substantial modification the Department seeks here. Nor can it do so without depriving the public of its statutory protest rights. If the Department seeks to amend its Change Petitions, it must withdraw and resubmit them like any other applicant, restarting the protest period and the Board’s review process for the amended submittals.

Second, and even more fundamentally, the Request only serves to amplify jurisdictional flaws in this proceeding that preclude the Board from considering the merits of the Change Petitions, either as submitted on February 22 or as improperly amended on August 23. The Change Petitions, like the Department’s belated August 2024 Operations Plan for the DCP, assume water rights that simply do not exist. The Department insists on muddying the procedural waters with its submittals, but the issue is simple: The water rights permits the Department invokes for the DCP expired in December 2000; they were never extended; the Department is neither currently seeking their extension nor could such an extension be granted without violating law barring cold storage of water rights; and if the Department now wishes to appropriate 6,000 cubic feet per second (cfs) of water for the DCP, it must rejoin the queue and submit a water rights application just like every other would-be appropriator. At the end of the day, the Department is asking for special treatment, but the law requires it to be held to the same standards and its applications subject to the same procedural protections that apply to everyone else. Failing to properly enforce the Board’s jurisdiction and hold the Department to uniform standards will perpetuate a long and violent history of infringing on Tribal Nations’ water rights,

compromise waterways that are vital to the health and welfare of the Delta’s most vulnerable residents, and accelerate the collapse of native fish species and the already fragile ecosystem of this imperiled watershed.

Third, even if the Board had jurisdiction to process the Change Petitions—which it does not—it cannot proceed to adjudicate the Change Petitions until underlying water quality planning processes have been completed. This includes the long-awaited completion of the Bay-Delta Plan update, adjudication of tribal water rights, and conclusion of the U.S. Environmental Protection Agency’s pending investigation into the Board’s discriminatory mismanagement of Bay-Delta water quality and exclusion of Tribal Nations and communities of color from decision-making processes.

Fourth and finally, Protestants provide recommendations for the phasing of case-in-chief submittals that appropriately accord with respective burdens of proof. In doing so, however, Protestants again underscore that the many threshold procedural and jurisdictional issues set forth herein must be resolved before the Board can lawfully proceed with any substantive evaluation of the Change Petitions or set a fair and appropriate hearing schedule.

In short, Protestants urge the Presiding Hearing Officer to reject the Department’s fatally defective August 23 Request. The Board must further require that the Department either withdraw and resubmit its Change Petitions as an application to appropriate water for the DCP under Water Code section 1250 et seq. or stay these proceedings pending the Department’s submittal and the Board’s final disposition of a request to retroactively extend the Department’s expired permits.

## DISCUSSION

### **I. The Board Should Reject the Department’s August 23 Request to Amend its Midstream Change Petitions**

On August 23, 2024, six months after filing its Change Petitions and more than three months after the protest period closed, the Department improperly submitted a request to modify its February 22, 2024 Change Petitions. Though the Department calls this amendment “minor” and “implicit in the Petition already filed,” it is anything but.<sup>1</sup> The Department asks the Board to allow it to rewrite its February 22 Change Petitions by requesting to modify Term 6 of its underlying permits to retroactively extend the deadline to complete construction authorized

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<sup>1</sup> Department of Water Resources, Minor Change to Department of Water Resources’ Petitions for Change of Water Right Permits 16478, 16479, 16481, and 16482 (Applications 5630, 1443, 14445A, and 17512, respectively), p. 1 (Aug. 22, 2024).

under the permits by fifty-five years, from December 31, 2000 to December 31, 2055.<sup>2</sup> Neither law nor equity sanctions this bold sleight of hand. Because the Board lacks authority to accept a midstream amendment to a change petition, the Presiding Hearing Officer must reject the Department's August 23 Request and require the Department to either withdraw and resubmit a modified change petition with a new protest period or be held to the terms of its February 22, 2024 filing.

The Department invokes Water Code section 1700.4 as authority for this amendment. But as the September 17 Notice correctly points out, neither section 1700.4 nor any other provision of the Water Code allows an applicant to modify an already accepted change petition—especially, as in this case, months after the protest period has closed, the matter has been referred to the administrative hearings office, and informal resolution negotiations are well underway. Section 1700.4 authorizes the Board to make a minor change to an application for a new water right “without requiring the filing of a petition for change” if the requested change meets four enumerated criteria that ensure it will not meaningfully affect the diversion applied for, the affected area, water supply of other legal users of water, or instream beneficial uses.<sup>3</sup> In a similar vein, section 1700.6 authorizes the Board to “make a minor change to a permit or license without requir[ing] the filing of a petition for change” if the Board finds that the requested change meets enumerated criteria that again ensure it will not increase consumptive uses, adversely affect the water supply of other legal users of water or instream beneficial uses, or otherwise constitute more than a minor adjustment to the point of diversion, place of use, or purpose of use.<sup>4</sup> In other words, sections 1700.4 and 1700.6 allow an applicant for a new water right or a permit holder to make a minor adjustment to a pending application or an existing permit, respectively, where the change is so minor that requiring the applicant or permit holder to go through the full change petition process would be imprudent. Neither section provides the Board authority to permit a midstream amendment to a change petition.

Any doubt about whether these sections authorize the instant request is dispelled by their legislative history. The Legislature added sections 1700.4 and 1700.6 to the Water Code in 2020 through Senate Bill 779. The preamble to Senate Bill 779 makes clear that the purpose of these sections is to provide water rights applicants and permittees an alternative to undergoing the full change petition process set forth in section 1701 et seq. when the modification sought to the application or permit is so minor that it cannot possibly adversely impact water supply, instream

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<sup>2</sup> *Id.*

<sup>3</sup> Cal. Water Code § 1700.4(a). Before making a change to an application for a new water right under section 1700.4, the Board must provide formal notice to protestants, post notice to its website, and allow at least 15 days for public comments. *Id.* § 1700.4(b).

<sup>4</sup> Cal. Water Code § 1700.6.

beneficial uses, or interests of other water rights holders or the public.<sup>5</sup> The Legislature could have amended the Water Code to authorize minor changes to pending section 1701 change petitions, but it chose not to. Rather, its purpose was to create an *alternative* to the change petition process for truly minor adjustments to water rights applications or permits.<sup>6</sup> Applying section 1700.4 to enable a *change to a change petition* as the Department requests would effectively rewrite the law.<sup>7</sup>

Misapplying section 1700.4 to allow the Department to rework its Change Petitions after adjudication has begun would also severely prejudice the public and community members affected by DCP construction. Had the public been given adequate notice and opportunity to protest the Department’s request to retroactively extend construction timelines under its expired permits by fifty-five years, additional protests may have been filed and existing protestants could have raised additional concerns. By instead submitting its modification under section 1700.4, the Department has effectively eliminated the opportunity for meaningful public input, undermining the right to protest and bypassing essential procedural safeguards.

Even if section 1700.4 could authorize midstream modifications to pending change petitions—which it does not—it still could not authorize the modifications the Department seeks here. The Department asserts that modifying the February 22, 2024 Change Petitions to add a request to extend the period for completion of construction work by fifty-five years is “minor.”<sup>8</sup> This characterization could not be further from the truth. As discussed above, the Legislature has set forth criteria that govern what constitutes a minor change. These criteria require that a minor change is “not substantial” (or “constitutes a reduction” in a “feature of the application”)<sup>9</sup> and that it “does not have the potential to adversely affect the water supply of other legal users of water or instream beneficial uses.”<sup>10</sup> Neither these nor the other requisite criteria for a section 1700.4 minor change are met here.

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<sup>5</sup> Senate Bill 779 (2020) (“This bill would authorize an applicant, permittee, or licensee to initiate the making of, or consent to the making of, a minor change to an application, permit, or license without requiring the filing of a petition for change if the board makes specified findings, including that the change does not have the potential to adversely affect the water supply of other legal users of water or instream beneficial uses.”)

<sup>6</sup> See *Cal. Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 (“We must assume that the Legislature knew how to create an exception if it wished to do so.” [citation omitted]).

<sup>7</sup> See *DiCampi-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992 (“A court may not, ‘under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms uses.’ [quoting *Cal. Fed. Savings & Loan Assn.*, 11 Cal.4th at 349].).

<sup>8</sup> See Dept. of Water Resources, *Minor Change to Department of Water Resources’ Petitions for Change of Water Right Permits 16478, 16479, 16481, and 16482* at p. 1 (Aug. 22, 2024) (“This change is submitted pursuant to California Water Code section 1700.4 and seeks to modify Terms 6 of the referenced water rights permits. Term 6 currently reads ‘Construction works shall be completed on or before December 31, 2000.’ As a component of the Petition, DWR seeks to modify Term 6 to read ‘Construction work shall be completed on or before December 31, 2055.’”).

<sup>9</sup> Wat. Code § 1700.4(a)(3).

<sup>10</sup> Wat. Code § 1700.4(a)(4).

An extension of the construction deadline for Delta conveyance facilities by five and a half decades is quite clearly “substantial.” The public, including Bay-Delta Tribal Nations, communities, and interest groups represented by the undersigned, have relied on the permits’ assurance that construction of any further State Water Project conveyance facilities in the Delta was complete as of December 2000. The change the Department is now seeking would not only resurrect these expired permits from the dustbin; it would also mean that Bay-Delta communities would have to endure the construction of conveyance infrastructure for generations to come. Furthermore, the construction that the Department is requesting the Board to authorize for an additional fifty-five years is far from trivial. It would involve, among other aspects, building two entirely new North Delta intakes and a massive underground tunnel approximately forty feet in diameter, stretching the length of the South Delta with the capacity to export 6,000 cfs of water.<sup>11</sup> What the Department terms a minor change is quite clearly a major modification to the construction timeline and to the hydrology of the Delta as well as to the lived experience of Delta communities and the countless plants, animals, and people who rely on its flows.

The Department’s attempted permit modification also has clear potential to harm the Bay-Delta’s instream beneficial uses, which include, but are not limited to, “[t]he use of water for recreation and preservation and enhancement of fish and wildlife resources.”<sup>12</sup> As noted above, the Department seeks to extend construction timelines to enable the diversion and export of an additional 6,000 cfs of water from the Delta. It requests this change despite Board recognition that current Delta flows are already diverted far beyond the levels needed to protect instream beneficial uses.<sup>13</sup> Insufficient flows have driven the Delta ecosystem into what the Board itself has acknowledged is a state of “crisis,” causing collapse of native fish populations, devastating native riparian vegetation and wildlife, forcing the closure of fisheries, and inducing proliferation of harmful algal blooms, among many other ecosystem impacts—all of which compromise fish and wildlife resources, impair recreational opportunities, and injure other designated instream beneficial uses of Delta waters.<sup>14</sup> With the Department’s plans to divert even more water through the DCP, further injury to instream beneficial uses will be all but guaranteed.

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<sup>11</sup> See Department of Water Resources, Delta Conveyance Project: Final Environmental Impact Report, p. 3-13 (Dec. 2023) (describing adopted project).

<sup>12</sup> Water Code § 1243; see also Cal. Water Code § 13050(f) (“Beneficial uses” of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.”); State Water Resources Control Board, *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary*, pp. 8-9 (Dec. 13, 2006) (designating beneficial uses for Bay-Delta watershed, including, among other instream uses, water contact and non-contact recreation, shellfish harvesting, cold and warm freshwater habitat, commercial and sport fishing, migration of aquatic organisms, spawning, reproduction, and/or early development, estuarine habitat, wildlife habitat, and rare, threatened or endangered species).

<sup>13</sup> See, e.g., State Water Bd., Bay-Delta Plan Draft Staff Report: Sacramento/Delta Update at 5-69 (Sept. 2023) (describing fully appropriated streams).

<sup>14</sup> Cal. State Water Res. Control Bd., *July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan* 4 (2018),

Similarly, construction of DCP intake facilities pursuant to the requested fifty-five-year extension is almost certain to increase surface water methylmercury and selenium contamination.<sup>15</sup> As the Board has acknowledged, mercury contamination is particularly harmful to subsistence fishing, commercial and sportfishing, and the survival of endangered fish species.<sup>16</sup> Decades of intake facility construction will undoubtedly amplify these impairments.

These concerns also negatively impact the ability of Delta Tribes to assert and protect their rights to Bay-Delta flows as well as Tribal Beneficial Uses (“TBUs”) of Bay-Delta waters, which are currently pending formal recognition before the Board.<sup>17</sup> The Department’s ongoing exploitation of the Bay-Delta has diminished Tribes’ access to water, as well as the fish, plants, and wildlife that depend on the ecosystem and which many Delta Tribes in turn depend on for cultural, subsistence, and ceremonial practices. By requesting an extension to enable even more significant conveyance facility construction, the Department risks further reducing Bay-Delta flows and introducing more contaminants into the water. An extension would thereby compound the obstacles to Tribes’ assertion of federal water rights and impair TBUs by disrupting Tribes’ cultural, subsistence, and ceremonial practices tied to these waters. These actions deepen the alienation of Tribes from the lands and waters they have stewarded since time immemorial.

## **II. The Board Cannot Retroactively Extend Expired Permits**

An even more fundamental flaw in the Department’s submissions is that the Board lacks jurisdiction to act on the Department’s Change Petitions, whether in their original form submitted in February or as improperly amended in August, since the water rights permits in question expired nearly twenty-five years ago. The Board should therefore instruct the Department to resubmit its Change Petitions as an application for a new water right pursuant to Water Code section 1250 et seq. Alternatively, if the Board wishes to allow the Department to exhaust its options, the Board should stay proceedings on the instant Change Petitions while the Department submits a request to extend its expired permits and until an extension is finally and fully adjudicated. Ultimately, this latter approach is certain to be an inefficient use of resources for all parties involved, as there is no legal basis for the Board to retroactively extend expired permits.

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[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/docs/sed/sac\\_delta\\_framework\\_070618%20.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/sed/sac_delta_framework_070618%20.pdf).

<sup>15</sup> See Protest at 28-29.

<sup>16</sup> See, e.g., State Water Bd., Final Staff Report: Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays and Estuaries of California – Tribal and Subsistence Fishing Beneficial Uses and Mercury Provisions, p. 80 (May 2, 2017),

[https://www.waterboards.ca.gov/water\\_issues/programs/mercury/docs/hg\\_SR\\_final.pdf](https://www.waterboards.ca.gov/water_issues/programs/mercury/docs/hg_SR_final.pdf)

<sup>17</sup> See Protest at 10; State Water Resources Control Board, *TBU Progress Updates, Division of Water Rights—Bay Delta Plan*, [https://www.waterboards.ca.gov/tribal\\_affairs/regional\\_tbu\\_updates.html](https://www.waterboards.ca.gov/tribal_affairs/regional_tbu_updates.html) (last visited Oct. 9, 2024) (reporting that “[i]ncorporation of tribal beneficial uses were included as part of the Draft Staff Report in support of proposed update to the Bay-Delta Plan for the Sacramento/Delta”).

As multiple protestants have pointed out, the Department’s request to resuscitate long-expired permits for construction and use of the DCP raises significant jurisdictional problems, which must be addressed before the Board can consider the merits of the Change Petitions. To assure that it has authority to proceed with this adjudication, the Board must first determine that there exists a vested entitlement, or a valid permit, that can be modified to allow the construction of DCP facilities and diversion of water for the DCP.<sup>18</sup> There does not.

The history of the Subject Permits makes this clear. The Board issued the four Subject Permits (“1972 Permits”) on September 26, 1972, authorizing the Department to appropriate water from the Feather River and Sacramento/San Joaquin River Delta channels to operate the State Water Project.<sup>19</sup> The 1972 Permits required complete construction of facilities by December 1, 1980 and complete application of water to the proposed use by December 1, 1990. The Department petitioned for and obtained an extension of both deadlines from the Board: Term 6 of the amended permits required construction to be completed by December 31, 2000 and Term 7 required complete application of water to the proposed use by December 31, 2009. Conceding that it had “not directly diverted, rediverted, or diverted to storage the maximum amounts allowed annually under the Feather River/Delta Permits,” the Department applied on December 31, 2009 for a further five-year extension of time to “place the water currently authorized under the permits to beneficial uses prior to licensing.”<sup>20</sup> The Department did not, by contrast, request an extension of its construction deadline, which had already expired ten years prior. Instead, it explicitly stated that “[a]ll facilities required for the storage, diversion, and conveyance of the water-related to this project, from its sources to its points of diversion and rediversion for both authorized consumptive and non-consumptive uses, have been completed,” and thus, the requested extension of time “will not authorize the construction of any new facilities.”<sup>21</sup> Multiple parties protested the extension requests, and the Board took no action on either the protests or the extension requests. Ultimately, the Department withdrew the extension requests on August 21, 2024.<sup>22</sup>

In summary, the Department has no permits that could conceivably be amended to authorize the construction of the DCP or the diversion of 6,000 cfs of water through DCP facilities.<sup>23</sup> As the Department conceded in its December 31, 2009 extension request, any

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<sup>18</sup> Cal. Water Code § 1398(a) (providing that “[t]he period specified in the permit for . . . completion for construction work, for application of the water to beneficial use, or any and all of these periods may, for good cause shown, be extended by the board” [emphasis added].).

<sup>19</sup> See Dept. of Water Resources, Petition for Extension of Time for Permits 16478, 1649, 16481, and 16482 (Application 5630, 1443, 1445A and 17512, respectively) (Dec. 31, 2009).

<sup>20</sup> *Id.* at Att. 1.

<sup>21</sup> *Id.*

<sup>22</sup> Joint Objection to DWR Minor Change Request, Ex. B (Sept. 3, 2024).

<sup>23</sup> See Cal. Water Code § 1397 (The work shall be completed and the water applied to beneficial use in accordance with . . . the terms of the permits and within the period specified in the permit.).



construction authorized under the 1972 Permits was completed as of December 2000, and the Department's opportunity to apply water to the proposed use expired on December 31, 2009. The Department must now operate within the bounds of the permitted rights that were perfected during those periods, or it must seek a new permit.

The Presiding Hearing Officer's September 17 Notice suggests that perhaps the Department would not need an extension of time to construct facilities if it was merely "exercis[ing] the portion of the Subject Permits that it has already perfected, and for which it now seeks to add points of diversion and rediversion."<sup>24</sup> This is both incorrect and misses the point.<sup>25</sup> Water Code section 1398 would require an extension of time to push out the deadline "for completion of construction work,"<sup>26</sup> and Board regulations specify the forms and fees for such a request;<sup>27</sup> the deadline for completion cannot be extended through a change petition. Regardless, the Department is not seeking to construct facilities for perfected water rights. The Department's Change Petitions and its environmental impact report for the DCP make clear that the Department seeks to divert up to 6,000 cfs of water *beyond* the amounts it put to beneficial use before December 31, 2009.<sup>28</sup> The Department has not held a permit to construct new Delta conveyance facilities since December 31, 2000 or appropriate additional amounts of water up to the 10,350 cfs limit in its 1972 Permits since December 31, 2009. There is simply no permit to extend.<sup>29</sup>

The proper result is that the Board should reject the Change Petitions as facially flawed and require the Department, if it wishes to proceed with the DCP, to submit an application to appropriate water and construct new conveyance facilities. The only other possibility left to the Board is to stay proceedings on the Change Petitions while the Department exhausts efforts to extend the long-lapsed construction and appropriation deadlines under the 1972 Permits.

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<sup>24</sup> September 17 Notice at 5.

<sup>25</sup> The September 17 Notice suggests that "DWR may not need an extension of time to construct facilities to exercise the portion of the Subject Permits that it has already perfected, and for which it now seeks to add points of diversion and rediversion" (September 17 Notice at 5). But whether and to what extent the Department may have perfected a portion of its 1972 Permits cannot be determined through this proceeding; rather, those questions must be answered through a separate licensing process in compliance with the procedural and substantive requirements that pertain to licensing. *See* Cal. Water Code § 1600 et seq. (governing licensing).

<sup>26</sup> Cal. Water Code § 1398(a).

<sup>27</sup> 23 Cal. Code Regs. § 842.

<sup>28</sup> *See* Change Petitions at 1-2 (asserting that total diversion with the DCP will remain within the 10,350 cfs limit under the 1972 Permits); September 17 Notice at 4 ("DWR's analysis of the effects of the proposed DCP operations in the Final Environmental Impact Report assumes that diversions under the Subject Permits would not be limited based on the amount of water used before the 2009 deadline to perfect those rights.").

<sup>29</sup> Even if the water rights necessary for construction of the DCP had vested, they would have been forfeited due to non-use. Water Code section 1241 is clear: water rights are subject to forfeiture if the water is not put to beneficial use for a period exceeding five years. Wat. Code § 1241 ("If the person entitled to the use of water fails to use beneficially all or any part of the water claims by him or her, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of five years, that unused water may revert to the public and shall, if reverted, be regarded as unappropriated water."); *see also, e.g., Millview Cnty. Wat. Dist. v. State Wat. Resources Control Bd.*, 229 Cal.App.4th 879, 889 (2014) ("[A]ppropriators must 'use it or lose it.'").

Resolving these matters in this order protects the integrity of the proceedings and preserves important resources. As discussed above, the Board cannot consider petitions to change the expired 1972 Permits until it determines that those permits are valid and capable of extension. And it is quite clear that the Board does not have the discretion to retroactively extend long-expired permits. Should the Board agree, the existing Change Petitions would be moot, and the Department would have no choice but to apply for new water rights should it wish to proceed with the DCP.

Under Water Code section 1398 and Code of Regulations Title 23, section 844, the Board may approve a request for an extension of time to construct facilities and/or put water to beneficial use only if it finds “good cause” for the extension.<sup>30</sup> Specifically, section 844 requires the Board to determine that granting the extension is “in the public interest,” and that the Department has exercised due diligence in meeting previous deadlines, explaining any obstacles that could not be reasonably avoided.<sup>31</sup> Furthermore, the Department must demonstrate that it will make “satisfactory progress” on the DCP if an extension is granted.<sup>32</sup> The Department cannot meet any of these criteria.

The Department has not exercised due diligence. Rather, it allowed the construction deadline to lapse without issue in December 2000 and let its December 2009 extension request for Term 7 linger well beyond the five additional years it had requested to perfect its water right. There have been no obstacles to the construction or application of water to beneficial uses beyond those for which the Department is responsible, such as its failure to obtain financing.<sup>33</sup> The Department has neither explained why it failed to meet the December 31, 2000 deadline for construction, nor any of the other extension deadlines it has received since then for the 1972 Permits. There is every reason to believe that the Department will fail to make satisfactory progress on the construction of the DCP, given that it still lacks a viable financing plan and relevant regulatory approvals and faces a host of other hurdles it has yet to complete or demonstrate that it likely can do so.<sup>34</sup>

The Department’s extension request would fail for an additional reason: The DCP facilities are radically different from the originally permitted State Water Project facilities. A permit extension provides only “the right to complete [the permittee’s] *original* project.”<sup>35</sup> The

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<sup>30</sup> Cal. Water Code § 1398; 23 Cal. Code Regs. § 844.

<sup>31</sup> 23 Cal. Code Regs. § 844.

<sup>32</sup> *Id.*

<sup>33</sup> 23 Cal. Code Regs. § 844 (“Lack of finances, occupation with other work, physical disability, and any other conditions incident to the person and not the enterprise will not generally be accepted as good cause for delay.”)

<sup>34</sup> See, e.g., Jeffrey Michael, *Review of Delta Conveyance Project Benefit-Cost Analysis: Implications for Decision-Makers and Financing* (June 24, 2024), available at <https://www.pacificcbpr.org/wp-content/uploads/2024/06/DCP-BCA-review-062424.pdf> (“At its recent estimated cost of \$20.1 billion (2023), the [DCP] is an enormous financial commitment for water agencies facing increasing constraints on their customers’ ability to pay.”).

<sup>35</sup> *Cal. Trout, Inc. v. State Water Res. Control Bd.* (1989) 207 Cal. App. 3d 585, 618.

Board cannot approve an extension of existing permits if the subject agency would effectively be the “beneficiary of *new* permits authorizing or predicated upon an expanded project. The term ‘extension’ in this context is a palpable misnomer.”<sup>36</sup> Yet this is exactly what the Department seeks.

The DCP deviates substantially from the facilities authorized in the 1972 Permits, including altering diversion locations, the siting of the conveyance facility, and the proposed method of water transport. If approved, the DCP would divert water at two intake locations and transport it via a subterranean tunnel to a new pumping facility and aqueduct complex, ultimately discharging the water into a reservoir at the start of a larger aqueduct system. No facilities resembling the DCP were contemplated in the enabling legislation for the State Water Project or the Central Valley Project, nor were they described in the 1972 Permits. In fact, the two intakes proposed in the August 2024 Operations Plan would be miles from the location of the “Delta Water Facilities” diversion point listed in the 1972 Permits.<sup>37</sup> Given these and other substantial discrepancies between the 1972 Permits and the facilities the Department seeks to construct and operate through its Change Petitions, the Board should simply acknowledge that the DCP is a fundamentally different undertaking and accordingly require the Department to submit a new permit application.

In a similar vein, any attempt by the Department to claim rights to waters that were not put to full beneficial use within the time allowed under the 1972 Permits would flout well-established prohibitions on the cold storage of water rights. The Court of Appeal in *California Trout, Inc. v. State Water Resources Control Board* rejected a similar attempt to use an extension request to evade the need to apply for a new water right. There, the Court of Appeal held that L.A. Water and Power lost its entitlement to divert water because it had failed to construct an aqueduct within the period authorized by its permit and which the agency needed to put the full amount of water secured under its permits to beneficial use.<sup>38</sup> To hold otherwise would unlawfully “permit an appropriator of water from a complex of sources to lock up artificially high ‘vested’ water rights . . . despite its inability to apply such waters to beneficial use.”<sup>39</sup>

Just so here. The Department ran out the clock on its permitted time to construct new conveyance facilities and was thus physically incapable of putting the 10,350 cfs of water allotted under its 1972 Permits to full beneficial use by December 31, 2009. The upshot is that the Board is limited to the portion of those permits that it timely perfected; any attempt by the Department to divert water beyond that—either through the Change Petitions or an application to

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<sup>36</sup> *Id.*

<sup>37</sup> DWR- 331, “Map Cal WaterFix Facilities” (Feb. 21, 2017).

<sup>38</sup> *Cal. Trout*, 207 Cal. App. 3d at 618.

<sup>39</sup> *Id.*

extend the expired permits—must be treated as a new appropriation.<sup>40</sup> If the Board adjudicates the Change Petitions under the assumption that the 10,350 cfs limit under the 1972 Permits remains valid, it would effectively endorse the cold storage of water rights in violation of governing case law, the Water Code’s directive for diligent perfection of appropriations, and the Board’s own precedents.<sup>41</sup>

Allowing the Department to resurrect its long-expired permits for the DCP would not only flout the law: It would have significant, even catastrophic, consequences for Delta ecosystems and communities. As the Board has acknowledged, Bay-Delta waterways are fully appropriated, even without accounting for unadjudicated tribal water rights, and diverted well in excess of the levels necessary to protect beneficial uses and public trust resources.<sup>42</sup> This underscores the need to thoroughly assess whether 6,000 cfs of water is genuinely available for the Department to appropriate, an assessment properly made through an application for a permit to appropriate water, not a change petition.<sup>43</sup>

### **III. The Board Must Address Bay-Delta Water Quality Before Deciding Whether to Authorize Construction and Use of the DCP**

Despite numerous objections, the Board has thus far insisted on moving forward with consideration of the Change Petitions for the DCP before completing its decades-overdue update to Bay-Delta water quality standards. The undersigned and other protestants have consistently raised concerns that this approach is fundamentally backward, harming Delta Tribes, disadvantaged communities, and the ecological integrity of the Bay-Delta. The Board must complete these and other threshold processes to determine minimum instream flow protections and existing water rights before considering either the Change Petitions, an extension request, or an application for a new permit to construct and operate the DCP.

First, the Board must establish scientifically sound Bay-Delta flow criteria before entertaining any authorizations for the DCP. The Board has not yet established the “appropriate Delta flow criteria” required by Water Code section 85086(c)(2) to approve a change in the point of diversion of the State Water Project. The Bay-Delta Plan has not been substantively updated in nearly thirty years. Scientific consensus demonstrates that the current 1995 instream flow requirements are inadequate to protect fish and wildlife and other beneficial uses, as well as water quality and communities in the Delta. Until the Bay-Delta Plan update is completed with

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<sup>40</sup> *Id.* at 619 (reasoning that the term “‘extension’ was a palpable misnomer” where the agency had filed to construct facilities necessary to put the appropriate water to full beneficial use, and the grant of an extension thus made the agency the effective “beneficiary of *new* permits authorizing or predicated upon an expanded project”).

<sup>41</sup> *See, e.g.*, State Water Bd Order WR 2008-0045; WR 2022-0165.

<sup>42</sup> State Water Bd., Bay-Delta Plan Draft Staff Report, *supra* note 3.

<sup>43</sup> *See* Cal. Water Code § 1375(d) (“There must be unappropriated water available to supply the applicant” for issuance of a permit to appropriate water.”).

regulatory flow criteria and a plan of implementation, the Board cannot determine whether the DCP's operations would be consistent with the minimum instream flow levels necessary to protect instream beneficial uses.<sup>44</sup> Nor can it ascertain whether the Department will make "satisfactory progress" in developing a project that might be precluded from operating by water quality controls so as to obtain a permit extension.<sup>45</sup> Flow reductions resulting from years of water governance failures have already proven insufficient to meet beneficial use standards, and any further reductions will worsen the existing ecological crisis in the Delta and harms to Delta communities, including disrupting tribal cultural practices and posing serious health risks to adjacent disadvantaged populations. These problems underscore the need for a comprehensive water availability analysis, informed by updated water quality criteria that comply with the Clean Water Act and Porter-Cologne Act before any decisions on adding new 6,000 cfs export facilities can be made. If the Board continues to rush consideration of the DCP without addressing these critical issues, it will once again be Tribal Nations and disadvantaged Delta communities who shoulder the heaviest consequences.

Likewise, from a wholly practical standpoint, any adjudication related to the availability of water for the DCP, as well as any necessary conditions on the appropriation of purportedly available water, can only occur after regulatory flow criteria and standards are set. Making a determination that water is "available" and can be diverted by the Department before the State Water Board identifies how much water must remain instream will require serial rounds of evidence to be presented in this proceeding, prolonging the hearings and necessitating the introduction of evidence that may ultimately not be relevant to the outcome.

Second, the Board is currently under investigation by the U.S. Environmental Protection Agency ("EPA") for violations of Title VI of the Civil Rights Act of 1964 resulting from its discriminatory mismanagement of Bay-Delta water quality and exclusion of Tribes and communities of color from decision-making processes. Specifically, on August 8, 2023, the EPA accepted for investigation a civil rights complaint filed by Shingle Springs Band of Miwok Indians, Winnemem Wintu Tribe, Little Manila Rising, Restore the Delta, and Save California Salmon,<sup>46</sup> opening an investigation into, among other allegations, "[w]hether the [Board's] administration of the water quality standard setting program with respect to the Water Quality Control Plan for the [Bay-Delta] watershed ("Bay-Delta Region"), including timeliness of rulemaking and opportunities for public participation, subjects members of Native Tribes and Black, Asian, and Latino residents of the Bay-Delta Region, particularly the South Stockton

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<sup>44</sup> The updated Bay-Delta Plan must include regulatory flow criteria to make it possible for the Board to assess "a change in point of diversion of the State Water Project . . . from the southern Delta to a point on the Sacramento River" for consistency with "appropriate Delta flows" as required by Water Code section 85086(c)(2). A non-regulatory update that does not adopt and implement "Delta flow criteria," like what is being contemplated through the Voluntary Agreement alternative set forth in the Board's draft staff report, cannot substitute.

<sup>45</sup> 23 Cal. Code Regs. § 844.

<sup>46</sup> The Complaint was subsequently amended to add Buena Vista Rancheria of Me-Wuk Indians as an additional complainant.

community, to discrimination based on race, color, and national origin.”<sup>47</sup> Shortly thereafter, EPA, the Board, and Complainants entered into informal resolution discussions, which remain pending.<sup>48</sup> The Board must await the completion of this resolution process and the conclusion of the investigation before addressing the DCP to ensure that it is acting consistent with federal civil rights guarantees.

Third, the Board must ensure that tribal water rights—which have been overlooked and infringed upon for centuries—are fully adjudicated before considering any further action on the Change Petitions. Under the *Winters* Doctrine, when the federal government reserves land for Tribes, it also reserves sufficient water to fulfill the purposes of the reservation.<sup>49</sup> These federal reserved water rights “vest[] on the date of the reservation and are superior to the rights of future appropriators.”<sup>50</sup> Unlike appropriative rights administered by the Board, federal reserved water rights cannot be forfeited through non-use.<sup>51</sup> Despite the presence of tribal lands and reservations throughout the Delta and its headwaters, tribal water rights have yet to be fully adjudicated and integrated into California’s water permitting and management processes.<sup>52</sup> Moving forward with consideration of the DCP without first addressing tribal water rights would present yet another barrier to their exercise.<sup>53</sup> The Board must prioritize adjudicating tribal water rights to ensure Tribal Nations receive their fair share of water resources and are not further marginalized by the State’s water management decisions.

#### **IV. The Board Should Ensure that Any Eventual Hearing Schedule Comports with Burdens of Proof and Provides for Full and Fair Hearing of the Issues**

Given the unresolved procedural and jurisdictional issues detailed above, a January 10, 2025 deadline for submission of case-in-chief exhibits and related documents would be premature. The same is true for the scheduled January 25, 2025 hearing date, which is impossible to meet under the circumstances. The Board must first address the many threshold defects with the Department’s submittals—including requiring the Department to withdraw its improperly submitted August 23 Request and refile the Change Petitions as a new water rights application or

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<sup>47</sup> EPA, Letter RE Acceptance of Administrative Complaint, EPA File No. 01RN0-23-R9 (Aug. 8, 2023).

<sup>48</sup> EPA, Letter RE Informal Resolution/Tolling of Preliminary Findings Timeframe, EPA File No. 01RN0-23-R9 (Sept. 12, 2023).

<sup>49</sup> *Winters v. United States* (1908) 207 U.S. 564, 576–77 (establishing the principle of Indian reserved water rights based on federal law).

<sup>50</sup> *Cappaert v. United States* (1976) 426 U.S. 128, 138.

<sup>51</sup> *Colville Confederated Tribes v. Walton* (9th Cir. 1981) 647 F.2d 42, 51.

<sup>52</sup> See U.S. Environmental Protection Agency, *California Tribal Lands and Reservations*, [https://www3.epa.gov/region9/air/maps/ca\\_tribe.html](https://www3.epa.gov/region9/air/maps/ca_tribe.html) (last visited Oct. 7, 2024).

<sup>53</sup> See State Water Resources Control Board, Resolution No. 2021-0050, *Condemning Racism, Xenophobia, Bigotry, and Racial Injustice and Strengthening Commitment to Racial Equity, Diversion, Inclusion, Access, and Anti-Racism* ¶ 7(c) (Nov. 16, 2021) (acknowledging that “California Native American Tribes continued to face barriers to defining, quantifying, accessing, protecting, and controlling their ancestral lands, water rights, instream flows, cultural resources, and beneficial uses”).

exhaust any efforts to extend its expired 1972 Permits—before addressing any merits issues. The Board should also refrain from considering any authorization for DCP facilities and diversion, whether submitted as a change petition, permit extension, or new water right, until it has finalized the Bay-Delta Plan update and pending EPA investigations into Board discrimination in the Bay-Delta have concluded.

While the Board works out these threshold issues, it should vacate the January 10 submission deadline and the January 25 hearing date to provide clarity and certainty for the parties. Even if the Board were to decide that it could lawfully proceed to adjudicate the Change Petitions—which it cannot—a January 2025 deadline for case-in-chief submittals would be unworkable. On August 22, 2024, the Presiding Hearing Officer vacated the September 5 deadline to submit written comments on proposed hearing issues and the November 4 deadline for parties to file initial notices of intent to appear, stating that “[i]n the near future, the AHO will issue an amended notice of public hearing setting a revised schedule for this proceeding.” No amended notice has been issued, and no hearing issues have been established. After resolving the threshold issues discussed above, the Presiding Hearing Officer will need to set forth proposed hearing issues, elicit parties’ comments, finalize hearing issues, and set a new date for appearances, in addition to determining case-in-chief and rebuttal scheduling. Further, the Hearings Office must provide the parties with sufficient time between the announcement of hearing issues and the deadline for submitting case-in-chief materials to allow the parties to prepare testimony and submit their documents properly. None of this could be accomplished by January 10.

If the Board reaches the merits of the Change Petitions, Protestants propose the following hearing format. Since the Department bears the burden of proof for its petitions, it should submit and present its case-in-chief first. After a sufficient period—at least three months—protestants will then submit and present their cases-in-chief. Following this, the Department and protestants will present staggered rebuttals. This structure allows protestants sufficient time to thoroughly review and respond to the Department’s testimony, ensuring that all relevant issues are fully explored. A rushed or concurrent schedule would make it difficult to adequately address the numerous and complex legal, scientific, and equity issues raised in this proceeding. It would also compromise the due process interests of the parties. Under this or any other approach to staggering the hearing schedule, the January 10 and January 25 dates will need to be vacated.

## CONCLUSION

For the reasons set forth above, the undersigned Protestants urge the Presiding Hearing Officer to reject the Department’s unauthorized August 23 Request to change its Change Petitions and to require the Department to either resubmit its Change Petitions as a new water

right or stay the current Change Petition proceedings while the Department submits and the Board resolves applications to extend the expired 1972 Permits. Protestants further urge the Board to defer any proceedings on the merits of the DCP authorizations, in any form, until it has completed its long overdue update of the Bay-Delta Plan and until pending investigations into the Board's discriminatory mismanagement of Bay-Delta water quality have concluded. Finally, Protestants urge the Presiding Hearing Officer to vacate the January 10, 2025 case-in-chief deadline and the January 25, 2025 hearing date, and defer setting a new schedule for hearing on the merits until these and other threshold issues are resolved.

Respectfully submitted,

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